INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

THE MOTOR VESSEL (M/V) "NORSTAR" CASE N° 25

THE REPUBLIC OF PANAMA v. THE ITALIAN REPUBLIC

REPLY OF PANAMA

28 FEBRUARY 2018

PART I

REPLY OF PANAMA

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REPLY OF PANAMA

CHAPTER 1
INTRODUCTION

1. In this Reply, Panama will concentrate on demonstrating that the breach by Italy of articles 87 and 300, of articles 92, 97(1), 97(3), and of other relevant conventional provisions applicable to human rights are not affected by the Italian reinterpretation of the reasons for the arrest of the M/V "Norstar" from providing fuel on the high seas (bunkering) to smuggling and tax evasion exclusively in Italy. Panama will also discuss the misleading challenges and invalid counterclaims on the part of Italy regarding its claims for damages.

2. To this end, it is important to state from the outset that Panama is not in a position to discuss the validity of any of the provisions of Italian domestic law that have been cited by Italy in its Counter-memorial.[1]

3. Instead, the focus will be on the evidence provided by Italy itself and will refer to the Italian decisions, orders, decrees and/or judgements only in reference to how the Convention has been breached over the course of this case.

4. Italy has insisted that some issues that constitute the "factual matrix of this case"... "remain the subject of marked disagreement"[2]. In addition, Italy claims that Panama's narration of the facts is based on "serious mischaracterizations, on which Panama has to rely to try and argue its case".[3]

5. Naturally, Panama does not agree with these contentions. Panama is of the view that the reinterpretation of the sequence of events that Italy has now put forward does not alter the facts of this case, which remain clear and duly characterized.

I. Italy´s misconceptions and contradictions concerning the facts related to the interpretation and application of article 87 of the Convention.

6. Italy has argued that article 87 does not pertain to this case for several reasons. For example, Italy states that "Panama´s argument on Italy´s breach of Article 87 is based exclusively on the proposition that Italy applied its jurisdiction extraterritorially".[4] However, this line of reasoning lacks merit, because it distorts Panama's argument.

7. The Panamanian argument is based not only on Italy's misapplication of its jurisdictional powers, but also on the impact of the response of the Italian criminal legal system to activities carried out by the M/V "Norstar" while it was on the high seas, the consequence of which restrained its movements, thereby unlawfully hindering its exercise of the freedom of navigation protected by article 87.

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[1] Counter-memorial, para. 37, p. 7 and 8; para 45, p. 10; para. 47, p.11; and para. 58, p. 14 and 15.
[2] *Ibid.*, para. 2, p. 1.
[3] *Ibidem.*
[4] *Ibid.*, para. 6, p. 1.

8. Italy has based its latest objections to the applicability of article 87 to this case both on the location where the arrest took place, and on the site where, it now says, the alleged criminal activity of the M/V "Norstar" was actually committed. Italy now claims that because the vessel was detained in port, the freedom of the high seas provision of article 87 does not apply.

9. Panama maintains that the relevance of article 87 is independent of the *locus* of the detainment, but instead pertains to the potential for any vessel to enjoy the freedoms therein protected, regardless of its location. The fact remains that this wrongful arrest did indeed impede the M/V "Norstar"'s right to that very freedom, as the Tribunal confirmed when examining its link to the Italian order.[5]

10. Italy has also contended that the order of arrest of the M/V "Norstar" was not an extraterritorial application of its jurisdiction because it did not pertain to the activities of this vessel on the high seas but to crimes which it was "alleged to have been instrumental in committing *within*" Italy.[6]

11. However, in spite of being aware that, by lacking a contiguous zone, it did not have any right to exercise its enforcement power to challenge any infringement of its customs or fiscal laws and regulations outside its territorial sea, Italy still proceeded to apply its internal legal regime to the M/V "Norstar" and all the persons involved in its operation.

12. As for penal or criminal jurisdiction and the application of the coastal State regulations, Italy has exclusive competence over illicit acts committed on board foreign merchant vessels, such as the M/V "Norstar", located within its internal waters.

13. But a totally different protocol is called for when the illicit conduct is performed on the high seas, which is precisely where the M/V "Norstar" operated. Since Italy applied its criminal legal system and criminal jurisdiction extraterritorially, and acquired the M/V "Norstar" as *corpus delicti*, and as "an object through which the investigated crime was committed",[7] there is no doubt that it breached article 87.

14. If Italy had respected this provision, it would not have grounded its order of arrest, simply on a "Legislative Decree", on a "Decree of the President of the Republic" and on several provisions of its "criminal code"[8], nor would it have considered the vessel to be "inside the contiguous vigilance zone"[9], because it would have known that such a geographical area did not exist.

15. Panama will show that the documentary evidence filed by Italy itself contradicts Italy's assertion that the seizure was justified, because the order of arrest clearly stated that the M/V "Norstar" was carrying out bunkering activities outside the territory of Italy, specifically on the high seas.

16. Italy has also stated that when the investigations started, they originally concerned the lack of compliance with certain Italian regulations by Rossmare Int'l[10], whose managing

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[5] Preliminary Objections Judgement, para. 111 and para. 122.
[6] Counter-memorial, para. 8, p. 2.
[7] Decree of Seizure dated 11 August 1998, Counter-memorial, Annex I, p. 1.
[8] *Ibidem.*
[9] *Ibidem.*
[10] Counter-memorial, para. 27, p. 5.

partner was Mr Silvio Rossi[11], and whose business consisted in supplying "a clientele of recreational vessels" with fuel.[12]

17. That the recreational vessels in question were supplied on the high seas means that it was not correct to state that Mr. Rossi was "a trader in mineral oil products operating only within Italy" as Italy has stated.[13]

18. Italy has declared that the investigations "revealed the existence of a connection in the summer of 1997 between Mr. Silvio Rossi and his companies, on the one hand, and the M/V "Norstar"",[14] on the other, and that "on 28 June and 12 August 1997, by the intermediation of Mr. Rossi, acting as agent of Nor Maritime and Borgheim Shipping, Nor Maritime purchased and loaded on board the M/V "Norstar"",[15] fuel subject to Italian customs duties.

19. However, Italy has based its allegation on the false premise that the M/V "Norstar" and the persons interested in its operations were carrying out subsequent activities in Italian waters, a supposition that Panama will show is not correct.

20. That the Italian judiciary ruled that the arrest of the M/V "Norstar" was made in error because its activities were, in fact, performed on the high seas makes it impossible for Italy to now validly argue that they were not. Thus, Panama's assertion that Italy violated article 87 remains unchallenged.

II. Panama's claim based on article 300

21. Italy has also challenged Panama's invocation of article 300, saying there was no abuse of rights on its part, because no one involved with the ship's operation was physically detained. Although Panama concedes that there were no restrictions of movement of any individual interested in the operations of the M/V "Norstar", it still objects to their wrongful prosecution. It is this objection on which its reference to article 300 is based.

22. In its Memorial, Panama stated that a breach of the duty of good faith occurred when Italy

> once more described the M/V "Norstar" and its cargo as a '*corpus delicti*', - i.e. the means through which the crime was perpetrated of the above mentioned offences.[16]

Nevertheless, Italy has persisted in characterizing the M/V "Norstar" this way throughout these proceedings.

23. This is, of course, an incorrect representation of the facts. Italy has continuously ignored what its own courts have repeatedly affirmed: that the charges against M/V

[11] *Ibid.*, para. 28, p. 5.
[12] *Ibidem.*
[13] *Ibid.*, para. 28, p. 6.
[14] *Ibid.*, para. 29, p. 6.
[15] *Ibid.*, para. 33, p. 6.
[16] Memorial, para. 49, p. 17.

"Norstar" were dismissed as unfounded, because the activities which formed the basis for such occurred on the high seas outside its jurisdiction.

24. Panama calls attention to the fact that the jurisdiction of this Tribunal in this regard has already been confirmed in its ruling on the Preliminary Objections issued on 4 November 2016.

25. In spite of this ruling, however, Italy has acted, and still acts, in a manner contrary to international law by continuing to mischaracterize the M/V "Norstar" as a *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.

26. Panama reiterates that the violation of article 300 in this case has been shown to be related to the breach of article 87 with regard to the procedural conduct of Italy before this Tribunal. Furthermore, by claiming that this Tribunal does not hold jurisdiction in the present dispute[17], Italy is only compounding the consequences of its conduct in these proceedings.

III. Panama's claim based on other articles of the Convention and other human rights instruments

27. According to the juridical principle *jura novit curia*, tribunals are presumed to know the law and if there are other provisions of the Convention that could be considered relevant by the Tribunal, counsel´s task is to bring these forward, as Panama is now doing.

28. Italy, on the other hand, asserts that the Tribunal does not hold jurisdiction to consider the violation of any other provisions of the Convention and human rights instruments, so that all such claims are inadmissible, because all the defendants involved in the operation of the M/V "Norstar" were acquitted "within a reasonable timeframe".[18]

29. However, despite the fact that the admissibility stage of the proceedings has already passed, it remains that the time it took to acquit the persons involved in the operations of the M/V "Norstar" was not at all reasonable.

30. The intrusion into the commercial operations of the vessel and its effect on the persons involved in such operations was instigated on 25 September 1998, while the acquittal of the natural persons involved was not finalized until 25 October 2005. Seven years of proceedings is an excessively long time for judicial proceedings, of this kind, particularly when no wrongdoing was committed.

Furthermore, it should be remembered that the vessel itself was kept under arrest until its public auction withdrawal from the port on 8 August 2015.

31. As its Judiciary found, Italy acted under the erroneous premise that a crime had been committed through the M/V "Norstar" in its territory. For this reason, Panama considers article 87(1)(a) of the Convention to have been violated when, in the exercise of its criminal jurisdiction, Italy requested the enforcement of its arrest order against the M/V

[17] *Counter-memorial*, para. 11, p. 2.
[18] *Ibid.*, para. 14, p. 3.

"Norstar" and prosecuted all persons involved in its operations, in the exercise of its criminal jurisdiction.

32. In its Counter-memorial, Italy has argued that none of the effective domestic remedies available to those who allegedly suffered damages in connection with the arrest and detention of the M/V "Norstar" were ever activated, concluding that this precludes any suggestions of procedural misconduct.[19]

33. This contention had already been advanced by Italy when it stated that "private victims of an internationally wrongful act should ...have exhausted the local remedies available in the Respondent State"[20], an argument the Tribunal has already considered and rejected in its Judgement of the Preliminary Objections dated 4 November 2016, concluding that "the claims in respect of such damage are not subject to the rule of exhaustion of local remedies".[21]

34. On the basis of the *res judicata* rule of law, it would be improper to reopen the discussion about aspects that have already been sufficiently debated in the Preliminary Objections stage so as to have become constituent knowledge of the Tribunal in its judgement. Thus, Italy's continued arguments in this regard are without merit.

[19] *Ibidem.*
[20] Preliminary Objections, paragraphs 4(a), 28-29, 35(a), and its Reply, paras 94-95, 98-100, 114-116, 122.
[21] Preliminary Objections Judgement, paras 264-271.

CHAPTER 2
THE FACTS

35. In this chapter, Section I will examine the meaning of "bunkering activities" within the context of the Memorial and the Italian proceedings that led to the arrest of the M/V "Norstar". Section II will review the facts concerning the *locus* of the activities for which the M/V "Norstar" was arrested. Finally, Section III will concentrate on the facts concerning the *locus* of the M/V "Norstar" when it was arrested.

I. The meaning of "bunkering activities" within the context of the Memorial and the Italian proceedings that led to the arrest of the M/V "Norstar".

36. In its Counter-memorial, Italy has conflated "bunkering" and "bunkering activities" with "smuggling" and "tax evasion"[22]. This not only dishonors the M/V "Norstar", which was not convicted of either of the crimes the two latter terms represent, but also distorts Panama's use of the two former terms, so that it appears that Panama is trying to misrepresent events in order to portray illegal actions as harmless ones.

37. Italy arrested the M/V "Norstar" because it believed that its bunkering activities on the high seas were unlawful, but it now objects to Panama's characterization of the M/V "Norstar"'s actions as bunkering, while simultaneously claiming that it has never disputed the legality of bunkering, as such.[23]

38. To justify its actions, Italy now maintains that the arrest was "in connection with the suspected crimes of smuggling and tax evasion"[24] regarding the products the M/V "Norstar" transported. As a result, it is reasonable to conclude that in Italy's estimation, bunkering and smuggling are sometimes interchangeable and sometimes not. This confusion suggests that Italy's representation of the facts has been far from straightforward.

39 Consequently, the Italian argument lacks any sustainability because "bunkering activities", which include not only the purchase of bunkers but also the sale and transfer of this commodity to the buyers' leisure boats, are entirely legal on the high seas, which has already been established as the *locus* of the M/V "Norstar"'s operations.

40. The evidence, as presented, clearly shows that the purchase, sale and bunkering of fuel oil is all that the M/V "Norstar" and the persons therein connected did, and that was perfectly legal. Italy only *suspected* smuggling and tax evasion, but in spite of this the M/V "Norstar" and the persons therein connected were not charged with these crimes, much less convicted of them. To suggest otherwise is to distort the facts of this case and misrepresent the evidence before the Tribunal.

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[22] Counter-memorial, para. 3, p. 1.
[23] *Ibid.*. paras. 117-119, p.26.
[24] *Ibidem*.

II. The facts concerning the *locus* of the activities for which the M/V "Norstar" was arrested (LOCUS OF THE ACTIVITIES)

41. While in some parts of its Counter-memorial, Italy suggests that the arrest was ordered "in the context of criminal proceedings concerning alleged offences that occurred within the Italian territory"[25], in other parts of its pleading, Italy stated that the M/V "Norstar" was

> ...in the business of selling the fuel purchased in Italy in exemption of tax duties to a clientele of Italian and other EU leisure boats in the international waters off the coasts of the Italian city of Livorno.[26]

42. The contradiction embedded in Italy's argument is seemingly meant to obfuscate the sequence of events, by conflating the actual bunkering that took place with accusations of smuggling and tax evasion. Panama vigorously objects to this subjective revision of the facts, noting that this account conflicts with the rationale for arresting the M/V "Norstar" in the first place. It is impossible to justify Italy's newfound accusation of smuggling and tax evasion in the absence of any trial conducted on this basis.

43. In order to become the passive subject of cross-border crimes, such as smuggling or tax evasion, there has to be an unlawful exchange between the territory of one State and another. Since such an illicit transfer across boundaries never occurred, Italy's claim leaves only a distorted depiction of what actually took place. Therefore, Italy's claim is to be declared void.

44. In fact, all of the evidence presented by Italy itself has expressly granted that the M/V "Norstar" was arrested for the bunkering activities it carried out on the high seas. Therefore, by now claiming in its Counter-memorial that "the plain facts of this case are" that "the M/V "Norstar" was arrested in the internal waters of Spain for a crime that it was suspected of having committed in Italy"[27], Italy has only shown that its current argument is neither plain, nor factual.

45. Furthermore, by suggesting that the M/V "Norstar" not only sold fuel to leisure boats on the high seas, but also bought it from and reintroduced it to Italian territory in violation of customs and excise statutes, Italy is now promoting precisely what the Italian courts dismissed. Those courts 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*.

46. In this particular case, there is a cause-effect relationship between the bunkering (or the purchase, sale and provision of gasoil) by the M/V "Norstar" to leisure boats on the high seas which then re-introduced such products to Italy on the one hand, and Italy's order of arrest, on the other.

47. In other words, the supplying of fuel to megayachts, crafts, and leisure boats on the high seas was the *sine qua non* for Italy to suspect the occurrence of smuggling and tax evasion.

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[25] *Ibid.*, para. 44, p. 10.
[26] *Ibid.*, para. 130, fn. 102, and para. 35, p. 7.
[27] *Ibid.*, para. 9, p. 2.

However, without actively linking the M/V "Norstar"'s "bunkering activities" on the high seas to smuggling and tax evasion, Italy has made the legitimacy of the investigation and arrest of the M/V "Norstar" impossible to explain.

48. Multiple documents pertaining to this case show that Italy has recognized that the M/V "Norstar" was arrested for supplying of fuel to recreational crafts (megayachts) on the high seas.[28] Yet, in front of this Tribunal, Italy now refutes this recognition by lodging an accusation of smuggling and tax evasion. The contrast between its previous and current position will become apparent when we examine in detail how article 87 of the Convention applies to the legitimate bunkering activities of this vessel.

49. Italy has now also claimed that the Decree of Seizure did not entail an extraterritorial application of Italy's territorial jurisdiction, since it "did not target the activities carried out by the M/V "Norstar" on the high seas, but rather crimes that the M/V "Norstar" was alleged to have committed *within* the Italian territory."[29]

50. Along these lines, the Counter-memorial says that the M/V "Norstar" was arrested in Spain

> ...for a crime that it was suspected of having committed in Italy; Italy is the place where the criminal conduct under investigation began, with the M/V "Norstar" being loaded with gasoil bought in exemption of excise duties; Italy is the place where the crimes of smuggling and tax evasion were allegedly perfected at the moment of the reintroduction of such gasoil, in violation of Italian custom and criminal laws.[30]

51. Italy grounds its argument in the part of the Decree of Seizure that says that the offence was committed "in Savona and in other ports of the State during 1997"[31]. However, not only was this supposition unconfirmed by the Italian courts in the subsequent jurisdictional stage and appeal, but the fact remains that the arrest was made in the context of suspected criminal activity concerning "bunkering" carried out by the M/V "Norstar" on the high seas.

52. Thus, there is a fundamental difference in the interpretation of the events and evidence on each side. Panama will show *infra* that the evidence supports its version of what transpired.

53. It is important to emphasize that Italy now relies not on the decisions of its jurisdictional authorities, but rather on the very source of this conflict, the Decree of Seizure, when referring to offences "committed in Savona and in other ports of the State during 1997."[32]

54. Panama has always claimed that Italy arrested the M/V "Norstar" because of its bunkering activities on the high seas. However, since it is not justifiable for a State to institute criminal proceedings and order the arrest of a vessel for this reason, Italy has

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[28] Cfr. documents showing that the activity of the M/V "Norstar" which led to the arrest was supplying bunkers on the high seas: Chapter 3(IV)(A-G), paras. 133-179, pp. 25-33.
[29] *Ibid.*, para. 8, p. 2.
[30] *Ibid.*, para. 9, p. 2.
[31] *Ibid.*, para. 45, citing the Decree of Seizure of 11 August 1998.
[32] *Ibid.*, Annex I, p. 1.

now chosen to redefine the bunkering activities of the M/V "Norstar" as smuggling and tax evasion, even though its territorial line was not crossed by this vessel.

55. In other words, Italy has now raised suspicion that the M/V "Norstar" was involved in a smuggling and tax evasion operation, one which was never proved, to account for its arrest of this vessel for bunkering activities on the high seas that were totally legal. Such behavior only confirms Italy's liability in front of this Tribunal.

III. The facts concerning the *locus* of the M/V "Norstar" where and when it was arrested (LOCUS OF THE ARREST)

56. In this section, Panama will show that the fact that the M/V "Norstar" was in Spain did not justify its arrest.

57. Panama concedes that the M/V "Norstar" was in Spain when it was arrested. However, Panama maintains that the arrest of the M/V "Norstar" was illegitimately based on conduct on the high seas so as that the location where that arrest took place is ultimately irrelevant. What is relevant are the motives that led to such a forceful action by Italy.

58. Such conduct suggest that Italy had already realized that arresting the M/V "Norstar" in Italy or on the high seas would be a breach of the Convention, and that Italy intentionally waited for the M/V "Norstar" to enter a foreign port in order to act on its suspicions and request its detention. Italy's continued pursuit of the M/V "Norstar" under these circumstances and its subsequent distortion of the facts represents a lack of good faith and an abuse of rights, as will be discussed *infra*.[33]

59. Italy also seems to have used Spain as a means to evade its own responsibility. This line of reasoning recalls arguments previously advanced by Italy, such as:

i) Spain was not a Party to the proceedings, so this Tribunal should dismiss the claim for lack of jurisdiction,[34]

ii) Italy was the "wrong respondent" as a result, and

iii) the "adjudication over the claim …would require the Tribunal to ascertain rights and obligations pertaining to Spain in its absence."[35]

60. With the dual objectives of diminishing its own culpability and overruling Panama's objections, Italy has suggested that "Article 87(1) cannot be interpreted to mean that a vessel is protected against coastal State measures that prevent it to leave a port in order to gain access to the high seas."[36]

61. However, with regard to this line of defense, the Tribunal observed that since article 87 provides that the high seas are open to all States and that the freedom of the high seas comprises the freedom of navigation, the Decree of Seizure with regard to activities

[33] Chapter 4, Section III, Subsections A-H), paras. 233-336, pp. 43-58.
[34] Preliminary Objections, para. 24.
[35] *Ibid.*, para 34, p. 7.
[36] Counter-memorial, para. 97, p. 22.

conducted by the M/V "Norstar" on the high seas may be viewed as an infringement of the rights of Panama under that provision.[37]

[37] Preliminary Objections Judgement of 4 November 2016, para. 122, pp. 17-18.

CHAPTER 3
THE ITALIAN MISSTATEMENTS OF FACTS AS THEY PERTAIN TO THE APPLICATION AND INTERPRETATION OF ARTICLE 87 OF THE CONVENTION

I. Introduction

62. In this chapter, Panama will concentrate on the points of fact and their relationship to the misapplication and faulty interpretation of article 87 of the Convention in the Italian Counter-memorial.

63. Despite its own authorities concluding that the arrest of the M/V "Norstar" was unlawful, Italy still does not accept this fact. In Section II of this chapter, Panama will show how the arguments in the Counter-memorial concerning the relevance of the *locus* of the M/V "Norstar"'s arrest to article 87 are erroneous. Section III will refer to the impropriety of Italy when applying its internal laws to activities governed by international proceedings. Section IV will demonstrate how the identification of the *locus* of the activities for which the M/V "Norstar" was arrested has been misinterpreted by Italy to suggest the inapplicability of article 87. To this end, we will scrutinize A. the Savona Fiscal Police's Report, B. the Decree of Seizure, C. the Decree Refusing the Release of Confiscated Goods, D. the Letter Rogatory of the Tribunal of Savona to the Spanish Authorities of 11 August 1998, E. the Savona Tribunal's Judgement, F. The appeal submitted by the Savona Public Prosecutor in response to the judgment delivered by the Court of Savona, and G. the Genoa Tribunal's Appeal Judgement. In Section V, Panama will show how the Italian reasoning as to why article 87 should not be considered has not changed since the Tribunal made its 4 November 2016 Judgment confirming that article's relevance to this case. Collectively, the points made in these sections will reiterate how Italy not only breached article 87, by wrongly arresting the M/V "Norstar", but also how Italy has disregarded the bearing of this article 87 on this case ever since.

II. The arguments in the Counter-memorial about the relevance of the *locus* of the M/V "Norstar"'s arrest concerning article 87 are erroneous

64. In order to sustain its position, Italy has relied on the fact that "...the M/V "Norstar" was within Spanish internal waters at the time when the Decree of Seizure was issued and executed...."[38]

65. With this in mind, Italy claims that its right to exercise its jurisdiction extraterritorially in the case of the arrest of the M/V "Norstar" did not infringe upon article 87 of the Convention, because the arrest was not made on the high seas.

66. Regarding its extraterritorial application of its laws and jurisdiction, Italy specifically asserted that

> an extraterritorial exercise of jurisdiction that does not determine any physical interference with the movement of a ship **on** the high seas does not constitute a conduct ordinarily able to breach Article 87.[39] (emphasis added)

[38] Counter-memorial, para. 7, p.2.
[39] *Ibidem.*

67. With this assertion, Italy is explicitly admitting to the exercise of its jurisdiction extraterritorially, while arguing that it was fully justified in doing so. However, the use of the preposition "on" in the passage above exposes a critical weakness of the Italian argument. Article 87 does not use such a preposition but, instead, uses the preposition "of". In the relevant part, this provision of the Convention states:

> Article 87
> Freedom **of** the high seas
>
> 1. The high seas are open to all States, whether coastal or land-locked. Freedom **of** the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:
>
> (a) freedom of navigation;
> (b) .....
>
> 2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom **of** the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area." (emphasis added)

68. According to Italy in reference to the application and interpretation of article 87 of the Convention, the M/V "Norstar" did not enjoy the right to freedom of navigation because it was in port when it was arrested, and therefore no violation of that right could have occurred.[40]

69. Italy's position is that article 87 of the Convention would not be breached by an arrest of a vessel while it is in port because that vessel would not be actively exercising its freedom of navigation on the high seas.[41]

70. The test question is then: does the M/V "Norstar" in port enjoy the right to absolute freedom of navigation under article 87? Italy has decided it did not. Yet, 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.[42]

71. Wendel notes that the freedom of navigation is a fundamental concept of the Law of the Sea and that it "includes the right of ships to enter upon the oceans and to pass them unhindered by efforts of other states or entities to prohibit that use or to subject it to regulations unsupported by a general consensus among states."[43] In addition Bardin states that "the freedom of navigation is the oldest of the freedoms of the high seas and cannot be impaired, as stated under the Convention and international law."[44]

In a similar vein, Rayfuse recalls that "[w]hile historically the port state has enjoyed enforcement powers in respect of violations occurring within its waters, *no right of*

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[40] *Ibid.*, paras. 74-75, p. 19.
[41] *Ibid.*, Chapter 3, Section I, paras. 75-101, p. 19-23.
[42] Wendel, Philipp, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law*, Springer, p. 5.
[43] *Ibidem.*
[44] Bardin, Anne, "Coastal State's Jurisdiction over Foreign Vessels", 14 *Pace Int'l L. Rev.* 27 (2002), p. 45.

sanction has applied in respect of activities that took place on the high seas or within the maritime zones of other states before a vessel entered a port state's waters."[45] (emphasis added)

72. In other words, the fact that a vessel is in port does not affect its right to enjoy freedom of navigation, including the freedom to sail towards the high seas.

73. If article 87 were applicable only when vessels were on the high seas, then the high seas would not be open to vessels of all States as the provision requires, but only to those already in international waters.

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

75. Therefore, Panama contends that the consequence of Italy's wrongful arrest would have been the same no matter where that 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.

76. Italy also states that "the correlation between freedom of the high seas and unimpeded movement of the ship emerges with clarity from the Memorandum of the UN Secretariat to the International Law Commission"[46].

77. However, the extract of this document that Italy has relied upon does not support its conclusion, because Italy has defined navigation as something done only *through*[47] the high seas, not *towards* the high seas, as justification for its behavior both during and subsequent to making the arrest in port. The Memorandum it has cited makes no such distinction.

78. Panama maintains that efforts of States to hinder the freedom of navigation enjoyed by other states are not restricted to interventions that actually take place on the high seas, but can also manifest themselves as efforts to unlawfully stop a vessel in port with the goal of precluding that vessel from returning to or having continued access to the high seas. This is precisely what happened in the case of the M/V "Norstar" and, thus, Panama asserts that article 87 applies in this instance.

79. From the date that Panama instituted proceedings, and Italy took notice that one of the charges was the breach of article 87, Italy has insisted that since the M/V "Norstar" was seized while it "was anchored at the Palma de Mallorca Bay within Spanish territorial waters"[48], such provision of the Convention has not been breached.

80. Italy has reminded us that in the M/V *"Louisa"* Case, when Saint Vincent and the Grenadines argued that its vessel was denied access to the high seas and that, therefore,

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[45] Rayfuse, Rosemary, "The Role of Port States", in *Routledge Handbook of Maritime Regulation and Enforcement*, R. Warner and S. Kaye (eds.), at p. 77 (emphasis added).
[46] Counter-memorial, para. 79, p. 20.
[47] *Ibid.*, para. 78, p. 20.
[48] Written Observations and Submissions in Reply to Observations and Submissions of the Republic of Panama, 8 July 2016, para. 37.

its freedom of navigation on the high seas as provided for in article 87 was breached,[49] Judge Wolfrum noted that he found it hard to imagine how the arrest of a vessel in port in the course of national criminal proceedings could be construed as violating the freedom of navigation on the high seas, and that to take this argument to the extreme would mean that the principle of freedom of navigation would render vessels immune from criminal prosecution since any arrest whatsoever, would violate the flag State's right to enjoy the freedom of navigation.[50]

81. According to Italy, ITLOS decided that case "in terms most germane to the present case" recalling that the Tribunal maintained that "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" and that, accordingly, "the same would apply to Panama's Claim in the present case."[51]

82. However, when the Tribunal referred to this Italian reasoning[52] in response to Panama's contention that the circumstances of the arrest of the M/V "Norstar", arising from activities on the high seas, were different from those of the M/V "*Louisa*", which was arrested for conduct within Spanish territorial waters,[53] the Tribunal tacitly rejected the Italian argument, deciding that "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".[54]

83. Yet, Italy still maintains in its Counter-memorial that article 87 is irrelevant to the present case because the M/V "Norstar" was seized while it was within Spanish territory rather than on the high seas. On the other hand, Panama steadfastly avers that the freedom of navigation governed by article 87 does apply to this case, because the activities for which the M/V "Norstar" was detained took place in international, not Spanish, waters. Thus, there is a clear distinction here; Italy has based the applicability of article 87 on the locus where the arrest was made, while Panama insists that its relevance must be based on the locus of the alleged crime.

84. The only activity that Panama was performing through the M/V "Norstar" was bunkering other vessels on the high seas. That the M/V "Norstar" was arrested as a consequence of this exercise is beyond dispute. Article 87 was violated by Italy's improper arrest, because, as Italy has itself confirmed,[55] the activities of the vessel were carried out in accordance with the law.

85. With this arrest of the M/V "Norstar", Italy impeded its ability to conduct legitimate commercial activities, and by filing charges against the persons having an interest in its

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[49] *Ibid.*, para. 39.
[50] *Ibid.* para. 38.
[51] *Ibid.*, para. 40.
[52] Preliminary Objections Judgement, para. 119.
[53] *Ibid.* paras 120-121.
[54] *Ibid.*, para. 122.
[55] Tribunal of Savona Judgement of 13 March 2003, Counter-memorial, Annex M; Court of Appeal of Genoa Judgement of 25 October 2005, Counter-memorial, Annex T.

operations, Italy violated its obligation to respect free navigation on the high seas accorded by article 87 of the Convention.

86. No justification exists for Italy having exercised its jurisdiction beyond its territorial waters, in relation to lawful conduct, in this manner.

87. Therefore, when the Counter-memorial disregards the Panamanian argument which states that, by seizing the M/V "Norstar", Italy improperly applied its laws and jurisdiction extraterritorially, and replies that this "does not determine any physical interference with the movement of a ship on the high seas" and, therefore, "does not constitute a conduct ordinarily able to breach Article 87" because the M/V "Norstar" was "within Spanish internal waters"[56] when it was arrested, Italy is using specious reasoning.

88. As regards the locus of the arrest enforcement, Italy has also referred to four cases previously brought before the Tribunal, those of the *Wanderer,* the *Arctic Sunrise,* the *Volga, and* the *Saiga.*[57] Italy refers to these cases in an attempt to claim that article 87 of the Convention was not violated because the M/V "Norstar" was not exercising its freedom of navigation when the Decree of Seizure was issued or executed. However, none of these cases support the Italian position because they do not refer to vessels in port. In fact, these cases only further emphasize the fundamental nature of the freedom of navigation within the framework of the Convention.

89. Italy's reference to the aforementioned cases is an attempt to evade the real issue in this case, *i.e.* that Italy violated article 87 because it arrested the M/V "Norstar" for *lawful* activities that were conducted *on the high seas.* These precedents are thus of no assistance to Italy's case, rather they only strengthen Panama's case.

90. Italy claims that "[t]he typical situation in which Article 87(1) of the Convention would be violated would be the case in which a State's interference with a foreign vessel's navigation on the high seas occurs *by means of enforcement action, or some other kind of physical interference, with the movement of the ship.*"[58] (emphasis added) This is precisely what happened in the present case: Italy's conduct amounted to physical interference with the movement of the M/V "Norstar".

91. None of these cases have relevance to the facts of this case because, unlike the M/V "Norstar", all of these vessels were conducting commercial activities on the high seas at the time of their arrest. Furthermore, in those cases, the complete freedom of navigation on the high seas was reasserted by the Tribunal, something that Italy has readily conceded.

92. In any event, that it was decided that a foreign vessel should not be arrested on the high seas in those cases certainly does not mean that it was lawful for Italy to arrest the M/V "Norstar" in port in this one.

[56] Counter-memorial, para. 7, p.2.
[57] *Ibid.*, paras. 78-86, pp. 20-21.
[58] *Ibid.*, para. 80, p. 20.

III. The impropriety of Italy in applying its internal laws to activities governed by international proceedings.

93. In Chapter 2, Statement of Facts, Part I of the Counter-memorial, Italy refers to the conduct investigated by the Italian authorities that led to the Decree of Seizure, citing the Notification of *notitia criminis* against Silvio Rossi and Others by the fiscal police of Savona on 24 September 1998 (Annex A), and stating that on a future date, which turned out to be September 11th, 2009 (11 years later), Rossmare International S.a.s. of Rossi Silvio located in Savona would be subject to a tax audit for "exclusively operating abroad in the wholesale trade of oils and lubricants for recreational crafts field..."[59]. This is the basis of Italy's accusation of smuggling against the M/V "Norstar".

94. Additionally, in paragraph 35 of its Counter-memorial, Italy contends that the M/V "Norstar" was using fuel illicitly obtained from Italy to supply bunkers on the high seas, describing this as follows:

> In particular, it emerged that the M/V "Norstar" was involved in the business of selling the fuel purchased in Italy in exemption of tax duties to a clientele of Italian and other EU leisure boats in the international waters off the coasts of Italian city of Sanremo.[60]

95. And, in paragraph 39 of its Counter-memorial, Italy added that the alleged criminal plan was loading with fuel bought in Italy and reselling it "to a clientele of Italian and EU leisure boats stationed on the high seas..." the buyers "potentially eluding the payment of the fiscal duties due."[61]

96. According to Article 3 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARS), a State is not allowed to use its own legal provisions as the basis to justify the arrest of a vessel for actions taking place outside of its boundaries, which was the case in the arrest of the M/V "Norstar". In fact, both parties have stipulated that the Italian legal system does not apply extraterritorially.

97. The Commentary to Article 3 of DARS states that, "conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful."[62] In the *S.S. "Wimbledon"* case the Permanent Court of International Justice (PCIJ) rejected Germany's argument that "the passage of the ship through the Kiel Canal would have constituted a violation of the German neutrality orders".[63] In this case a neutrality order could not prevail over the Treaty of Peace under which Germany had the duty to allow the passage of the *Wimbledon* through the Kiel Canal.[64] The PCIJ held that,

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[59] Counter-memorial, para. 27, fn. 2, p. 5.
[60] Page 7.
[61] Page 8.
[62] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, adopted by the International Law Commission at its fifty-third session, at pp. 36-37.
[63] *Ibidem.*
[64] *S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1*, p. 15, pp. 29-30.

> "it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."[65]

Thus, by trying to rely on its own laws in order to evade its obligations under article 87 of the Law of the Sea Convention in the present case, Italy is contravening the principles of DARS.

98. There is no question that all legal documents filed as evidence in this case show that the arrest was grounded in the internal laws and provisions of Italy, *i.e.* it was based on the Italian internal legal system. A scrutiny of the body of evidence in this case reveals that the following internal provisions were employed by Italy:

> Article 254 T.U.L.D. (Testo Unico dela legilsazione Aduanale- Consolidated Law Text of Customs Legislation) , Article 253 T.U.L.D., Article 40 Clause b of the legislative decree number 504/1995[66], Article 292 T.U.L.D.[67] Legislative Decree No. 504 of 26 October 1995, Article 40[68], Decree of the President of the Republic No. 43 of 23 January 1973, Articles 2, 253-254 and 292-295bis[69], Law Decree No. 429 of 10 July 1982, Article 4[70], Law No. 516 of 7 August 1982, Article 1, amending Law Decree No. 429 of 10 July 1982, Article 4[71], Order concerning the application for re-examination of the seizure of the Spiro F[72], Italian Code of Criminal Procedure, Articles 253, 257, 262, 263, 324, 365 and 606[73], Decree of the President of the Republic No. 115 of 30 May 2002, Articles 150-151.[74]

On the other hand, no international laws were either cited or applied.

99. Likewise, the Decree of Seizure was based on the internal laws and regulations of Italy. In order to justify this, Italy argues in its Counter-memorial that its application was strictly territorial because it "did not target the activities conducted in the high seas"[75] but rather "alleged fiscal and customs offences carried out in areas that were subject to Italy`s full jurisdiction.[76] Italy declares that "there can be no doubt about this".[77]

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[65] *Greco-Bulgarian "Communities", Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, p. 32. See also *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, p. 24, where the PCIJ stated that "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force"], and *Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 12; and *ibid., Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 96, at p. 167, where the PCIJ reiterated that "France cannot rely on her own legislation to limit the scope of her international obligations."

[66] Counter-memorial, Notification of *notitia criminis* against Silvio Rossi and Others by the Fiscal Police of Savona, 24 September 1998, Annex A, p. 6.

[67] *Ibid.*, p. 7.

[68] *Ibid.*, Annex B.

[69] *Ibid.*, Annex C.

[70] *Ibid.*, Annex D.

[71] *Ibid.*, Annex E.

[72] *Ibid.*, Annex F.

[73] *Ibid.*, Annex H.

[74] *Ibid.*, Annex R.

[75] Counter-memorial, para. 121, p. 27.

[76] *Ibid.* para. 126, p.28.

[77] *Ibidem.*

100. However, the pieces of evidence on which Italy bases the above-mentioned proposition are limited to some provisions of the Italian Criminal Code and parts of the Decree of Seizure itself.[78] 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". By doing so, Italy has fashioned a line of reasoning that does not hold up when viewed through the lens of the Convention.

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

102. After it has been proven that the arrest order was held to be illegal by Italy itself[79] is it not then a contradiction for Italy to now state the opposite?

103. The illegality of the arrest order derives from the fact that it was based on activities performed when the arrested vessel was in an area which the conventional provisions describe as the high seas, not as one within the territorial sea of Italy.

104. Even if the M/V "Norstar" had been arrested within Italian territory, this would have still entailed the violation of article 87, because Italy would have still hampered the freedom of navigation of a vessel conducting lawful activities in international waters.

105. None of the M/V "Norstar"'s conduct mentioned by Italy in its Counter-memorial or described in the investigations by the Savona Public Prosecutor has ever been a crime. Selling fuel to Italian and other leisure boats in the international waters off the coast of Italian city of San Remo was not a crime, precisely because such resale was performed on the high seas.

106. Therefore the application of its internal laws by Italy to the activities and conduct performed by the M/V "Norstar" and all the persons involved in its operation constitutes a clear breach of article 87 of the Convention. If Italy had rightfully interpreted this provision it would have also concluded this.

IV. The errors concerning the identification of the *locus* of the activities for which Italy arrested the M/V "Norstar" and their influence on the interpretation and application of article 87

107. The right of all States to enjoy the freedom of the high seas and any navigation therein are the very foundation of the International Law of the Sea.

108. Article 87 of the Convention establishes that all States shall enjoy the freedom of navigation exercised under the conditions laid down by the Convention and other rules of international law.

109. The opening sentence of article 87 reflects a most fundamental principle of the International Law of the Sea: the high seas are open to all states. The article then goes on

[78] *Ibid.*, para. 129, p. 28.

[79] Tribunal of Savona Judgement of 13 March 2003, Counter-memorial, Annex M; Court of Appeal of Genoa Judgement, 25 October 2005, Counter-memorial, Annex T.

to include a non-exhaustive list of freedoms which are within the scope of the overall concept of navigational freedom.

110. Paragraph two of the same article, in particular, spells out this concept in more detail, stating that in the exercise of the "freedom of navigation" all States are to have due regard for the interests of other States as an international obligation, the breach of which gives rise to responsibility.

111. In addition, the concept of freedom of navigation includes activities ancillary to or related to this right, so that there is the presumption that the rule of freedom applies not only to the activities explicitly mentioned in article 87, but also to new or unnamed lawful uses of the sea compatible with its statutes, as long as they make no claim to appropriation of the rights of other States protected by the Convention.

112. Therefore, when Italy bases its defense on a mischaracterization of the facts of the dispute by stating that Panama falsely "portrays the bunkering activity of the M/V "Norstar" on the high seas as the reason for the commencement of the Italian criminal proceedings that led to the seizure of the M/V "Norstar""[80], Panama can only reply that the facts not only refute Italy's supposition, but also that article 87 is clearly and inextricably involved.

113. The evidence filed shows, contrary to the Italian proposition, that the arrest was carried out based on activities performed on the high seas by the M/V "Norstar", and not for any conduct carried out within Italy.

114. Based on its Counter-memorial, though, it appears that Italy still does not respect the universal freedom represented by article 87 of the Convention and is trying to justify its breach by differentiating between "bunkering operations" and "the suspected crimes of smuggling and tax evasion."[81], claiming, i) that the activities for which the M/V "Norstar" was arrested were not bunkering activities, but smuggling and tax evasion and, ii) that those crimes were carried out within its territory.

115. However, there are multiple evidentiary documents, which Italy itself has acknowledged, that indicate that the activities for which the M/V "Norstar" was arrested were bunkering activities which did not take place within Italy, but on the high seas, as Panama has always asserted. These will be shown *infra*.

116. In its Counter-memorial, Italy has maintained that in order to claim a breach of article 87, Panama has had to rely on "the legality of bunkering" even though the reason for the arrest was the "suspected crimes of smuggling and tax evasion" [82] However, it is the validity, rather than the nature, of the charges that have bearing on the relevance of this article to these proceedings.

117. As such, Italy's latest argument now intends to circumvent the main reason why it ordered the arrest of the M/V "Norstar" in the first place. Italy further attempts to justify

[80] Counter-memorial, para. 3, p. 1.
[81] *Ibidem.*
[82] *Ibidem.*

its conduct by relying on facts neither central or essential to the dispute[83], denying in its Counter-memorial that the arrest was based on the M/V "Norstar"'s "bunkering".

118. Nevertheless, Panama will show that bunkering was precisely the reason for the arrest and, as such, that arrest violates the Convention. The M/V "Norstar" was bunkering, that is to say, providing pleasure vessels of different nationalities with fuel in international waters, and the Italian judicial authorities in both Savona and Genoa concluded that this was not a crime, thus acquitting the M/V "Norstar" and the persons therein connected of the charges brought against it.

119. The alleged fact that those pleasure vessels, in turn, returned to Italy with purchased fuel on board was not smuggling, either. Nor was such an activity an internationally wrongful act.

Therefore, any interference derived from Italy's arrest order was not lawful under the Convention. Italy seems to differentiate between bunkering and the reentry of fuel sold to Italian ships into its territory when such a distinction does not exist in any legal sense.

120. The bunkering activities performed by the M/V "Norstar" on the high seas and outside the jurisdiction of Italy were, and continue to be, lawful. Moreover, any reintroduction of bunkered products has been declared as lawful by Italy itself.[84] Yet even if Italy considered the reintroduction of fuel purchased in international waters to its own territory to be a criminal offense, it would not have jurisdiction to arrest the M/V "Norstar" for such activities on the high seas.

121. It also should be noted that Italy has completely ignored the fact that on 18 September 1998, the same Public Prosecutor who ordered the arrest of the M/V "Norstar" received a Letter (Telespresso), dated 4 September 1998, from the Service of Diplomatic Litigation, Treaties and Legislative Affairs of the Ministry of Foreign Affairs of Italy concerning the arrest of the M/V Spiro F.[85]

122. In this official letter, the Savona Prosecutor was alerted that Italy did not have a Contiguous Zone and that the only zone under State control was its territorial sea. If this letter is analyzed in detail, it can be clearly deduced that the prosecutor used the same erroneous reasoning to bring charges against the M/V "Norstar" as had been used to arrest the Spiro F, i.e. "within the contiguous zone subject to the full jurisdiction of the State regarding fiscal and customs crimes".[86]

123. It may be noted that the Savona Public Prosecutor obviously had not received the letter referred to above by 11 August 1998 when the arrest order was issued. Nevertheless, as of 18 September 1998, the Savona Public Prosecutor should have been aware of the warning concerning the applicability of the Italian customs criminal legal regime to vessels in international waters.

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[83] *Ibid.*, 27-41, p 5-9.

[84] Tribunal of Savona Judgement, Counter-memorial, Annex M, para. 5:

> The purchase of fuel intended to be stored on board by leisure boats outside the territorial sea line and 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.

[85] Memorial, Annex 7.

[86] *Ibidem.*

124. If the letter was received on 18 September 1998, and the arrest was performed on 24 September 1998, the Public Prosecutor could and should have put off the arrest.

125. Yet, Italy did not do anything with this information as it applied to the present case. After the arrest, the M/V "Norstar" was kept under Italy's jurisdiction and remained subject to its authority in contravention of international law.

126. Five years later, despite the first instance judgement issued by the Court of Savona that held that

> 5. ....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

and that

> whoever organizes the supply of fuel offshore –it does not really matter whether this occurs close to, or far from, the territorial waters line –does not commit any offence even though he/she is aware that the diesel fuel is used by leisure boaters sailing for the Italian costs...." Nor is there an offence...when diesel fuel, either sold or transshipped offshore, has been purchased on the Italian territory with a relief from the payment of excise duties because the fuel was regarded as a store. These goods are then considered to be foreign goods once the ship leaves the port or at least the territorial waters line.

the Public Prosecutor of Savona filed an appeal with the Appeals Court of Genoa on 18 August 2003.

127. Even though he was aware that the facts under discussion indicated that the bunkering activities of the M/V "Norstar" were carried out on the high seas and that, consequently, the bunkers acquired the nature of a foreign good, the Savona Public Prosecutor attempted to retry this case. Unsurprisingly, the Appeals Court of Genoa ruled against this appeal.

128. Thus, even the Italian judiciary determined that the evidence filed showed, contrary to the current Italian proposition, that the arrest was carried out based on activities performed by the M/V "Norstar" on the high seas, and not for any conduct carried out within Italy. By choosing to ignore this distinction now, Italy is treating its breach of article 87 as legitimate conduct.

129. From all indications, Italy intentionally, rather than inadvertently, violated the principle of freedom of the high seas and Panama's freedom of navigation therein, by determining that it was entitled to arrest the M/V "Norstar" for activities beyond its territorial sea and treating it as an object through which an alleged crime was committed, *i.e.* as a *corpus delicti*. In so doing, Italy contravened article 87.

130. Although Italy now seems to accept that the "bunkering activities" that the M/V "Norstar" was performing fall within the freedom of navigation and other internationally

lawful uses of the sea related to that freedom, it did not respect Panama's rights for seven years from the time the Decree of Seizure was issued until the M/V "Norstar" and the persons therein connected were acquitted of all charges. Nor has it done so thereafter.

131. Instead, in its Counter-memorial, Italy has attempted to rewrite the history, now denying that it arrested the M/V "Norstar" for carrying out bunkering in the high seas but rather depicting it as part of the crime of smuggling alleging that the offences for which the M/V "Norstar" was arrested were all "carried out in areas that were subject to Italy's full jurisdiction"[87], and that this was supported by Italian Criminal Code[88], documents filed by the Fiscal Police of Savona[89], the Decree of Seizure[90], the Decree Refusing the Release of Confiscated Goods[91], the Letter Rogatory of the Tribunal of Savona to the Spanish Authorities of 11 August 1998,[92] the Judgement of the Tribunal of Savona[93], the appeal submitted by the Savona Public Prosecutor in response to the judgment delivered by the Court of Savona, and the Court of Appeal Judgement of Genoa[94].

132. Yet the examination of these Italian documents which follows still clearly demonstrates that the M/V "Norstar" was arrested for bunkering activities in international waters, a crucial fact that Italy has steadfastly refused to accept.

A. The Italian Fiscal Police of Savona's Report

133. In the Criminal Offence Report Communication from the Italian Fiscal Police of Savona, referenced in its Counter-memorial, Italy professes to show that the investigation found illegal activity. However, parts of this document read as follows:

> international trading activities of oil products designed to supply recreational crafts....Said activities are conducted..... **by means of a tanker that positions itself in international waters**, about"20 miles from Sanremo's coast, with the intent to (in order to) supply recreational crafts both European and not with tax-free fuel. (without paying the required fees.)[95] (emphasis added)
>
> SUMMER SEASON 1997
> The **off-shore bunkering activities** were conducted by means of the vessel known as "NORSTAR"...[96] (emphasis added)

134. In this Criminal Offence Report Communication, Italy also referred to the activities of the M/V "Norstar" as "**bunkering activities**"[97] later adding that

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[87] Counter-memorial, paras. 104-126, p. 23-28.
[88] *Ibid.*, para. 127, p.28.
[89] *Ibid.*, para. 27-36, pp. 5-7, and all its footnotes referring to notifications of *notitia criminis* by the Fiscal Police of Savona.
[90] *Ibid.*, para. 129.
[91] *Ibid.*, Decree Refusing the Release of Confiscated Goods by the Public Prosecutor of the Tribunal of Savona, 18 January 1999 (Annex L).
[92] Counter-memorial, para. 130, p. 28.
[93] *Ibid.*, para. 56-64, pp. 14-16.
[94] *Ibid.* para. 69-73, pp. 17-18.
[95] *Ibid.*, Criminal Offence Report Communication, Annex A, p. 1.
[96] *Ibidem.*
[97] *Ibid.*, p. 2.

> The Nor Maritime Bunker co Ltd of La Valleta (Malta) by means of the motor vessel "NORSTAR", **traded the oil..... in international waters....**"[98], (emphasis added)

and concluding with

> The product was (then) boarded on the "NORSTAR"....**transported in international waters off the coast of Sanremo** and allocated as fuel supply for Community crafts...[99] (emphasis added)

In other words, this document confirms that the Italian police had taken into account the fact that the M/V "Norstar" operated in international waters.

135. This document also shows that bunkers on board the M/V "Norstar" were not only obtained from Italy, but also from Spain (Barcelona) and Gibraltar. The Criminal Offense Report Communication from the Italian Financial Police, file number 1155/97/21 R.G.N.R. says that "a) The M/V "Norstar" has loaded marine gas oil in four occasions, in the harbours of GIBILTERRA LIVORNO BARCELONA and again LIVORNO".[100]

136. This is an additional reason for concluding that Italy did not and still does not have any grounds for even suspecting that a crime of smuggling or tax evasion was ever committed. This also confirms that the investigations only concerned the commercial activities of the vessel and showed an absence of the crimes of smuggling, tax evasion, or anything else.

137. Given this information, is it proper for Italy to now argue that its arrest was not based on bunkering in international waters or now certify that this arrest was not in breach of article 87? Clearly it is not.

138. The Italian Fiscal Police admitted that, after conducting an audit against Rossmare International, it found that the M/V "Norstar" had been "exclusively operating abroad in the field of wholesale trade of oils and lubricants for recreational crafts" , and that the bunkers had been "allocated as fuel supply" , "in order to supply European recreational crafts..." . Are these activities not synonymous with legitimate "bunkering operations"?

139. The Italian Fiscal Police also concluded that the product boarded on the M/V "Norstar" was, "transported in international waters off the coast of San Remo and allocated as fuel supply for Community crafts that bought it..."[101], and that the Nor Maritime Bunker Co. Ltd. "by means of the motor vessel "NORSTAR", traded the oil bought duty and VAT free off the coast of Sanremo, in international waters, in order to supply European recreational crafts..."[102] thus verifying that the activities in question were carried out beyond the territorial limits of Italy.

140. With this in mind, is it inaccurate for Italy to now state, as it has in its Counter-memorial that the investigation that led to the seizure of the M/V "Norstar" did not pertain

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[98] *Ibidem.*
[99] *Ibidem.*
[100] *Ibidem.*
[101] *Ibid.*, para. 35, fn. 9, p. 7.
[102] *Ibid.*, para. 36, fn. 10, p. 7.

to its operations on the high seas after it has been shown that the Italian Fiscal Police had concluded that this was precisely the *locus* of its operations? Clearly, the answer is yes.

141. Furthermore, since its public prosecutor used the words "bunkering activities" to refer to the conduct of the M/V "Norstar", it is untenable for Italy to now characterize Panama's use of this wording as improper. In any case, no use of terminology can disguise the fact that the arrest of the M/V "Norstar" was made for activities carried out extraterritorially on the high seas, i.e., outside the territory of Italy and, thus, illegally.

B. The Decree of Seizure

142. The public prosecutor attached to the Court of Savona ordered the arrest of the "NORSTAR" through a Decree of Seizure and declared that the M/V "Norstar" "must be acquired as *corpus delicti*" and as an "object through which the investigated crime was committed" thus being subject to "mandatory confiscation".[103] The decree stated that the "NORSTAR" "positions itself beyond the Italian....territorial seas....and promptly supplies with fuel (so-called "offshore bunkering) mega yachts...." [104]

143. That Italy considered the application of its legal criminal and tax regime to the M/V "Norstar" extraterritorially is evidenced by this order which showed that the Public Prosecutor expressly described the M/V "Norstar"'s transactions as being "beyond the Italian" territorial seas.[105]

144. Panama contends that Italy had to resort to an elaborate distortion of the doctrines of "constructive or presumptive presence" and "genuine link"[106] in order to unsuccessfully try to justify its conduct.

145. The doctrine of constructive presence allows a coastal State to exercise jurisdiction over a foreign flag vessel acting in concert with another vessel (contact vessel) or aircraft that violates coastal State laws in waters over which the coastal State may exercise jurisdiction. In order to exercise jurisdiction over a "mothership", the contact vessel must be physically present in coastal State waters or be subject to coastal State jurisdiction under the doctrine of hot pursuit. Once pursuit of the mothership has legitimately commenced, it may proceed until it ceases to be continuous or until the mothership enters foreign territorial waters.[107]

146. Italy itself referred to "constructive or presumptive presence" saying:

> Having noted that the seizure of the mentioned goods must be performed also in international seas, and hence beyond the territorial sea and the contiguous vigilance zone, given that: - actual contacts between the vessel that is to be arrested and the State coast were proved (by means of surveys and observations contained in navigation reports, as well as by means of documents acquired on the ground and through observations services) which implied infringements of the customs and tax legislation as a result of the

[103] Decree of Seizure issued on 11 August 1998, p. 1, Memorial, Annex 3, Counter-memorial, Annex I.
[104] Memorial, Annex 3, p.1: Counter-memorial, Annex I, p. 1.
[105] *Ibidem.*
[106] Decree of Seizure issued on 11 August 1998, p.2, Memorial, Annex 3, Counter-memorial, Annex I.
[107] www.cga.edu/WorkArea/DownloadAsset.aspx?id=5753. This doctrine is also addressed by the Convention in article 111.

> previous sale of smuggled goods in the State territory (so-called "constructive or presumptive presence"...;[108]

147. The mere fact that Italy knew that the vessel was on the high seas when the arrest was to be enforced, proves that the doctrines of constructive or presumptive presence and genuine link were needed by Italy to justify the arrest. However, it is clear that those doctrines do not apply.

148. It is important to recall that the head officer of the Service of Diplomatic Litigation, Treaties and Legislative Affairs of the Ministry of Foreign Affairs of Italy also referred to the use of the doctrine of "genuine link" regarding the case of the Spiro F saying that

> In the same Decree furthermore you use the "genuine link" term as the ship connection between the tanker and the Italian territory.
> Pls. note that this term in the international law is used for the connection between the State and the State flag of a ship (ar. 91 Montegobay Convention).[109]

149. This is further indisputable evidence that Italy applied its legal regime to the M/V "Norstar", despite consciously knowing that this vessel was carrying out its commercial activities on the high seas, and that it was misrepresenting the doctrines of constructive presence and genuine link to justify such actions. On these grounds, it is easily confirmed that Italy (through the Public Prosecutor of Savona), wrongly considered the M/V "Norstar" as an object through which a crime was committed by treating it as *corpus delicti*.

150. That Italy based its order of arrest on its own legal system was confirmed by the wording of the Decree of Seizure and the legal grounds referred to therein, stating that this Decree was "pursuant to Articles 6 crim. Code and 111 Montego Bay Conventions, ratified by Law no 689/94."[110]

151. However, the Savona Public Prosecutor not only should have known the territorial limits of its authority, but also should have paid attention to the letter signed by the head officer of the Service of Diplomatic Litigation, Treaties and Legislative Affairs of the Ministry of Foreign Affairs who advised against an arrest of another vessel based on the presence of a Contiguous Zone because Italy did not have such a zone and that he was mistakenly grounding his decision on the genuine link doctrine.[111]

By disregarding these considerations, the Savona Public Prosecutor through the Decree of Seizure made an improper and unlawful arrest of the M/V "Norstar".

C. The Decree Refusing the Release of Confiscated Goods

152. In Chapter 2, Section III of its Counter-memorial Italy referred to the decree refusing the release of confiscated goods.

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[108] Counter-memorial, Annex I.
[109] Letter (Telespresso), dated 4 September 1998, from the Service of Diplomatic Litigation, Treaties and Legislative Affairs of the Ministry of Foreign Affairs of Italy, Memorial, Annex 7.
[110] Decree of Seizure issued on 11 August 1998, *op. cit.*
[111] Letter (Telespresso), dated 4 September 1998, op. cit. *supra* para. 144.

153. However, in its Counter-memorial Italy does not take into account that in this document, the Public Prosecutor of Savona admitted that

> the motor vessel NORSTAR was stationed outside the territorial waters, refueling yachts headed towards European ports...", and that "the mother ship was stationed in international waters for the criminal goal referred above.[112] (emphasis added)

154. Nor does the Counter-memorial acknowledge that in this decree the Public Prosecutor stated, "It was irrelevant that the conduct was performed in international waters,....".[113]

Thus, this document reveals not only that the conduct for which the M/V "Norstar" was arrested was carried out in international waters as Panama has asserted, but also that Italy did not consider the *locus* to be significant.

155. In other words, the Public Prosecutor not only confirmed that the M/V "Norstar" had been conducting the business for which it was arrested outside the Italian jurisdictional waters, but also that he was determined to prosecute the vessel anyway.

156. A similar ship, the M/V "Spiro F", which apparently was operating on the high seas as well, was considered by Italy to have been operating within its contiguous zone, which turned out to be nonexistent.[114] Nevertheless, Italy unsuccessfully intended to prosecute this ship, as well. Unfortunately, the M/V "Norstar" has been a victim of Italy's failure to learn from its mistakes.

D. The Letter Rogatory of the Tribunal of Savona to the Spanish Authorities of 11 August 1998

157. In spite of the fact that Italy accused Panama of falsely portraying "the bunkering activity of the M/V "Norstar" on the high seas as the reason for the commencement of the Italian criminal proceedings that led to the seizure of the M/V "Norstar"",[115] in the Letter Rogatory, Italy itself had previously characterized its investigation as one "into the phenomenon known as "**offshore bunkering**" of mega yachts close to the borders of Italy's territorial waters by oil tankers flying foreign flags".[116]

158. In this letter, Italy again referred to the bunkering activities of the M/V "Norstar", in the following passage:

> Another distinctive feature of this case was that, although the foreign oil tankers changed, and with them also the (foreign) companies which managed the **offshore bunkering**, ..." ...."It [the "Norstar"] **exclusively operated abroad** in the wholesale trade of fuels and lubricants", ..."**offshore bunkering activity** which took place in 1997", "In the Summer of 1997

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[112] Counter-memorial, Decree Refusing the Release of Confiscated Goods by the Public Prosecutor of the Tribunal of Savona, 18 January 1999, Annex L, p. 2.
[113] *Ibidem.*
[114] *Ibid.*, p. 3.
[115] Counter-memorial, para. 3, p. 1, *supra*, para. 12.
[116] Letter Rogatory, p. 2, Preliminary Objections, Annex D.

> **offshore bunkering** was carried out through the Panamanian-flagged vessel "Norstar"....[117] (emphasis added)

and once more stated at pages 4 and 5 that the conduct of the M/V "Norstar" was "offshore bunkering".

159. On page 4 of the Letter Rogatory Italy even provided a sketch map in which it clearly positioned the M/V "Norstar" within "**INTERNATIONAL WATERS**". (emphasis added)

160. If Italy positioned the M/V "Norstar" in international waters for the purpose of issuing the Letter Rogatory, Italy cannot validly deny now that its request for the arrest of the M/V "Norstar" was based on activities performed within its own territorial waters.

E. The Judgement of the Tribunal of Savona

161. The judgement of the Savona Tribunal has been distorted by Italy in the Counter-memorial. While Italy now states that "Panama's account of the reason for the acquittal is not accurate"[118] when we compare Panama's argument[119] to the relevant section of the Tribunal's judgement cited by Italy[120], we can see that the two are essentially the same.

162. Panama has noted that the Court of Savona acknowledged the absence of a rationale for believing that an offence had been committed within its territorial waters and decided that any fuel purchased by leisure boats outside the territorial sea was not subject to import duties. Along these lines, the Savona judgement stated:

> 2. ...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.[121]

163. Furthermore, it is easily confirmed that the "elements of the conduct" of the M/V "Norstar" acknowledged by the Tribunal of Savona were

> the purchase of oil products in non EU countries or in Italy and in other EU ports but under a customs-free regime, for such products to be then used to refuel ships or vessels outside Italian territorial waters.[122]

164. Such actions were bunkering operations conducted outside Italian territorial waters. As such, the Italian Judiciary found them to be totally permissible. These actions are completely legitimate under international law, as well.

165. In its decision, the Savona Tribunal confirmed that the purchase "**outside the territorial sea line**" for its subsequent introduction into Italy "**no matter whether this**

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[117] *Ibidem.*
[118] Counter-memorial, para. 58, p. 14.
[119] Memorial, para. 29, p.14.
[120] Counter-memorial, para. 57, p. 14.
[121] *Ibid.*, para. 58, p. 14, fn. 43.
[122] Tribunal of Savona Judgement, p. 6; Memorial, Annex 10, and Counter-memorial, Annex M.

was close to, or far from, the territorial waters line", and whether it had been "**purchased on the Italian territory**", there was no crime.[123] (emphasis added)

166. In other words, the Savona Tribunal concluded that the evidence showing that the *locus* where the bunkering activities were carried out by the M/V "Norstar" was of the essence in arriving at its judgement. Contrary to what Italy is now trying to assert, this Italian judicial authority clearly recognized that

> 6. In light of the above remarks, before asserting any kind of criminal liability, a preliminary test is needed as to **where** the provision of supplies occurred because if it took place outside the line of territorial waters no one of the offences charged does actually exist.[124] (emphasis added)

167. Consequently, the Tribunal of Savona ruled that the arrest of the M/V "Norstar" was wrongful precisely due to the location of the vessel when it was bunkering. For this reason, the public prosecutor order of arrest was revoked and the vessel was ordered to be returned to its owner.

168. While Panama has succinctly summarized the Tribunal's rationale for its decision to acquit the M/V "Norstar", Italy has chosen to misinterpret it. By doing so, and by trying to distort Panama's argument, Italy has attempted to hinder a just resolution of this case, long after the main points have already been clarified.

F. The appeal submitted by the Savona Public Prosecutor in response to the judgment delivered by the Court of Savona

169. The importance of the appeal submitted by the Savona Public Prosecutor stems from the fact that the Italian arguments in the Counter-memorial are based on this document.

170. The prosecutor appears to have believed, and Italy's counsel still seems to agree, that the activity for which the M/V "Norstar" was arrested and for which the persons involved with its operation were prosecuted

> was bunkering, but actually was aimed at distracting the oil fuel- which was sold in international waters -from paying custom taxes and duties, ...
>
> Therefore we are not contesting whether the vessels seized could carry out bunkering operations, but we are contesting that the activity carried out was quite different from actually being bunkering....[125]

171. Later in this document, the Savona Public Prosecutor stated that

> "The motor tankers therefore placed themselves beyond the Italian territorial waters, supplying regularly pleasure vessels that landed exclusively in EU harbours, thus giving willfully and consciously to the product they sold a destination different from the one for which they had obtained the tax exemption (with reference to the product

[123] *Ibid.*, para. 5, p. 10.
[124] *Ibid.*, para. 6, p. 10.
[125] Appeal submitted by the Public Prosecutor against the Court of Savona Judgement, p.2, Memorial, Annex 13, p. 2.

bought in Italy, mainly by NORSTAR, that was therefore reintroduced artificially into the custom's territory)...[126]

The previous paragraph confirms that Italy has been trying to revive a thesis whose illegitimacy that was ultimately declared invalid by its own courts.

G. The Court of Appeal Judgement

172. One of the documents upon which Italy relied in its Counter-memorial was the decision of the Court of Appeal of Genoa of 25 October 2005.[127] However, despite entitling a section of the Counter-memorial to acknowledge its existence, Italy did not address the substance of the Genoa Court's ruling at all, suggesting that it would prefer to ignore that Court's conclusions.

173. Nevertheless, because this important judgement confirmed the ruling of the Savona Tribunal, Panama will focus on some of its key points, keeping in mind that Italy has itself failed to give any serious consideration to its findings.

174. The charges against the persons involved with the operations of the M/V "Norstar" brought by the Public Prosecutor read as follows:

> they chartered the oil tanker in question from the company headed *de facto* by MORCH and anchored it a little beyond the territorial sea in order to supply regularly gasoil to recreational vessels, which subsequently landed solely in ports of the State or, in any case, in ports of EU Member States...[128]

175. The Genoa Tribunal unequivocally decided that "the appeal was unfounded."[129] The Public Prosecutor had argued that the M/V "Norstar" transferred mineral oils, gasoil and lubricating oils for profit and that "tankers were anchored beyond the Italian territorial sea, supplying recreational vessels bounds solely to European ports....".[130]

Thus, besides acquitting the M/V "Norstar", this judgement implies that other tankers were performing the same activities (bunkering), and that the M/V "Norstar" had been unfairly singled out.

176. The Genoa Tribunal also determined that

> 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.[131]

and that "The Court of First Instance correctly held that the foreign ship's stores were not introduced, nor marketed, nor consumed in the territory of the State."[132]

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[126] *Ibidem*, p. 3.
[127] Counter-memorial, Section VI, paras. 65-73, pp. 16-18.
[128] Court of Appeal of Genoa Judgement of 25 October 2005, p. 4, Annex T.
[129] *Ibid.*, p. 7.
[130] *Ibidem.*
[131] *Ibid.* p. 9.
[132] *Ibid.* p. 8.

177. The Genoa Tribunal also observed that a need to punish the supplier of fuel to recreational vessels was not required, by concluding

> that the purchase by recreational vessels of fuel intended to be used as ship's stores outside the limit of territorial sea and its subsequent introduction inside it does not entail any application of duties so long as the fuel is not consumed within the customs line or landed; that **no offence is committed by anyone who provides bunkering on the high seas**, even in full knowledge that the gasoil will be used by leisure boaters bound for Italian coast; that there is not any possibility of establishing the offence provided for, and punishable under, ... when the gasoil, which has been sold or transshipped **on the high seas**, has been purchased under exemption from payment of the excise duty for being ship's stores (such goods are certainly to be considered foreign goods once the vessel has left the port, or once it has gone beyond the limit of territorial waters).[133] (emphasis supplied).

The Genoa Court also concluded that "the consumption of fuel in Italian territorial waters does not amount to smuggling."[134]

178. Clearly, the Italian final judgement confirms that anyone who provides "bunkering on the high seas", as Panama has repeatedly characterized the activity of the M/V "Norstar", and for which, in turn, it has been roundly criticized by Italy in its Counter-memorial, has not committed any punishable offence. In other words, the Court of Appeal Judgement strongly supports Panama's case in this dispute, while refuting Italy's. This would certainly explain why Italy has chosen not to rely on this piece of evidence in its Counter-memorial.

179. Italy has unsuccessfully tried to demonstrate that article 87 of the Convention is not applicable because the prosecution of the vessel and the persons therein connected were based on criminal acts carried out within Italy. Panama does not object to the right of a State to exercise its jurisdiction and apply its legal system for crimes performed within its territory. However, this was not the case when it came to the arrest of the M/V "Norstar".

180. By continuing to pursue this argument Italy is going against its own internal decisions and therefore acting in violation of the doctrine of *venire contra factum proprium non valet*.[135]

181. Even if Italy believed that it had the right to exercise its jurisdiction and apply its internal legal system to the M/V "Norstar" for acts performed within its territory, it would still have to explain why it would do so forcefully as early as September 1998, despite having been warned that this would be against the law[136], and why it would maintain *sine die*, particularly after deciding that such an arrest was wrong and the vessel had to be returned to its owner.[137]

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[133] *Ibidem.*
[134] *Ibid.* p. 8.
[135] *Infra.*, Chapter 4, Section IV, Subsection G, paras. 338-348, pp. 52-53.
[136] *Supra*, Chapter 3, Section IV, paras 121-125, p. 19-20.
[137] *Ibid.*, paras. 144-155, pp. 27-29.

182. Both judgements of the Italian courts acquitted the M/V "Norstar", and all the persons therein connected, of the charges brought against them, precisely because the vessel had been operating in international waters, rather than Italian custom territory.

183. Additionally, neither the M/V "Norstar" nor any of the persons therein connected were ever prosecuted with smuggling or tax evasion. Thus, the latest Italian version of what transpired, based on the unsuccessful appeal by the Savona Public Prosecutor, is incompatible with the true sequence of events. Consequently, the rationale for Panama's invocation of article 87 remains intact.

V. The Italian reasoning concerning the interpretation and application of article 87 has not substantially changed since the Tribunal issued its Judgment of 4 November 2016.

184. The fundamental arguments of Italy in its Counter-memorial are the same as they were in its Reply to Observations and Submissions of the Republic of Panama. Italy is using the same reasoning it previously brought to the Tribunal when objecting to its jurisdiction and to the admissibility of the case in order to pre-empt the Tribunal's consideration of article 87.

185. Despite the Tribunal having already examined whether a link existed between the Decree of Seizure and any rights enjoyed by Panama under article 87 of the Convention, and rejecting the Italian argument that this provision was irrelevant *ratione loci* because the M/V "Norstar" was seized while it was anchored at the Palma de Mallorca Bay[138], Italy is, nevertheless, repeating the same line of reasoning[139], continuing to maintain that when the Decree of Seizure was issued, transmitted to the Spanish authorities, and enforced, the vessel was docked in Spain[140] and, therefore did not enjoy the freedom of navigation.[141] It is difficult to understand how this argument will achieve a different result this time.

186. Similarly, with reference to the areas where the activities of the vessel were being carried out, Italy has relied on a rationale that has barely varied over time. In its Preliminary Objections, Italy stated that "from 1994 to 1998, the M/V "Norstar", "....carried out bunkering activity off the coasts of France, Italy and Spain"[142] and that "the offences of criminal association aimed at smuggling mineral oils and tax fraud.... were alleged to be committed through foreign tanker vessels, among them the M/V "Norstar""[143].

187. Now, in its Counter-memorial, Italy has only slightly changed its argument, still proclaiming that the Decree of Seizure did not target the activities of the M/V "Norstar" on the high seas[144], while continuing to rely exclusively on the original arguments of the Public Prosecutor, despite these having since been superseded by two competent Italian tribunals.

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[138] Preliminary Objections Judgement, para. 119.
[139] Counter-memorial, para. 75-101, p. 19-23.
[140] *Ibid.*, para. 75, p. 19.
[141] *Ibid.*, para. 93, p. 22, para. 102, p. 23.
[142] Preliminary Objections, para. 7, p 2.
[143] *Ibid.*, para. 8, p. 2.
[144] Counter-memorial, para. 121, p. 27.

188. All of the documentary evidence referred to above confirms that most of the sequence of events leading up to the arrest is not in dispute. The parties only differ in terms of how the M/V "Norstar"'s operations on the high seas have been interpreted.

189. Italy now belatedly contends that bunkering was not the basis for the arrest of the M/V "Norstar", replacing it with the crimes of smuggling and tax evasion, while Panama has consistently based its arguments on the arrest and subsequent court cases as they actually transpired.

190. Panama submits that the facts have always supported its position that the M/V "Norstar" was arrested for bunkering on the high seas, while continuing to refute the Italian version of events that states otherwise.

191. Even if one accepted the revised Italian argument that the basis for the investigation that led to the arrest of the M/V "Norstar" was not its bunkering operations or activities on the high seas but the crimes of smuggling and tax evasion, this would not lessen Italy's responsibility for wrongfully arresting a vessel in proceedings which did not meet the threshold of a legitimate investigation.

192. In fact, the Italian *rationale* for arresting the M/V "Norstar" and prosecuting the persons involved in its operations for the crimes of smuggling and tax evasion would now be impossible for Italy to prove.

193. In treating this vessel as a *corpus delicti* and prosecuting the persons involved in its operations as related to the crimes of smuggling and tax evasion, the arresting State had to show evidence that such criminal conduct was carried out in its territorial sea or at the least in its contiguous zone.

194. All the evidence presented, however, demonstrates that neither was the case. The investigated conduct could not have taken place within the continuous vigilance zone, because that was nonexistent. The only other option would be to arrest the vessel based on the doctrines of "constructive or presumptive presence" and "genuine link", both of which have been shown to be unsound.[145]

195. In summary, when Italy bases its current defense on a mischaracterization of the facts of the dispute by stating that Panama "portrays the bunkering activity of the M/V "Norstar" on the high seas as the reason for the commencement of the Italian criminal proceedings that led to the seizure of the M/V "Norstar""[146], Panama can only reply that the facts not only refute Italy's supposition, but also that article 87 is clearly and inextricably involved.

196. Both of the main arguments of the Italian Counter-memorial have already been considered by the Tribunal, which has ruled that article 87 is relevant to this case. That Italy has continued to recycle these arguments does not change the underlying facts of the case in any way, but instead reinforces the conclusion that Italy has, indeed, unequivocally breached this provision.

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[145] *Supra*, Chapter 3, Section IV, Subsection B, paras. 144-151, pp. 23-24.
[146] Counter-memorial, para. 3, p. 1.

CHAPTER 4
THE MISTAKEN ARGUMENTS OF ITALY CONCERNING ARTICLE 300

I. Introduction

197. Section II of this chapter addresses the relationship between article 87, article 300 and the circumstances of time and space concerning the arrest of the M/V "Norstar"; Section III discusses how the decision to arrest the M/V "Norstar" after it had left Italy and the high seas, as well as Italy´s subsequent behavior, represents bad faith; and in Section IV, Panama will describe the specific acts on the part of Italy that have constituted a breach of the duty of good faith between the arrest and the proceedings before this Tribunal, i.e., A. by intentionally delaying the initiation of criminal proceedings; B. by prematurely and unlawfully enforcing the arrest order; C. by intentionally refusing to reply to the communications from Panama; D. by arresting the M/V "Norstar" in Spain for contradictory reasons; E. by keeping the res under its jurisdiction, authority and control for an extended period of time, rather than promptly taking steps to return it; F. by considering a conventional provision to be binding only on Panama; G. by contradicting its own previous conduct concerning the order of arrest of the M/V "Norstar" in violation of the principle, *Non concedit venire contra factum proprium*;. and H. by taking advantage of its own wrong in violation of the principle, *Nullus Commodum Capere De Sua Injuria Propia*.

II. The relationship between article 87 and article 300 and the circumstances of time and space concerning the arrest of the M/V "Norstar"

198. The freedom of navigation on the high seas established under article 87 guarantees the right of all States to free navigation as well as their obligation to respect other States' freedom to likewise navigate without undue interference.

199. It is in this context that Panama affirms that good faith means exercising rights in a manner compatible with obligations and that such interdependent rights and obligations represent a genuine interest in their protection without causing unfair prejudice toward any other state.

200. 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. Italy maintains that this requirement "is not respected by invoking a general incompatibility of a State´s actions with the manner of the exercise of the right of jurisdiction recognized by the Convention… "[147].

This argument completely ignores the specific examples of numerous breaches of good faith on the part of Italy that Panama has described in the Memorial.[148]

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[147] Counter-memorial, para. 198, p. 40.

[148] By detaining the vessel as *corpus delicti* for an unreasonable period, para. 115; By letting criminal proceedings against the persons to endure for 5 years without any compensation, Ibid.; By willfully and wrongfully only taking into account its own interests when prosecuting and applying its laws to the M/V "Norstar" and the persons involved in its operations, para. 116; By intentionally evading, and contradictorily considering, the facts because it knew that the locus of the activities for which it requested the arrest was the high seas, para. 117; By not taking any steps to criminally prosecute during four years and to suddenly treat the M/V "Norstar"'s actions as a crime, para. 118; By keeping the res under its

201. According to Italy, Panama has ignored the fact that a breach of article 300 has to be committed "from the perspective of Article 87" and that in view of good faith scrutiny "all of Italy's conduct, including in this Tribunal and in the course of domestic proceedings"[149] is, therefore, outside the jurisdiction of the Tribunal.

202. In fact, Panama is most aware of the interrelationship between these two provisions, recalling that the Tribunal cited the M/V "*Louisa*" case in its judgement of 4 November 2016, by stating that article 300 of the Convention could not be invoked on its own and that the question of its involvement was linked to "whether Italy has fulfilled in good faith the obligations assumed by it under article 87 of the Convention"[150].

203. All claims that Panama has made concerning Italy's bad faith and abuse of rights have emerged from the hindrance of the free navigation protected by article 87.

204. Panama recalls the comments by Corten and Klein on article 26 of the Vienna Convention on the Law of Treaties, who stated that "every treaty in force is binding upon the parties to it and must be performed by them in good faith. This fundamental provision is applicable to the determination whether there have been violations of that principle of good faith and, in particular, whether material breaches of treaty obligations have been committed". In his fourth report to the International Law Commission, Sir Fitzmaurice adopted the following wording: "A treaty must be carried out in good faith, and so as to give it a reasonable and equitable effect according to the correct interpretations of its terms."[151]

205. And Sir Humphrey Waldock proposed a second part of the adopted provision, reading: "good faith, inter alia, requires that a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects.[152]

206. The second part of Sir Humphrey's proposal, that a party must abstain from acts calculated to frustrate the objects and purposes of the treaty – was considered by the Commission as implicit in the obligation to uphold the treaty in good faith.[153]

207. It is Panama's view that, 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. Furthermore, 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.

208. In the case of the *Territorial Dispute between Chad and Libya* the International Court of Justice (ICJ) recalled the rules on interpretation of treaties when applying them to the the agreement of 10 August 1955 between France and Libya which served as a basis for its judgment in the following manner:

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jurisdiction and authority without effectively returning in a timely manner, in spite of its own clear orders to do so, para. 119; By requesting the arrest prior to the date its criminal courts had found the unlawfulness of such an order, and just before the M/V "Norstar" was about to sail, and taking advantage that the vessel was in port to make the arrest easier, para. 120; By not answering any of the communications sent by Panama concerning this claim and concealing these over a period of 15 years, para. 121-122.

[149] *Ibid.*, para. 11, p. 2.

[150] Preliminary Objections Judgement, para. 132.

[151] Corten O. and Klein P. (eds), The Vienna Conventions on the Law of Treaties A Commentary Vol. 1, (OUP, 2011) p. 678.

[152] *Ibid., p. 680.*

[153] *Ibidem.*

> ...in accordance with customary international law, reflected in article 31 of the Vienna Convention on the Law of Treaties, 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.[154]

209. The Court applied this teleological method to reject supplementary means of interpretation which it perceived as useless in this particular case and sought to give an *effet utile* to the treaty. *Effet utile* - the principle of *ut res magis valeat quam pereat* – has also been mentioned in numerous decisions of international courts.

210. In these cases, *effet utile* has been defined as a simple appeal to logic that can be effectively used as a lever towards a broad interpretation. The ICJ made use of this concept not only in the case of *The Territorial Dispute between Chad and Libya* [155] but also in the case of *Kasikili/Sedudu Island.*[156] *Effet utile* is a teleological or ends-focused interpretation that has been more or less explicitly the focal point of numerous decisions.

211. In *The Saiga (No.2)* Case before, the Tribunal also made use of this method. After an agreement transferred to the Tribunal the responsibility of settling a dispute initially submitted to an arbitral tribunal, the Tribunal framed the possibility of a lasting agreement on *effet utile.*[157]

212. The Tribunal also took direct recourse to such a teleological interpretation in *The Camouco Case*[158] as well as in *The Gabcikovo-Nagymaros Case* where it wrote:

> Article 26 combines two elements, which are of equal importance. ...[It] is the purpose of the treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.[159]

213. In the present case Italy insists on a literal application of the freedom of the high seas.

214. Panama asks the Tribunal to interpret article 87 in a broad manner, in light of the principle of *effet utile*, so as to recognize a material breach of article 87 in light of the concept of good faith when addressing the particular situation of the MV "Norstar".

215. These are the reasons why, from Panamas perspective, it is crucial to use the concept of good faith to interpret article 87 and link it with article 300 of the Convention. Due to a lack of good faith when arresting the M/V "Norstar" Italy frustrated the object of the treaty – namely the freedom of navigation.

216. If Italy had not impeded the right of the M/V "Norstar" to freely navigate with its order of arrest, none of the charges alleging a breach of good faith would have been brought. It is, then, within the context of Italy's violation of article 87 through its arrest

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[154] *Territorial Dispute between Chad and Libya,* ICJ Rep. 1994, para 41, pp. 19-20.
[155] *Ibid.*, pp 23-4, para 47.
[156] *Kasikili/Sedudu Island,* ICJ Rep. 1999, para 93, p. 61. See also O. Corten and Pierre Klein (eds), The Vienna Convention on the Law of Treaties A commentary Vol. 1 (OUP, 2011) p. 831.
[157] *The "Saiga" No. 2 Case*, Judgement of 1 July 1999, para. 51.
[158] *The "Camouco" Case*, Prompt Release, 2000, para. 58.
[159] *Gabcikovo-Nagymaros Project (Hungarz/Slovakia)*, ICJ Rep. 1997, pp. 78-9, para 142.

of the M/V "Norstar" that Panama affirms that Italy has acted in breach of its good faith duty. However, the relevance of article 300 to this case does not stop there.

217. Panama has shown, through a description of the sequence of events, that all of the Italian conduct leading up to and during the time that the arrest was in force was in violation of article 87, while its conduct since the arrest, including examples cited by Italy in its Counter-memorial, have demonstrated a lack of good faith, thereby contravening article 300 of the Convention.

218. In paragraph 169 of the Counter-memorial, Italy states that even if there were no limitation to the applicability of article 300 beyond the obligations under article 87, "Panama would still have failed to identify what provisions of the Convention Italy would have violated by the conducts indicated in paragraphs 157-160".[160]

219. However, paragraphs 157-160 simply repeat arguments previously brought forward by Panama concerning the breach of Italy's duty to act in good faith. These arguments have not been specifically addressed in the Counter-memorial, rather than provide examples of Italy's conduct, so it is hard to know exactly what Italy is referring to.

220. In international exchanges and negotiations, good faith is presumed. However, Panama maintains that this presumption has been distorted by the unlawful conduct of Italy in several instances, which will be described below.

221. Italy chose to arrest the M/V "Norstar" in Spain. To justify this, Italy stated that "From 1994 to 1998, the M/V "Norstar" ...carried out bunkering activity off the coasts of France, Italy and Spain, through the brokering of Rossmare International sas"[161] and that during the summer of 1997, specifically on 28 June and 12 August 1997, it entered the port of Livorno.[162] . Similarly, Italy states that the M/V "Norstar" had entered four times the ports of foreign countries, including once in Gibraltar and once in Barcelona, in addition to the two times in Livorno.[163] The question then arises, "Why was the M/V "Norstar" not arrested then?"

[160] Counter-memorial, para. 168-169, p. 36.
[161] Preliminary Objections, para. 7, citing the Tribunal of Savona Judgement dated 13 March 2003 (Annex B), p. 4.
[162] Counter-memorial, para. 32-33, p. 6.
[163] *Ibidem.*

III. The decision to arrest the M/V "Norstar" after it had left Italy and the high seas, as well as Italy's subsequent behaviour, represents bad faith

222. Italy´s justification to arrest the M/V "Norstar" in Spain was:

> The M/V "Norstar" was arrested in the internal waters of Spain precisely to avoid breaching the provision of the Convention on freedom of navigation on the high sea.[164]

223. Panama has previously indicated three ways in which the response of Italy based on this reasoning represents bad faith.

224. Firstly, to wait until a vessel sails into the port of another state in order to enforce an arrest for acts carried out on the high seas cannot be considered good faith. Such conduct amounts to a breach of the freedom of navigation if the arrest was wrongfully ordered, as was proven in the present case.

225. To try to circumvent its obligation under article 87 by waiting until a foreign vessel is no longer on the high seas does not constitute good faith. If Italy admits that it cannot arrest the M/V "Norstar" on the high seas as that would 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.

226. Such conduct amounts to a breach of the freedom of navigation if the arrest was wrongfully ordered in relation to those activities, as was proven in the present case. Italy should have made sure, before exercising its control and authority over a foreign vessel, in this case the M/V "Norstar", that those activities performed by such vessel and the persons interested in its operations were truly unlawful. By hindering the movements of this foreign vessel for activities which were carried out on the high seas and were not unlawful, Italy clearly breached articles 87 and 300 of the Convention.

227. Secondly, as Panama has explained in detail,[165] Italy has never addressed its failure to respond to Panama's requests for negotiation since the arrest. Is it good faith to keep silent when another State requests a reply in order to ascertain its views?

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

229. It has already been established that Italy abridged the freedom of the M/V "Norstar" in violation of article 87 by executing its arrest, but it is the prolonged detention, that brings the applicability of article 300 to this case.

230. Yet the Counter-memorial adds a fourth dimension to Italy's bad faith conduct. Italy has now tried to alter the facts of the case, saying that it was investigating actions by the M/V "Norstar" performed in Italian territory, so that the scope of the arrest decision was

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[164] *Ibid.*, para. 152, p.33.

[165] *Infra,* Chapter 4, Section IV, Subsection C, paras. 276-292, pp. 43-45.

actually not the high seas after all. This description has not been reflected by the record of events as they transpired.

231. By stating that the Decree of Seizure was issued on the basis of "offences that occurred within the Italian territory" in contrast to the Panamanian position that "the activities for which the M/V "Norstar" was arrested were carried out on the high seas"[166], Italy has completely ignored its Decree of Preventive Seizure, which said that

> the competence of this Tribunal is further grounded on the fact that the activities carried outside the territory of the State or its territorial waters are **not divisible** from the one destined to affect the Italian customs territory, as well as the fact that it would be sufficient that the action of **just one accomplice** occurred on the Italian territory or that within such territorial scope the punishable event took place, as maintained by the Court of Cassation in decision 11950 of 14 November 1980;..[167] (emphasis supplied)

232. This Decree of Preventive Seizure was issued in 1999. In addition to being further evidence of the exercise of the Italian jurisdiction over the M/V "Norstar" for activities carried out on the high seas, this order also tried to base the exercise of jurisdiction on the indivisibility of activities of the M/V "Norstar" and the existence of "just one accomplice"[168].

233. Using this reasoning, combined with an attempt to apply the constructive presence doctrine, Italy has tried unsuccessfully to evade its responsibility under the Convention. In so doing, Italy has infringed upon the good faith precepts of article 300.

234. Neither the doctrine of genuine link nor that of constructive presence applies to this case, because there was no criminal conduct on the part of either the M/V "Norstar" or the persons interested in its operations. As a result, in an effort to construct a false rationale for their implementation, Italy has violated articles 87 and 300.

235. Italy has also stated that "On 24 September 1998 the Italian Fiscal Police transmitted the findings of its investigation to the Public Prosecutor of the Tribunal of Savona"[169] and, that based on that information "the Public Prosecutor registered a criminal case against Mr Rossi and others under number 1155/97/21 R.N.R."[170]

236. However, it is interesting to observe that by that time, the M/V "Norstar" was already under arrest.

237. If it was not until 24 September 1998[171] that the Italian Police sent the findings of its investigation to the prosecutor, the arrest, dated 11 August 1998, would have been in force without foundation.

238. From all indications, the reason for issuing another order to arrest the M/V "Norstar", this time as a "precautionary seizure" issued by "the Judge of Preliminary Investigations"[172], confirms that Italy wanted to exert its authority and control over a

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[166] Counter-memorial, para. 45, p. 10.
[167] *Ibid.*, Decree of Preventive Seizure issued on 24 February 1999, p. 3., Annex G.
[168] Counter-memorial, para. 45, p. 10.
[169] *Ibid.*, para. 41, p. 9.
[170] *Ibidem.*
[171] *Ibid.*, para. 41, fn. 21; Decree of Preventive Seizure, Annex G.
[172] *Ibidem.*

foreign vessel for activities performed on the high seas without the necessary diligence that any State has to use in applying its internal laws and jurisdiction over foreign vessels. Such conduct represents an abuse of rights. Panama elaborates on this separately in Section V on Italy's abuse of rights within the meaning of article 300 of the Convention.

239. Italy has tried to promote the spurious claim that Panama "generally" considers the application of Article 300 as "the manner of the exercise of the right of jurisdiction recognized by the Convention"[173] and that it has failed to provide a link with any other specific provisions of the Convention. However, Panama has already made a link in its Memorial between articles 300 and 87 regarding good faith[174] with reference to an abuse of rights.[175] For Italy to ignore the Panamanian argument in this regard does not bolster its good faith credentials, but quite the contrary.

240. Panama does not accept the Italian premise that the Memorial suggests that Italy has simply violated "any obligation that Italy has assumed under the Convention"[176] in lieu of article 87, in order to argue that there was no breach of article 300. Panama has duly articulated all of Italy's violations of article 300 and has linked these to the principle of freedom of navigation contained in article 87. Panama has also enumerated the obligations that fall under article 87 of the Convention and has shown[177] that Italy did not fulfil these in good faith, but rather has committed an abuse of right.

241. It is highly contradictory for Italy to claim that "Article 87 does not confer any right of jurisdiction to Italy in the present dispute"[178] after having ordered the seizure of the M/V "Norstar" and prolonging its detention to the extent that the persons involved have now had to mount a defense and spend time and financial resources to gain redress.

242. Italy also maintains that the question of the abuse of rights "is not one that falls within the scope of the dispute"[179] and that it is "beyond the jurisdiction of the Tribunal in this case"[180] However, when one reads the judgement of the Tribunal of 4 November 2016 on which Italy grounds its argument, it is easily seen that the passage cited states exactly the opposite, *i.e.* that the Tribunal was of the view that "Article 300 is relevant to the present case"[181] as a direct consequence of the violation of article 87.

243. Therefore, the Italian statement that, "In the present case, similarly, the Tribunal has limited the relevance of Article 300 to the question as to whether Italy has fulfilled in good faith its obligations",[182] is simply not true.

244. Italy also states that "when a Tribunal decides that article 300 is relevant to a certain dispute it also specifies which one of the two obligations therein are relevant unless both

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[173] *Ibid.*, para. 195, p. 40.
[174] *Supra*, Chapter 3, Section V, paras. 184-196, pp. 30-31.
[175] Memorial, paras. 124-128.
[176] *Ibid.*, para. 163, p. 35.
[177] Memorial, Chapter 3, Section III(3), paras. 103-128, pp. 31-33.
[178] Counter-memorial, para. 201, p. 41.
[179] *Ibid.*, para. 186, p. 39.
[180] *Ibid.*, para. 192, p. 39.
[181] Preliminary Objections Judgement of 4 November 2016, para. 132.
[182] Counter-memorial, para. 191, p. 39.

are relevant"[183]. Panama agrees but notes that, because it did not specify either one, the Tribunal considers both to be relevant.

245. This is also supported by the fact, that in general international law the concept of good faith encompasses or includes the doctrine of abuse of rights. Amongst other sources, the Encyclopedia of Public International Law supports this view by stating that:

> Good faith may be said to cover the somewhat narrower doctrine of abuse of rights, which holds that a State may not exercise its international rights for the sole purpose of causing injury, nor fictitiously to mask an illegal act or to evade an obligation.[184]

246. Therefore, not very violation is necessarily an abuse of rights. On the other side, every abuse of rights is a violation of good faith. Consequently, since the Tribunal did not exclude abuse of rights, both concepts can be considered relevant.

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

248. The result has been a violation of those rights to the extent that not only is article 87 of relevance, but article 300 is, also.

IV. The specific acts on the part of Italy that have constituted a breach of the duty of good faith during the time between the arrest and the proceedings before this Tribunal

249. In this section, Panama will describe both the conduct by which Italy breached its obligation to uphold the freedom of navigation contained in article 87 and its lack of good faith leading up to the institution of proceedings by Panama before the Tribunal by means of the Application. These include A. The intentional delay by Italy to initiate criminal proceedings, B. The premature enforcement of arrest, C. The intentional refusal of Italy to reply to numerous communications that Panama sent, D. The contradictory explanations for arresting this vessel in Spain, E. The keeping of the *res* by Italy under its jurisdiction, authority, and control for an extended period of time, rather than promptly returning it, F. The fact that Italy considers a Conventional provision to be binding only on Panama, G. Denying its own actions- *non concedit venire contra factum proparium*, and H. Taking advantage of its own wrong- *Nullus Commodum Capere De Sua Injuria Propia*. Each of these points will be addressed, in turn, below.

A. The intentional delay by Italy to initiate criminal proceedings

250. The explanation of Italy for the acts attributed to it that bring into question that violation of good faith on the basis of time, *i.e.* the delay of four years, from 1994 and 1998, for it to initiate criminal proceedings against the M/V "Norstar" and the persons

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[183] *Ibid.*, para. 189, p. 39.

[184] D'Amato, Anthony "Good Faith", in R. Bernhardt (ed), *Encyclopedia of Public international Law*, Volume I (1992), pp. 599-601.

therein connected, is that the arrest was not for bunkering on the high seas, but for smuggling and tax evasion within Italian territory.[185]

251. Panama has discussed this matter at length and has elucidated that the "bunkering activities" of the M/V "Norstar" involved a series of acts that included buying bunkers, transporting them to the high seas, and selling them there to pleasure boats. These were the only activities in which this vessel was involved and the only conduct for which the vessel could have been arrested.

252. Italy has not offered any explanation for having waited for such a long period, during which the M/V "Norstar" carried out the same activities, before initiating the arrest. The M/V "Norstar" and all the persons involved in its operations had been allowed to sell bunkers on the high seas since 1994, so it does not represent good faith for Italy to suddenly interfere with this practice in 1997-1998, particularly after such a long period.

253. Italy stated that "it was only by then", *i.e.* 1997, that investigative activities by the Italian police came to suggest the involvement of the vessel in the crimes[186] meaning that from 1994 until 1997 such conduct did not suggest anything, which "demonstrates that the bunkering activities of the M/V "Norstar" were not as such of concern to the Italian authorities"[187]. The sudden change in Italy's stance, redefining bunkering as a crime, reflects a lack of good faith.

B. The premature and unlawful enforcement of arrest

254. Whenever a State considers seizing a vessel of another flag State, an emphasis must be placed on the burden of providing a balance between claimants and defendants and fully recognizing that the interests of justice for all must be served. Therefore, the task of the prosecutor must be undertaken with the utmost seriousness.

255. Instead, the arrest of the M/V "Norstar" was seemingly rushed and enforced without the final and definitive approval of the Italian jurisdictional authorities. The Decree of Seizure was issued on 11 August 1998 and, on the same day, Italy requested its enforcement by Spain.

256. In addition, the Savona Public Prosecutor based his decision only on Italian law and jurisdiction, despite the fact that the M/V "Norstar" was a foreign vessel within the territory of a third state.

257. We have already learned that the reason for this conduct was Italy's wrongful *belief* that since the vessel was not on the high seas, no breach of article 87 could be attributed to Italy.[188]

258. However, freedom of navigation is also applicable to vessels in port that normally conduct commercial operations on the high seas because their business depends upon their re-entry into open water. Freedom of navigation encompasses freedom of movement

[185] *Ibid.*, para. 3, p. 1, para 9, p. 2, para. 117, p. 26, and para 151, p. 33.
[186] *Ibid.*, para. 151, p. 33
[187] *Ibidem.*
[188] *Supra*, Chapter 2, Section II, paras. 41-55, pp. 6-8.

of ships.[189] Indeed, it would deprive freedom of navigation of its meaning if, to avoid their obligation under article 87, States could wait to arrest foreign vessels in port for *lawful commercial activities conducted on the high seas*.

259. Italy has stated that "the M/V "Norstar" was arrested to secure evidence which was necessary in order to ascertain whether the defendants had committed certain crimes on the Italian territory."[190]

260. However, 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, before executing an arrest for alleged crimes.

261. Furthermore, the authority of the arrestor State must prove that there exists *fumus boni iuris* and *periculum in mora.*[191]

262. According to Rodriguez and Castillo de la Torre, interim measures may be ordered

> only if established that such an order is justified prima facie in fact and in law (*Fumus boni iuris*) and that it is urgent in that, in order to avoid serious and irreparable damage to the applicants' interests, it must be made and produce its effects before the decision is given in the main proceedings (urgency).[192]

However, Italy has never shown an urgent need to arrest the M/V Norstar, particularly after letting it operate freely for four years prior.

263. In one of the cases cited by these authors, the Court stated: "...In the Commission's view, all the arguments concerning the alleged damage that would be suffered by the Italian economy and Italian firms are irrelevant as regards demonstrating urgency in respect of the applicant's own interests, which is required under settled case-law. ...".[193]

264. On the other hand, *periculum in mora* implies that there had to be a risk of imminent and irreparable harm to the interests of the arrestor State, which could only be avoided by means of an arrest as a precautionary measure. The onus of proving this *periculum*, and the risk of suffering serious and irreparable damage fell on Italy in this case, but as of yet, no such risk has been even raised, much less proven.

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[189] Statement of the International Tribunal for the Law of the Sea, "Freedom of Navigation: New Challenges", p. 2.

[190] Counter-memorial, para. 133, p. 29.

[191] *Pulp Mills on the River Uruguay (Argentina vs Uruguay)* I.C.J. Case N° 135. Order of July 13, 2006, Annex 9, (Provisional Measures), Separate opinion of Judge Abraham, para. 11 stating:

> 11. To sum up, I would say that the Court must satisfy itself of three things before granting a measure ordering the respondent to act or to refrain from acting in a particular way, so as to safeguard a right claimed by the applicant.
> Firstly, that there is a plausible case for the existence of the right.
> Secondly, that it may reasonably be argued that the respondent's conduct is causing injury, or is liable to cause imminent injury, to the right.
> Thirdly and finally, that the circumstances of the case are such that urgency justifies a protective measure to safeguard the right from irreparable harm.

[192] Rodriguez Iglesias Gil Carlos and Castillo de la Torre, Fernando, *The Legal Practice in International Law and European Community Law, The Procedure before the Court of Justice of the European Communities*, Martinus Nijhoff Publishers, p. 371-2.

[193] Case C-149/95 P(R) *Commission v. Atlantic Container* (1995) ECR I-2165, para. 22.

265. It is crucial to recall that on 4 September 1998, Italy was briefed about the consequences of going ahead with the arrest after the Diplomatic Service of its Foreign Office in Rome rightly warned the Savona Public Prosecutor of the international law implications of arresting a vessel for similar reasons to those used in the case of the M/V Spiro F.[194]

266. Despite the warning of its own Foreign Service[195], however, Italy went ahead with the arrest. If Italy had been acting with the care that good faith in international dealings requires, it would have determined the validity of the warning of its Foreign Office before proceeding.

267. Panama acknowledges that Italy did not imprison any person involved or interested in the ship's operation. Yet, all arguments supporting the abuse of rights of those persons derive from the order of arrest of the vessel and their prosecution under the criminal jurisdiction of Italy, both of which should never have occurred.

268. Italy, willfully and wrongfully, took only its own interests into account when it initiated criminal proceedings and applied its customs laws to the persons involved in the operations of the M/V "Norstar". If Italy had also considered the interests of Panama, it would have not demanded the prosecution of the persons involved in the commercial operations of the M/V "Norstar" without fully examining the facts and applicable Law.

269. Were the offenses allegedly committed serious enough to justify Italy's seizure of the vessel and its cargo, as well as its imposition of a substantial bond, for one to conclude that the Savona Public Prosecutor did not abuse the rights of the M/V "Norstar"? Clearly, the answer is no.

270. Could Italy have waited to definitively determine the validity of the charges submitting the persons involved in the operation of the M/V "Norstar" to its criminal proceedings? Certainly, it could have.

271. In fact, if Italy had waited for its judiciary to assess the soundness of the intentions of the Savona prosecutor before taking action things would have proceeded much differently. No breach would have ensued and no claim would have been presented.

272. Nor has there ever been any urgency to enforce the arrest order. It was certainly possible for the shipowner and the other persons interested in the operation of the vessel to have been summoned to discuss the lawfulness of its bunkering activities on the high seas before taking such forceful action. After all, the M/V "Norstar" was not a flight risk.

273. Instead, by detaining the M/V "Norstar" quickly in the absence of forethought, Italy committed a breach of article 87 of the Convention, causing damages to ensue, first, by issuing a Decree of Seizure, and, second, by requesting Spain to enforce it. This distinction is very important because without either the issuance of the Decree or its enforcement no damages would have been caused, precluding the need to involve this Tribunal.

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[194] *Supra*, Chapter 3, Section IV, paras. 121-125, pp. 19-20. This letter was received by the Public Prosecutor of Savona on 18 September 1998.
[195] *Ibidem*; see also Memorial, Annex 7.

274. The acts or omissions complained of by Panama are all part of the exercise of Italy's public authority (*act jure imperii*) and such exercise includes the right to do so with appropriate force.

275. But when such authority is wrongfully exercised, the probable and reasonable causes of such acts being absent, and the force of legal proceedings is consequently used to submit innocent persons to criminal proceedings, and to confiscate property, thereby causing damage, we may then precisely refer to an abuse of rights.

C. The intentional refusal of Italy to reply to the communications from Panama

276. One of the most salient illustrations of the lack of good faith on the part of Italy is that it did not answer any of the communications sent by Panama as a means to exchange views.

277. If Italy had acted in good faith, it would have at least acknowledged the Panamanian petitions for release and would have responded to the requests to exchange views. Furthermore, if Italy had done so, we probably would not be discussing this issue in this forum now.

278. The Tribunal has already decided that Italy could not claim ignorance of the fact that Panama had contested the legality of the detention under the Convention[196], but Italy has continued to withhold information and cooperation concerning the M/V "Norstar". According to the principle of mutual cooperation that is the basis for much of International Law, keeping intentionally silent when confronted with a request to resolve an issue of bilateral concern is behaviour contrary to good faith.

279. Panama's efforts to initiate negotiations and its subsequent realization that its efforts were being repelled have been characterized by Italy as a "false statement" or as "gratuitous accusations"[197], stating that, "Panama decided willingly to continue in its attempts to negotiate with Italy, in circumstances where there was no obligation to do so, and even when the prospects of a negotiated settlement were non existent."[198]

280. Panama accepts the first part of the Italian description, *i.e.* that there were continued efforts on the part of Panama to negotiate. However, to describe these efforts as futile by saying that the prospects of a settlement were non-existent, is evidence of the lack of good faith on the part of Italy because, if Italy knew that the prospects of a negotiated settlement were "non existent" it should have communicated this immediately to Panama.

281. However, instead of explicitly informing Panama of its decision to avoid negotiations, Italy decided to hide its true intentions, leaving Panama in the dark about its decision. This exemplifies a lack of the good faith expectations of article 300.

282. There were seven attempts made by Panama to communicate with Italy concerning this case, yet all of them were unsuccessful.[199] Italy has not disclosed that on 18 February 2002, the Public Prosecutor of Savona under whose authority was the M/V "Norstar",

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[196] Preliminary Objections Judgement, para. 97.
[197] *Ibid.*, para. 170, p. 36.
[198] *Ibid.*, para. 172, p. 36.
[199] Observations and Submissions of the Republic of Panama to the Preliminary Objections of the Italian Republic, Annexes 1-8.

received the letter dated 12 February 2002 from the Service of Diplomatic Litigation, Treaties and Legislative Affairs of the Ministry of Foreign Affairs of Italy which this time expressly referred to the Panama's agent request for damages and the Italian position as to article 292 of the Convention.[200]

283. In fact, it was not until 2016, when Italy filed its Preliminary Objections, that Panama first learned that Italy had, indeed, received the written correspondence and other forms of communication sent by Panama since 2001 but it did not disclose the above-mentioned letter.

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

285. Panama objects to Italy's reference to "the conduct of Italy in its *negotiations* with Panama" (emphasis added)[201] because Italy has never engaged in any type of negotiation. Italy is using a false premise to explain away its intransigence.

286. Since the Tribunal concluded that Italy could not rely on its silence to cast doubt upon the existence of a dispute,[202] such silence should also be the basis for a material finding of conduct contrary to the duty of good faith.

287. To date, Italy has not provided any valid justification for this inconsiderate behaviour, and despite the 4 November 2016 Judgment, where the Tribunal held that its excuses were not valid, Italy has continued to claim that it did not answer Panama's entreaties because the Panamanian counsel "was not vested with powers to negotiate" and "did not have the authorization to represent Panama".[203] If Italy had been acting in good faith, it would have immediately informed Panama of this concern, yet it never did.

288. Believing that Italy was not receiving its communications, Panama was ultimately forced to initiate the procedures before the Tribunal. A good faith response by Italy would have prevented this.

289. Even now, Italy is defending its inaction by pretending that its failure to respond is just a figment of Panama's imagination.[204] Conversely, Italy has also cited the Preliminary Objections Judgement where the Tribunal held that "Panama was justified in assuming that to continue attempts to exchange views could not have yielded a positive result"[205], while admitting that "its [own] position proved wrong as a matter of law"[206]. Through this contradiction, Italy has essentially confirmed the absence of good faith on its part.

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[200] Annex 12.
[201] Counter-memorial, para. 164, p. 35.
[202] Preliminary Objections Judgement, paras. 101-102.
[203] Counter-memorial, paras. 177-178, p. 37.
[204] *Ibid.*, para. 170
[205] *Ibid.*, para. 173, p. 37.
[206] *Ibid.*, para. 179, p. 37.

290. 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."[207] What is that "other reason" that Italy has failed to identify?

291. All of Panama's efforts to begin a dialogue with Italy regarding this matter have been unsuccessful, but that has not stopped Italy from now objecting to the "tautological nature" of Panama`s statements[208] and from simply suggesting that Panama has merely presumed Italy`s bad faith without evidence.[209]

292. In fact, it has been overwhelmingly clear from the one-sided efforts to communicate that have been entered into evidence that Italy has failed to show how Panama's interpretation misconstrued the facts. By making unsupported charges about what Panama is presumed to believe, instead, Italy has continued to act in bad faith.

D. Italy´s contradictory reasons for arresting the M/V "Norstar" in Spain

293. Italy has admitted that it decided to arrest the M/V "Norstar" while it was in Spain, because it knew that arresting it on the high seas would amount to a breach of article 87.[210]

294. Recalling the fact that the activities carried out by the M/V "Norstar" did not constitute a crime, we find it difficult to accept this admission as an act of good faith. Refraining from requesting the arrest of a vessel when on the high seas because this would amount to a breach of the freedom of navigation protected by article 87, loses its lustre when it simply means that the locus of the arrest shifted from the high seas to the territorial waters of another State.

295. The Decree of Seizure stated that

> - 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.
>
> Considering that the *corpus delicti* must be seized, as it has an intrinsic probationary nature, with no need to assess whether the order is necessary (reference to domestic case-law: Cass. SS.DU. 15/3/94 no. 2 and 20/1/97 no. 23);

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[207] *Ibidem.*
[208] *Ibid.*, para. 181, p. 38.
[209] *Ibidem.*
[210] *Ibid.*, para 152, p.33.

Having noted that the seizure of the mentioned goods must be performed also **in international seas,** and hence **beyond the territorial sea** and the contiguous vigilance zone, given that:

- actual contacts between the vessel that is to be arrested and the State coast were proved (by means of surveys and observations contained in navigation reports, as well as by means of documents acquired on the ground and through observation services), which implied infringements of the customs and tax legislation as a result of the previous sale of smuggled goods in the State territory (so-called "constructive or presumptive presence", pursuant to Articles 6 crim. code and 111 Montego Bay Convention, ratified by Law no. 689/94);

- the so-called "genuine link", which underlies the mentioned international law institution, unequivocally emerges from the overall content of the investigations ordered, as summarized above: the repeated use of adjacent high seas by the foreign ship was found to be exclusively aimed at affecting Italy's and the European Union's financial interests.

FOR THESE REASONS
ORDERS

that the above goods be seized and a copy of this decree be handed to the above-mentioned person, if present, or to anybody currently possessing the goods to be seized.[211] (emphasis added)

296. This Italian conduct is reproachable when we recall that, in its Preliminary Objections, Italy stated that "adjudication ...would require the Tribunal to ascertain rights and obligations pertaining to Spain, in its absence."[212] In this way, Italy intended to evade its unlawful conduct by attributing it to Spain.

297. From the Counter-memorial we now know that Italy´s intention to arrest the M/V "Norstar" within Spain was "to avoid breaching the provision of the Convention on freedom of navigation on the high seas."[213] On the other hand, the Savona Public Prosecutor, knowing that the M/V "Norstar" was in Spain, stated that it was issuing the Decree of Seizure based on the "constructive or presumptive presence" and "genuine link" doctrines.[214]

298. Neither the "constructive or presumptive presence" nor the "genuine link" doctrines would have been needed to ground the enforcement of the arrest order in Spain if the true intention was to avoid breaching article 87, as Italy stated in its Counter-memorial, because those doctrines were used precisely to justify the seizure enforcement "in

[211] Decree of Seizure of 11 August 1998, Preliminary Objections, Annex C; Counter-memorial, Annex I.
[212] Preliminary Objections, para. 34(b).
[213] Counter-memorial, para. 152, p. 33.
[214] Decree of Seizure dated 11 August 1998, Preliminary Objections, Annex C, p. 2.

international seas and the contiguous vigilance zone" as the Decree of Seizure expressly stated.[215]

299. Therefore, the reasons given by the Counter-memorial to arrest the M/V "Norstar" in Spain effectively contradict the reasoning behind the two doctrines. As such, Italy's conduct may hardly be considered to exemplify good faith, since this contradiction means at least one of Italy's arguments is misleading.

300. In any case, the justification for Italy's decision to arrest the M/V "Norstar" in a Spanish port has already been shown to be invalid.

E. Italy kept the *res* under its jurisdiction, authority and control for an excessive and extended period of time, rather than promptly taking positive steps to return it.

301. It is ironic that, after suddenly rushing to take the M/V "Norstar" into custody, Italy acted so slowly to resolve the matter.

302. Despite knowing that the M/V "Norstar" was wrongfully arrested and that the arrest violated the freedom of navigation governed by article 87, Italy did not take any operative measures to promptly return the vessel to its owners or to Panama as the flag State.

303. On the contrary, Italy allowed the M/V "Norstar" to decay for such an unreasonable period that, ultimately, it had to be sold in public auction as scrap. Is such conduct evidence of good faith?

304. On 21 March 2003, Italy told the shipowner that "[a]ccording to the Italian Law, the deadline to withdraw the vessel is thirty days from the date of receipt of this communication. In case of nonwithdrawal, the judge will order the sale".[216] When Italy referred to this argument, it said that "Panama, while generally lamenting the lack of communication from the Italian authorities, characterises such notification as a 'threat' to the ship-owner" but that "[o]n the contrary, the notification was a mandatory act, adopted in the interest of the ship-owner and required under Italian law in compliance with the principle of due process"[217].

305. Yet why did Italy fail to follow through on this? Was it good faith on the part of Italy to threaten the sale of the vessel if this was not its true intention? Italy does not provide any material reason to suspend the continuation of such notifications, in order to execute the release of the vessel.

306. Rather than face the consequences of its own inaction, however, Italy has chosen to blame the shipowner for failing to retrieve the vessel.

307. Panama 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. Then, there would be no doubt about the intention of Italy to return the vessel.

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[215] *Ibidem.*
[216] Memorial, Annex 12.
[217] Counter-memorial, para. 63, p. 16.

308. Panama also contends that if Italy had alleged that either Panama or the shipowner had an obligation to retrieve the vessel as Italy has stated, such mora accipiendi could have been the basis of a valid claim by Italy. However, Italy would then have been required to prove that there was an act of cooperation on the part of Panama or the shipowner, that Italy itself had done what was incumbent upon it, and that there was a refusal by Panama or by the shipowner to retrieve the vessel. None of these conditions have been demonstrated by Italy, so its claim has not been validated in this regard.

309. If Italy had taken such steps, it would have given the opportunity for Panama and the shipowner to determine the condition of the vessel and whether it still was a commercially viable asset or not. Instead, we now have only Italy's claim that this was not the case.

310. Despite its attempt to justify its lack of compliance with its own decision to return the vessel, Italy has never acknowledged that it kept jurisdiction, control and authority over the M/V "Norstar", while effectively doing nothing to comply with the court-ordered return of the vessel to its owner, as good faith would dictate.

311. Instead, after the execution of the arrest, the ship was kept under Italian jurisdiction, authority and control for an excessive period of time, extending well past the "Norstar's" acquittal. Only after the Spanish authorities requested the Court of Appeal of Genoa to issue instructions with regard to the feasibility of demolishing the M/V "Norstar" on 6 September 2006, was Italy even moved to consider the fate of the vessel. On 13 November 2006, the Court of Appeal of Genoa replied that it was not entitled to decide on the matter and stated that

> Having noted that this judgment obviously has to be enforced and there is no decision to be taken given that the destiny of the vessel, *after having been given back to the party entitled*, does not fall within the competence of this Court (and in any case, given that the first instance judgment was confirmed, any issue on the enforcement of the said judgment would be the competence of the Court of Savona pursuant to Article 665 of the Code of criminal procedure).[218] (emphasis added)

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

313. On the other hand, if the ship or property had greatly deteriorated in value, Italy could have, at any stage of the proceedings or thereafter, and either with or without application, ordered it to be sold and reimbursed the owner accordingly.

314. Instead, Italy seems to have forgotten completely about the M/V "Norstar", until Panama started proceedings before the Tribunal. Over the nearly ten intervening years, nothing further was done.

[218] Letter of the Court of Appeal of Genoa responding to the request of the Spanish Authorities to demolish the M/V "Norstar", 13 November 2006, Written Preliminary Objections by Italy, Annex O.

315. In its Counter-memorial, Italy admitted that it was Panama that revealed the ultimate fate of the M/V "Norstar" and that Italy had not known the whereabouts of the vessel, saying it

> learnt from Panama's Memorial that the M/V "Norstar" was removed from the harbour of Palma de Mallorca in August 2015, following a public auction approved by the local Port Authority. Global PGM, a company active in the recycling sector, bought it for converting the vessel into steel.[219]

316. This confirms that Italy was not complying with its duties as the seizing State because it did not even know that the M/V "Norstar" was publicly auctioned over ten years after it was deemed to be released, even though Italy had had the vessel under its jurisdiction, control and authority during that time.

317. Is it good faith on the part of Italy to order the sale of the M/V "Norstar" and then claim that it did not know anything about the fate of the vessel until this was "learnt from Panama's Memorial"? In fact, the information about the auction has always been public, as a simple internet search will easily confirm.

318. In an attempt to profess its good faith, Italy stated that "only months after the execution of the Decree of Seizure, it acceded to return the M/V "Norstar" but that the owner of the vessel failed to retrieve it"[220], claiming that "in contrast with Annex 8 of the Memorial... only about 5 months passed between the ship-owner's request for release and the actual knowledge by him of the release", and considering this to be "hardly a long detainment able to deprive a shipping company of all of its income."[221]

319. But the actual time frame between the request for release and its granting was actually eleven months. Is Italy showing good faith by distorting this? The shipowner had been earning income from the business activities performed by the vessel so that its unlawful confiscation caused this revenue stream to cease to exist.

320. Italy should realize that even five months is enough to destroy the shipping firm's financial viability and, therefore, should know better than to treat this outcome so casually.

321. Whereas five months is considered by Italy as "hardly a long 'detainment' able to deprive a shipping business of all of its income", Panama's position is that damages started accruing from the very moment that the vessel was not allowed to leave port, and that its owner and all the persons involved in its operation suffered a severe loss of income because the vessel could not continue performing the commercial activity for which it had been built and fitted out.

322. Without a doubt, the period from the arrest in 1998 to 2015 when the vessel was auctioned, far exceeds that which Italy describes as the time elapsed between the request for release and the actual knowledge of the release.

323. The material period of delay to which Panama refers, is the time elapsed from the date of the execution of the arrest (1998) and the date when the vessel was ultimately sold

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[219] Counter-memorial, para. 71; Memorial, Annex 16.
[220] *Ibid.*, para. 14, p. 3.
[221] *Ibid.*, para. 264, p. 53.

as scrap (2015). What really matters is the fact that the productive capacity of the ship has been lost since 1998, not merely for five months. Since the procedure to return or release was never initiated, or that the lifting from the arrest was not ever effectively enforced, and we now know that this is no longer possible, Panama seeks compensation as the only possible form of reparation.

324. Although Italy has maintained that it had "ordered the definitive release of the vessel"[222] the truth is that there has been no such release at all. Italy has admitted that since 13 November 2006 the vessel has remained under the jurisdiction of the Savona Tribunal.[223] Panama, then, does not accept the alleged refusal of the shipowner to retrieve its vessel in 2003 as valid.[224]

325. Italy has also pointed out that "the Tribunal of Savona requested the Spanish Authorities to inform the custodian of the ship of the release of the M/V "Norstar", ensure the actual return of the vessel to the ship-owner and then send confirmation of the release to the Italian authorities."[225] Such a request represents an abdication of responsibility on the part of Italy, yet another example of bad faith.

326. Italy has attempted to absolve itself by stating that "by letter dated 17 April 2003, the Spanish Judicial Authorities instructed the Provincial Maritime Service to lift the detention ...." and that "On 21 July 2003 the detention was consequently lifted... with Order No. 84/03", continuing by adding that "The following day, the Captain of the Provincial Maritime Service informed the competent Spanish Judicial Authorities that the detention of the M/V "Norstar" had been lifted, and attached the relevant documentation as evidence".[226]

327. Yet the document presented by Italy only says that "The document withdrawing the seizure and custody N° 84/03 dated 21 July 2003 is attached". However, no such document referred to as "Order N° 84/03" was included, nor has it ever been presented by Italy into evidence.

328. Even if such an order had been executed, there would still have been no effective enforcement of the release order without an actual and formal delivery to and receipt by an authorized person. Such a transaction has never occurred.

329. Italy argues that by ordering the "definitive release"[227] of the M/V "Norstar", the responsibility for its actions has shifted to the shipowner who "failed to retrieve it".[228] Panama does not understand Italy's meaning of "definitive" with regard to the release order, just as it is confused by the connotations of "the posting of a reasonable bond" and "conditional lifting". In any case, damages had already been incurred to the point that it was infeasible for the shipowner to retake possession.

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[222] *Ibid.*, para. 14, p. 3.
[223] Letter of the Court of Appeal of Genoa responding to the request of the Spanish Authorities to demolish the M/V "Norstar", dated 13 November 2016, Preliminary Objections, Annex O.
[224] Counter-memorial, Annex Q.
[225] *Ibid.*, para. 59, p. 15.
[226] *Ibidem*, para. 60, p. 15.
[227] *Ibid.*, para. 14, p. 3.
[228] *Ibid.*, para. 254, p. 51.

330. Although the Italian courts ordered the release of the M/V "Norstar", this decision was never executed, nor has Italy taken any further steps to comply with it, or even to show any evidence that it has ever had the intention to do so.

331. On the contrary, Italy has completely abandoned its duty to provide for the maintenance of the vessel in order to prevent its decay, therefore confirming its liability for the claimed damages. Thus, Panama feels entirely justified in describing Italy's actions, both during the period between 1998 and 2015, and its attempts to justify such actions in the course of these proceedings, as being conducted in bad faith.

332. In the Memorial, Panama stated that

> By keeping the res under its jurisdiction and authority without effectively returning it to any of the entitled person(s) in a timely manner, in spite of the clear and definitive orders by its own judicial authorities to do so, Italy has also not acted in good faith.[229]

333. The only objections from Italy on this count are, first, that Panama's claim "falls outside the jurisdiction of the Tribunal", and, second, that it was only included as a "general reference to Italy's "obligations under the Convention".[230] Neither is true.

334. The Italian argument claiming the Tribunal lacks jurisdiction regarding this matter is in direct contravention of what was already held by the Tribunal on 4 November 2016. On the other hand, as far as the generality of the obligations are concerned, it can be easily confirmed that the charge can be specifically located in the Memorial under the heading "3. Italy has not fulfilled in good faith its obligations under the Convention"[231] where all the counts including that of the extended time of the arrest, have been sufficiently enumerated.

F. The fact that Italy considers a conventional provision to be binding only on Panama

335. We refer to Italy's statement that "the obligation to have due regard to the rights of other States under Article 87(2), binds States that exercise their freedom of navigation under Article 87(1)." Italy's position is that only the flag States, and not the coastal States, are bound by this norm.

In other words, Italy believes that the obligation of due regard under article 87(2) only "binds Panama, not Italy."[232]

336. However, it is clear that when article 87(2) of the Convention refers to the freedom of navigation, it states that such freedom "shall be exercised by all States with due regard for the interests of other States ...." (emphasis added). This provision does not distinguish between flag and coastal States; the freedoms are to be implemented and upheld by all States with respect to the interests of other States. Italy is certainly not exempt from this provision. Consequently, both its reasoning and its interpretation are without merit.

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[229] Memorial, para. 119, p. 32.
[230] Counter-memorial, para. 161, p. 34.
[231] Memorial, paras. 113-123, pp. 32-34.
[232] *Ibid.*, para. 202, p. 50.

337. The sole fact that Italy considers article 87(2) of the Convention only binding on Panama and not Italy is further evidence of its lack of good faith.

G. Italy's denial of its own reasons is a breach of its duty of good faith for *non concedit venire contra factum proprium*

338. Italy has taken into account the Savona Judgement in its Counter-memorial (if only in a footnote), stating that

> 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 organizes 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.[233]

339. However, if Italy had once decided that the M/V "Norstar" had transacted its business beyond its territory it is disingenuous for it to contend, now, that "the M/V "Norstar" was arrested to secure evidence which was necessary in order to ascertain whether the defendants had committed certain crimes on the Italian territory".[234]

340. Italy, through the Savona Tribunal, has acknowledged that "before asserting any kind of criminal liability, a preliminary test is needed as to where the provision of supplies occurred because if it took place outside the line of territorial waters no one of the offences charged does actually exist."[235]

341. It is legally inconsistent, then, for Italy to subsequently allege otherwise, as it has in its Counter-memorial, that the arrest was enforced "for a crime that it was suspected of having committed in Italy."[236]

For this reason, Panama refers to the principle of *non concedit venire contra factum proprium*, because Italy is now arguing in direct opposition to its conduct that has been responsible for this case being brought before the Tribunal.

342. In any event, since the inception of this case, Italy has had control over the vessel and all proceedings surrounding its arrest.

343. Under these circumstances, it is not legitimate for Italy to state that "the arrest was not adopted in the context of criminal proceedings concerning bunkering activities carried out by the M/V "Norstar" on the high sea", but rather "in the context of proceedings concerning alleged offences that occurred within the Italian territory".[237]

344. Not only is this latest claim by Italy obviously incongruous with its own judicial decisions, but its argument that "those accused of the crimes in question were not acquitted because such crimes were not committed on the Italian territory but rather

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[233] *Ibid.*, paras. 58, fn. 43, 44, and 45.
[234] Counter-memorial, para. 133, p. 29.
[235] Tribunal of Savona Judgement, para. 6, p. 10.
[236] Counter-memorial, para. 135, p. 29.
[237] *Ibid.*, para. 44, p. 10.

because the judicial authorities found that the material elements of the crimes under consideration were not integrated by the conduct of the accused"[238] is, as well.

345. Panama contends that the Savona Judgement confirmed that the essence of the arrest of the M/V "Norstar" and the prosecution of the persons therein connected relied on the *locus* where the M/V operated as being in international waters.

346. This is contradicted by Italy's Counter-memorial when it stated that

> Italy is the place where the criminal conduct under investigation began, with the M/V "Norstar" being loaded with gasoil bought in exemption of excise duties; Italy is the place where the crimes of smuggling and tax evasion were allegedly perfected at the moment of the re-introduction of such gasoil, in violation of Italian custom and criminal laws.[239]

347. Furthermore, the Italian approach of breaking the M/V "Norstar"'s bunkering activities into a sequence of events, *i.e.* buying and transporting bunkers to the high seas and thereby supplying it to pleasure boats which came back to Italy, and describing Italy as the place where the conduct began and was perfected, was devised in order to avoid the application of article 87 of the Convention and escape liability. This is conduct based on an intention to deny its own wrongdoing.

348. The argument that such a series of acts previous, concomitant, and posterior to the supplying of bunkers on the high seas, somehow justifies Italy's conduct does not alter the unlawfulness of the arrest, nor does it nullify the grounds for Panama to claim damages because none of these acts was a crime.

H. *Nullus Commodum Capere De Sua Injuria Propria*

349. Italy, itself, decided that the arrest of the M/V "Norstar" was unlawful. The Savona Tribunal held that "As a consequence of the defendants' acquittal because the fact does not exist, the seizure of motor vessel Norstar shall be revoked".[240]

350. Yet, in spite of the fact that Italy had already concluded that the arrest was wrongful, by now stating that the M/V "Norstar" "was arrested and detained because it was allegedly part of a unitary criminal plan concerning the commission of the crimes of tax evasion and smuggling in the Italian territory"[241], Italy is trying to take advantage of its own wrong.

351. By invoking its own illegal conduct in an attempt to diminish its own liability, Italy is breaching the maxim, "*Nullus Commodum Capere De Sua Injuria Propria*". In the *Tattler Case* (1920), the Tribunal held that "It is difficult to admit that a foreign ship may be seized for not having a certain document when the document has been refused to it by the very authorities who required that it should be obtained".[242] This case seems

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[238] *Ibid.*, para. 132, p. 29.
[239] *Ibid.*, para. 135, p. 29.
[240] Tribunal of Savona Judgement, para. 6, p. 10.
[241] Counter-memorial, para. 151, p. 33.
[242] Brit.-U.S. Cl. Arb. (1910): Nielsen's *Report*, p. 489, at 9. 493, cited by Cheng, Bin, *General Principles of Law as applied by International Courts and Tribunals*, Stevens & Sons Limited, London 1953, p. 150.

analogous to that one, in that Italy has now constructed an entirely new rationale for the arrest based largely on its previous acquittal.

352. If Italy had already concluded that the M/V "Norstar" and all the persons therein connected had not committed any crime, all current Italian references to "crimes committed within its territory" are, without question, evidence that Italy is attempting to take advantage of its own wrong.

353. Italy had also stated that "From 1994 to 1998, the M/V Norstar...carried out bunkering activity off the coasts of France, Italy and Spain"[243] and such operations were performed without interference from the Italian Coast Guard or its Custom Officers.[244]

354. Having 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 Norstar's actions as a crime could hardly be considered as good faith but a violation of the principle *Nullus Commodum Capere De Sua Injuria Propria.* This is a kind of estoppel already accepted in International Law:

> The Government never having taken any steps to put a stop to this practice which they must have known existed either under the law or by arbitration under the contract, and never having declared the contract cancelled therefor, and having recognized the contract all through, and thus making themselves *particeps criminis* in such breach (if any) of the law cannot now in my opinion avail themselves of this contention.[245]

All the above exemplifies yet another breach by Italy of its duty to act in good faith.

V. The decision of Italy to issue the Decree of Seizure, constitutes an abuse of right within the meaning of article 300

355. The concept of abuse of rights implies the violation of the pillar of international law, and of law in general, summarized by the maxim *neminem laedit qui suo jure utitur*, or "nobody harms another when he exercises his own rights".

For this reason, when an abuse of rights occurs, the principle, *sic utere jure tuo alienum non laedas*, requiring the exercise of individual rights in such a way that others would suffer no injury, takes precedence to become the very fundament of the concept of rights protection.

356. Based on this latter principle, Panama contends 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.

357. The Encyclopedia of Public International Law describes three distinct legal situations in which the concept of abuse of rights may arise. In the second legal situation,

> ... A right is exercised intentionally for an end which is different from that for which the right has been created; with the result that injury is caused. This is the concept of *detournement de pouvoir,* well known in administrative

[243] Preliminary Objections, para. 7.
[244] Memorial, para. 14;
[245] *Shufeldt Case* (1930) 2 UNRIAA, p. 1079, at p. 1097, cited by Cheng, Bin, *op. cit.* p. 151.

> practice within States. It has been identified in general inter-State practice…[246]

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

359. In other words, Italy intentionally misused this right, in order to be able to target legal activities on the high seas.[247]

360. Italy claims, that the bases for its jurisdiction was territorial, referring to the custom laws stated in the Decree of Seizure.

361. However, Panama recalls the fact it referred to in paragraph 25 of the Memorial:

> 25. Although the activity of bunkering on the high seas constituted competition to the business of land-based Italian marinas, during the criminal proceedings in Italy, there was no evidence or opinions regarding the existence of a crime provided by its customs officers.
>
> In addition, during the proceedings of a previous case similar to that of the M/V Norstar, the use of several legal instruments by Italy confirmed that Italy applied its customs laws and indicated that such arrests were well-informed decisions.[248]

362. From this, it can be concluded that the exercise of Italy's right to issue the Decree of Seizure and make an arrest was arbitrary in this case, since no such informed decision-making occurred when the M/V "Norstar" was arrested.

363. In other words, the arbitrariness of Italy's decision to arrest the M/V "Norstar" showed a *detournement de pouvoir*, or misuse of power. Furthermore, Italy's order of arrest and the long proceedings resulted in injury to Panama, details of which will be specified in the section on damages.

364. For the reasons presented above, Panama maintains that the requirements which constitute an abuse of rights have been fulfilled. Thus the interrelationship between article 87 and 300, has also been firmly established.

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[246] Alexandre Kiss, "Abuse of Rights", in: R. Bernhardt (ed), *Encyclopedia of Public International Law*, Volume I (1992) p. 4-8. See also abuse of rights, in Max Planck Encyclopedia of Public International Law
[247] Chapter 4, Section III, paras. 222-248, p. 36-39; see also, Ch. 4, Section IV, para. 249-354, p. 39-54.
[248] Paragraph 25, p.13.

CHAPTER 5
THE APPLICATION OF OTHER RULES OF INTERNATIONAL LAW

I. Introduction

365. In this chapter, Panama will demonstrate that additional rules of international law are inextricably connected to articles 87 and 300. Section II shows why the Italian arguments do not preclude the relevance of articles 92(1), 97(1) and 97(3) of the Convention, and Section III demonstrates why the Italian breach of several rules of the human rights provisions invoked in the Memorial should also be considered by the Tribunal.

II. The violation of articles 92(1), 97(1) and 97(3) of the Convention

366. Article 87 of the Convention governs the Freedom of the high seas and states that not only shall such freedom be "exercised under the conditions laid down by this Convention", but also that "other rules of international law" shall be taken into consideration.

367. The fact that only articles 87 and 300 have heretofore been considered relevant to the present dispute does not preclude the Tribunal from considering other violations of international law closely related to these provisions. In this case, the violations that have occurred also fall under articles 92(1), 97(1), and 97(3) of the Convention.

368. Italy has not mounted any defense against the arguments put forward in the Memorial regarding the infringement of these additional provisions other than stating that their citation was inappropriate for this dispute.

369. However, since articles 87, 92, and 97 all fall under Part VIII of the Convention referring to operations on the high seas, the relevance of these clauses to this case, should not be treated so dismissively.

370. Contrary to what Italy has argued, by requesting this analysis, Panama is neither enlarging the dispute or making new claims because those provisions of the Convention strictly pertain to the Italian infringements of article 87 and its application to this case, while complementing the interpretation of this crucial provision.

371. Article 92 explicitly stipulates that ships on the high seas are subject to the exclusive jurisdiction of the flag State, [249] and article 97 specifies that any penal or disciplinary proceedings involving the actions of a ship's captain or its crew on the high seas can only be initiated by the flag State or the State granting nationality to the person charged.[250]

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[249] Article 92. Status of ships

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

[250] Article 97. Penal jurisdiction in matters of collision or any other incident of navigation

1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

372. The Italian exercise of its jurisdiction against the M/V "Norstar" and the persons therein connected has not only been demonstrative of the violation of the freedom of navigation protected by article 87, but has also superseded the authority granted by article 92.

373. At the same time, by instituting proceedings against the master and the other persons in the service of the M/V "Norstar", Italy also contravened article 97(1) which limits such an action to the judicial or administrative authorities either of the flag State or of the State granting nationality, neither of which applied in this instance.

374. Panama is the only State which has complete control over matters involving any question of criminal responsibility on the part of any of its vessels or of any persons involved in its service when that ship is on the high seas, the *locus* of the alleged crime in this case.

375. That the conduct which led to the arrest of the M/V "Norstar" affecting those involved in its operation, occurred on the high seas has already been established.

376. If, in the process of applying its internal laws and exercising its jurisdiction, Italy arrested the M/V "Norstar" in violation of article 87 for the activities this vessel was carrying out on the high seas, it is also certain that Italy failed to respect these related provisions concerning a vessel outside of its jurisdiction.

377. Paragraph 3 of article 97 affirms that, "No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State". Italy itself has stated that the M/V "Norstar" was arrested in the course of "preliminary investigations."[251]

378. Since Panama, not Italy, is the flag State, there should not be any controversy about the significance of this provision to this case.

379. As stated *supra*,[252] according to the principle *jura novit curia*, courts are presumed to know the law. Consequently, other provisions of the Convention that are intimately related to articles 87 and 300 are open to the court's interpretation, and there is nothing proscribing Panama from bringing forward arguments that may positively contribute to the adjudication by the Tribunal.

380. The claims concerning the exercise of the Italian jurisdiction and legal system over a foreign vessel arose directly out of the Application, where Panama stated that the

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[251] Counter-memorial, paras. 9, 26, 27, 29, 32, 37, 40, and 41, fn. 21, stating:

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

[252] Paragraph 27, p.8.

seizure of the Panamanian registered vessel, the M/V Norstar, was made "upon request of Italian authorities".[253]

381. This was complemented by Chapter 3, Section I, Subsection 5 of the Memorial entitled, "On the high seas, the M/V "Norstar" was subject to the exclusive jurisdiction of Panama as its flag state".[254] Thus, the nature of the claim has not varied in any way since this case was first filed with the Tribunal.

382. In fact, the links these related articles have with article 87 are so strong that it is not difficult to conclude that together all such provisions form a fundamental part of the regulatory protection of the freedom of navigation on the high seas that a flag State enjoys in relation to all other States, particularly to coastal States.

383. Articles 92 and 97 are integral parts of the regulatory protection of freedom of navigation on the high seas. Thus, it would be remiss for Panama, as the flag State, to neglect these provisions when constructing its argument concerning the operations of one of its vessels in international waters.

384. This view is in line with a contextual reading of other provisions of the Convention, such as article 293, related to jurisdiction. In this regard, articles 92 and 97 should be considered in light of the purpose and object of the Convention as a whole.

385. Yet, apart from unconvincingly arguing that the Tribunal lacks jurisdiction over this dispute, Italy has not offered any concrete reason why articles 92(1), 97(1) and 97(3) should not be considered germane. Given that the relevance of these provisions is implicit in the Tribunal's ruling on the Application, all of these provisions remain directly related to the subject matter of this case.

386. These cited provisions are not of a general nature, but arise directly out of the extraterritorial criminal jurisdiction exercised by Italy over a foreign vessel by means of the enforcement of an arrest for activities carried out on the high seas.

387. Since the character of the dispute has not transformed in any way, any attempt to apply these provisions does not contravene the Law of the Sea, but rather complements the application and interpretation of articles 87 and 300 of the Convention, hence contributing to the sound administration of justice.

III. The violation of human rights

388. In the present case, Italy has had, and will continue to have, the opportunity to oppose any claims concerning the violation of human rights raised during the written proceedings just as it would with any rule of international law invoked concerning the high seas.

389. Likewise, if the Tribunal has held that "States are required to fulfil their obligations under international law, in particular human rights law"[255] it means that human rights provisions can also be part of the subject-matter of its decisions.

390. Italy has argued that in the Memorial, "Panama seeks to expand the jurisdiction of the Tribunal by requesting it to declare that Italy has breached other rules of international

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[253] Application, para. 5.
[254] Memorial, paras. 90-99, pp. 26-27.
[255] *The M/V "Louisa" Case, (Saint Vincent and The Grenadines v. Kingdom of Spain)* Judgement, 28 May 2013, para. 155.

law, including human rights provisions, independently of the Convention"[256] and bases this contention on "the Submissions of Chapter 5".[257]

391. However after reexamining Chapter 5 of the Memorial in light of the events that have transpired in this case, Panama is still certain that "other rules of international law, such as those that protect the human rights and fundamental freedoms of the persons involved in the operation of the M/V "Norstar""[258], are inextricably linked to the Italian conduct of "ordering and requesting the arrest of the M/V "Norstar", in the exercise of its criminal jurisdiction and application of its customs laws to bunkering activities carried out on the high seas"[259] on the one hand, and to the violation of articles 87(1) and (2) and related provisions of the Convention[260], on the other.

392. Italy's counter-claim concerning the application of certain human rights provisions states that "Panama's claim does not fall within the jurisdiction of the Tribunal"[261]. However, in spite of Italy's argument to the contrary, this contention is not supported by what this Tribunal concluded in the M/V "*Louisa*" case.

393. The Tribunal determined that its lack of jurisdiction ensued not because the claim had been "substantively based on article 300 and the alleged violations of human rights by Spain", but because such claim was presented "after submitting the application.[262]

394. As a consequence, the Tribunal decided that in the case of the M/V "*Louisa*" it could do no more than take note of the issues of human rights. It is important to note that even though the Tribunal reasoned that it did not have jurisdiction, it still held the view that "States are required to fulfil their obligations under international law, in particular human rights law".[263]

395. The above position reflects article 293, which states that any tribunal having jurisdiction shall apply this Convention "and other rules of international law not incompatible with this Convention." Having established jurisdiction in this case, the Tribunal is able to consider such laws, including the related articles addressed in the Memorial.[264]

396. In its attempt to invalidate any reference to human rights in the case of the M/V "Norstar", Italy has also cited the *Arctic Sunrise* case, where the Permanent Court of Arbitration (PCA) decided that "it may have regard to general international law in relation to human rights in order to determine whether law enforcement action" was reasonable and proportionate, and that "this would be to interpret the relevant Convention provisions by reference to relevant context."[265]

397. Italy then stresses the part of this judgement which says, "This is not, however, the same as, nor does it require, a determination of whether there has been a breach of articles

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[256] Counter-memorial, para. 217, p. 44.
[257] *Ibid.*, para. 218, p. 44.
[258] Memorial, para. 260.
[259] *Ibidem.*
[260] *Ibidem.*
[261] Counter-memorial, para. 216, p. 44.
[262] *The M/V "Louisa"* Case, *op. cit.*, para. 141.
[263] *Ibid.*, para. 155.
[264] Memorial, Chapter 3, Section IV, paras. 129-149.
[265] *The "Arctic Sunrise"* Case, *op. cit.* para. 197, p. 46, cited in the Counter-memorial, para. 222.

9 and 12(2) of the ICCPR as such" because, "That treaty has its own enforcement regime and it is not for this Tribunal to act as a substitute for that regime."[266]

398. Additionally, Italy cites the part of the judgement where the PCA concluded: "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".[267]

399. However, Panama contends that the connection between the conclusions of the *Arctic Sunrise* case and the jurisdictional objection of Italy in this one is a *non sequitur*, because the citation Italy uses is incomplete.

400. In judging the case of the *Arctic Sunrise*, the PCA also stated that,

> 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 authorize the arrest or detention of a vessel and persons.[268]

Therefore, this decision in context does not preclude the application of human rights provisions to cases, but rather encourages such application.

401. The above factual and legal scenery forms a backdrop to refute Italy´s allegations that the human rights claim is "an entirely new argument that was not part of Panama´s original Application"[269] and that "claims regarding the alleged human rights violations committed by Italy fall outside the jurisdiction of the Tribunal, and are, in any event, inadmissible."[270]

402. The Memorial is, in fact, in line with the *Arctic Sunrise* case decision, because its pertinence to the breach of the individual human rights claimed in the present case is also inextricably linked to the breach of the right to freedom of navigation on the high seas and the wrong exercise of its criminal jurisdiction over a foreign vessel for its activities performed while on the high seas.

403. As one scholar (having the additional merit of being a former Judge of the Tribunal) has stated, "The Law of the Sea and the law of human rights are not separate planets rotating in different orbits".[271] Similarly, another scholar, after reviewing the connection between the Law of the Sea and human rights, states that the "Convention also addresses traditional human rights preoccupations with the rule of law, individual liberties and procedural due process."[272]

404. Finally, it is important to note that Panama has not requested compensation for any human rights violations in its submissions. If Panama felt that Italy should be condemned

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[266] *Ibid.*, para. 198.
[267] *Ibidem.*
[268] *Ibidem.*
[269] Counter-memorial, para. 224, p. 45.
[270] *Ibid.*, para. 225, p. 45.
[271] Treves, Tullio, "Human Rights and the Law of the Sea", *Berkeley Journal of International Law*, Vol. 28, Issue I, 2010, p. 12.
[272] Oxman, Bernard H., "Human Rights and the United Nations Convention on the Law of the Sea", 36 *Columbia Journal of Transnational Law* (1998), pp. 401-402.

by the Tribunal for the violation of the human rights provisions, it would have included such a request.

CHAPTER 6
THE DAMAGES CLAIMED BY PANAMA AS REPARATION

I. Introduction

405. In this chapter, Panama will show how the Italian objections in its Counter-memorial fail to validly challenge the amounts claimed by Panama as compensation. After this introductory section, in Section II, Panama will answer the Italian attempts to dismiss these claims by showing that all damages caused have directly resulted from the enforcement of the arrest of the M/V "Norstar" by Italy. Then, in Section III, Panama will refute the Italian description of the vessel's condition at the moment of its seizure. Next, Section IV will demonstrate that the causative link between the conduct of Italy, when enforcing the arrest of the M/V "Norstar", and the damages that arose from such conduct has been uninterrupted. In particular, Panama will show that neither the alleged failure to retrieve the M/V "Norstar" in 1999, nor the alleged failure to retrieve the M/V "Norstar" after the Judgment of the Tribunal of Savona of 2003, has broken the causative link. Section V will demonstrate that the damages caused by the arrest of the M/V "Norstar" exist and are well founded, despite Italy's contentions to the contrary. In addition, Panama will show that the admissibility of the Italian Counter-claims of Contributory Negligence and Panama's Duty to Mitigate Damages are unsubstantiated. After that, Section VI will answer Italy's charge of illegitimacy and its objection to the quantum of each of the items constituting damages that Panama claims. Finally, in Section VII, Panama will address Italy's improper procedural conduct.

II. All damages caused to Panama have been the direct result of the enforcement of the arrest of the M/V "Norstar" by Italy

406. Italy cited arguments made in the Memorial to question the existence of a causative link.[273] However, apart from subjectively characterizing these arguments as being addressed "summarily"[274] and as "rethoric",[275] Italy only repeated what a causative link means, how it had been considered by the International Law Commission Draft Articles on State Responsibility (hereinafter DARS), and how it has been dealt with in examples of case law.[276] Panama does not object to this, *per se,* but does not consider this to be a serious rebuttal of its use of the causative link concept in this case.

407. Italy only went so far as accepting that

> "the damages that would bear a direct connection to Italy's conduct... would be only the direct damages concerning the loss of the vessel ..., and the loss of the cargo ....by the charterer."[277]

408. Out of the list of damages Panama has submitted as suffered as a consequence of the arrest of the vessel, Italy only defines as direct A.1. the "Damages as substitution for the loss of the vessel" and B.1. the "Loss and damage compensation for the cargo"[278].

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[273] Counter-memorial, para. 242, 247 and 253 and footnotes 183, 184 and 187-188 respectively.
[274] *Ibid.*, para. 242.
[275] *Ibid.*, para. 253.
[276] *Ibid.*, paras. 238-241, pp. 48-49, paras. 245-246, p. 50.
[277] *Ibid.*, para. 247.
[278] *Ibidem. See also* Memorial, paras. 195-199 and 230.

409. Italy is apparently oblivious of the fact that the rest of the damages claimed are also directly related to the arrest of the M/V "Norstar".

410. Italy does not offer any reasons, apart from its subjective opinion, why the rest of the damages listed are not direct. 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 only one root cause: the arrest enforcement.

411. After the M/V "Norstar" had been successfully supplying bunkers to yachts on the high seas for many years, this was suddenly stopped. As a result, the bunker remaining on board could no longer be used for such purpose, thereby curtailing the M/V "Norstar"'s profitability. In addition, the ultimate demise of the ship is clearly a direct consequence of the arrest and subsequent detainment.

412. Nor has Italy explained how the shipowner could have complied with the duty to pay wages to the captain and the crew while the vessel was detained and out of business.

413. Apparently, Italy has never realized that if it were not for its wrongful prosecution of the M/V "Norstar" for activities performed on the high seas, it would not have been necessary to mount a defence of the ship and the persons involved in its operation in Palma de Majorca, Italy, and now in front of this Tribunal. It is not to be considered lightly that by not responding to its claims, Italy has necessitated Panama's hiring of legal counsel, at significant expense, to obtain appropriate redress.

414. If the M/V "Norstar" had not been arrested, it would have paid all the taxes and fees owed to the Panama Merchant Marine on time, rather than falling into arrears. In addition, in order to appear before this Tribunal, it has been necessary to prove that the M/V "Norstar" has been registered by the Panama Merchant Marine. As a result, all such fees and taxes owed to Panama for such registration are a legitimate part of the damages directly resulting from the vessel´s arrest.

415. Also, if it were not for the unlawful arrest of this vessel by Italy, the natural persons connected therewith (*i.e.* Mr. Silvio Rossi, the general manager of Rossmare International S.A.S., Mr. Tore Husefest, the former first captain of the M/V "Norstar", Mr. Renzo Biggio, the former second captain of the M/V "Norstar" -until 1997-, Mr. Arve Einar Mørch and Mr. Emil Petter Vadis (Chairman of the Board of Directors, and Managing Director of Intermarine & Co. A.S., correspondingly, owner of the M/V "Norstar"), would not have been subjected to the criminal proceedings which have entailed expenses, legal fees, and pain and suffering as direct consequences of their prosecution.

416. Italy has contended that

> several heads of damages do not have a causal connection with Italy´s alleged breach of the Convention or that, in any event any connection would be so remote as to not constitute the required ´proximate and actual consequences´ of Italy´s actions.[279]

417. However, this contention to be discussed *infra*, has only been supported by the allegation of the "failure to retrieve the M/V "Norstar"" by the owner in 1999 and 2003.[280]

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[279] *Ibid.*, para. 246, p. 50.

[280] *Ibid.*, paras. 255-265, and 266-268.

III. The falsehood about the vessel's conditions at the moment of its arrest

418. In Chapter 2, Section III of the Counter-memorial, Italy confirms that when the arrest order was issued and the arrest was enforced, the vessel was in Spain. That section devotes a great deal of attention to speculating on the condition of the vessel, intending to rebut Chapter 6 (Panama's claim concerning the reparation for damages), Section II (Quantification of damages), and Subsection C (Loss and damages suffered by the owner of the M/V "Norstar"), paragraph 292 of the Memorial.

419. Panama does not doubt that by 2003, the M/V "Norstar" "was in a very bad state, no longer seaworthy, and lacking valid certificates and class designation[281] as Italy has expressly claimed.[282]

420. However, Italy has simultaneously declared that Panama has "not produced evidence that five years before the vessel was in much better state"[283] asserting that, on the contrary, "the M/V "Norstar" was in anything but good conditions: it was in a state of abandonment and dismay in the Port of Palma de Mallorca, with one engine not working, broken parts and used as a makeshift shelter for homeless people."[284]

421. In order to ground its statement concerning the condition of the vessel at the moment of its arrest, Italy relied on a story published on a Spanish website in 2015 that Panama had presented as evidence regarding the auction sale and final removal of the M/V "Norstar". In the Counter-memorial, Italy referred to such "evidence" as follows:

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

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[281] *Ibid.*, paras. 292-293, p. 59; Memorial, para. 196.
[282] *Ibid.*, paras. 48-52, pp. 12-13.
[283] *Ibid.*, para. 293, p. 59.
[284] *Ibidem.*

(c) Panama maintains that "[a]t the time of its arrest, the M/V "Norstar" was a seaworthy" vessel. However, the truth is that the M/V "Norstar" was in such poor technical conditions that made it unfit for navigation outside the internal waters of Palma de Mallorca. This results in particular from a fax sent by Transcoma Baleares to Spanish Port Authorities in Palma de Mallorca, dated 7 September 1998, just weeks after the Decree of Seizure was issued. The fax records the bad condition of the chains aboard; the broken anchor of the starboard; the breakdown of one of the main generators; the lack of any fuel.[285]

422. However, Italy's reliance on this third-hand evidence is riddled with contradictions. Firstly, while Italy says that the vessel's "state of abandonment was such that the port police had found on several occasions people sleeping inside" and that "the unmade beds, cereals on the table, and towels hung on the door hanger indicated the crew's rapid flight and that the sailors who were on board disappeared leaving the boat in the middle of the port entry",[286] it is noteworthy 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 mv Norstar where she is moored" and "at the vessel where he lives..." respectively.[287]

423. Additionally, the document signed by the Lieutenant Chief of the Provincial Maritime Service of the Spanish Civil Guard, also stated that the Captain could be located "at the vessel where he lives" without describing any evidence of the squalor and abandonment that Italy has referred to.[288]

424. Nevertheless, Italy has linked the information contained in the internet publication[289] with the date of the enforcement of the arrest, by stating that at this moment the vessel "was used as a makeshift shelter for homeless people"[290]. That homeless people would immediately descend on a ship just arrested in port is a most unlikely scenario. Perhaps, Italy has painted such a dramatic picture to suggest that the amount of damages claimed regarding the total loss of the M/V "Norstar" should be diminished.

425. In any case, it is doubtful that the immediate degradation of the M/V "Norstar" occurred while the Captain was on board, particularly since the Spanish authorities did not make any reference to such conditions on the date of the arrest's enforcement.

426. Secondly, in its Counter-memorial, Italy did not consider the fact that while the Memorial did say that the ship entered Palma in March of 1998[291], it also added that "The rust, the excrement of gulls and the dust have been taking possession of the ship, contributing thus to the bad state **fruit of the passage of years**"[292], referring to its condition in **2015** (emphasis added). In its Counter-memorial, Italy did not make this distinction.

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[285] *Ibid.*, para. 51, pp. 12-13.
[286] *Ibid.*, para. 51(b), p. 12, Memorial, Annex 16.
[287] *Ibid.*, Statement of Detention of a vessel, Annex K, p.2 and 3.
[288] Counter-memorial, Annex K, p. 2.
[289] *Ibid.*, para. 51.
[290] *Ibid.*, para. 293, p. 59.
[291] Memorial, Annex 16.
[292] *Ibidem.*

427. In other words, 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. Thus, by means of poor reasoning, Italy has deceptively avoided taking responsibility for its extended detention of the ship, which ultimately led to its complete deterioration, into account.

428. It is true that the M/V "Norstar" entered the internal waters of Palma at the end of March 1998; but in April and May 1998, the cargo hold and derrick of the vessel were extensively upgraded for the lobster (insulated cooling room) and regular maintenance work was also carried out.

429. This work was completed before the ship was delivered to the charterer on 20 June 1998 on the basis of the charter contract dated 10 May 1998. The vessel was then loaded with a total of 273,776 mt of gasoil in Algeria and was during summer 1998 operating and supplying gasoil to megayachts on the high seas off the coast of Ibiza and Mallorca.

430. The Spanish authorities only allowed the vessel to operate 24 nm off the coast on the high seas between Ibiza and Mallorca. The clients were listed in 2001 by Mr. Emil Petter Vadis, then Managing Director of Inter Marine & Co. A/S.[293]

431. From this list it can be seen that the M/V Norstar was not in bad condition until its arrest, but she was in good working order and performing her usual operations. The vessel could have never been delivered on a timecharter without certificates, class and in a seaworthy condition.

432. In its Counter-memorial, Italy has also presented, for the first time, as evidence, a fax dated 7 September 1998 from Transcoma Baleares S.A. stating that it was sent "just weeks after the Decree of Seizure was issued".[294]

433. The background for the fax of 07 September 1998 was also that the Port Authority of Palma had never given a permission to berth the vessel during the operation. After the seizure, the Port Authority finally refused to grant entrance to any berth in the Port of Palma; the reason being that the vessel carried "dangerous cargo" (gasoil).

434. The fax of 07 September 1998 intended to make it clear to the Port Authority that the ship could be seriously damaged if it remained in anchorage on Palma Bay and that it was urgent to find a suitable berth for the vessel. The shipping company Transcoma Baleares S.A. therefore highlighted such negative aspects of M/V Norstar in order to obtain a berth for the vessel.

435. Thus, this document presented by Italy, in addition to the fact that it could, at the most be considered hearsay evidence, does not make a formal description of the vessel at that time. The photos of the M/V "Norstar" will show the standard of the vessel as presented for serious clients during offshore bunkering.[295]

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[293] Annex 1.
[294] Counter-memorial, para. 51(c).
[295] Annex 4.

436. In short, the evidence presented by Italy does not demonstrate that the M/V "Norstar" was in bad condition when the arrest was made. On the contrary, up until the date of the enforcement of the arrest order, the vessel had been operating with complete normalcy.

Thus, it strongly appears that the damage that befell the M/V "Norstar" occurred subsequent, rather than prior, to the arrest.

IV. The falsehoods of the Italian accusation that the owner failed to retrieve the M/V "Norstar" and the claim that this broke the causative link

437. Italy´s argument that the damages suffered by Panama do not bear any connection with the breach of the Convention is based on two moments:

> a) when the owner of the M/V "Norstar" failed to retrieve the vessel after its release was authorised in 1999; or
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> b) when the owner of the M/V "Norstar" failed to retrieve the vessel after the Judgment of the Tribunal of Savona in 2003, that ordered its unconditional release.[296]

438. Panama will demonstrate that Italy is trying to place most of the blame for damages on the owner by characterizing these as the most significant events in the history of this case. This is a blatant distortion of the facts.

439. However, even if Italy's version of the facts in this regard were true, neither of the moments Italy refers to would have sufficient weight to break the causative link between the enforcement of the arrest and the damages caused by that act.

440. The Italian interpretation of the facts is that there was a "failure to retrieve the M/V "Norstar"" in 1999 and again in 2003 so that consequently the shipowner, rather than Italy, is responsible for the damage that occurred. Panama takes issue with this assumption, not only because the damage was caused by lack of maintenance, but also because there is no evidence that either the shipowner or Panama had ever declined to take back the vessel in either instance.

441. In reality, neither the shipowner nor the flag State were ever contacted to discuss any steps to be taken to retrieve the vessel. This lack of contact further exemplifies the lack of the Italian interest in its fate.

442. Since Italy did not effectively return the M/V "Norstar" within a reasonable time frame after the wrongful arrest enforcement, Panama´s position is that all the damages claimed in this case remain the responsibility of Italy, particularly when taking into account that soon after this unlawful seizure, Panama began claiming damages.[297]

443. Neither the shipowner, Panama, nor the charterer could have retrieved the vessel without the knowledge and consent of the Italian and Spanish authorities, neither of which developed or coordinated an orderly procedure for the M/V "Norstar"'s transfer to its owner.

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[296] Counter-memorial, para. 254, p. 51.

[297] Preliminary Objections of 10 March 2016, Letter dated 15 August 2001 addressed from Panama to Italy, Annex F.

444. On the contrary, the Italian attitude towards the situation has been to avoid any communication with Panama as has been shown *supra*[298].

A. The alleged failure to retrieve the M/V "Norstar" in 1999 did not break the causative link

445. Italy stated that in January 1999, the Public Prosecutor of Savona accepted the request to release the vessel against the payment of 250 million liras, but the owner did not retrieve it because, according to Panama, he was unable to pay this amount of money due to the loss of all income.[299]

446. Italy also described the conditional release as having been granted according to Italian and international law[300], adding that such an amount was reasonable because "these bonds are normally in the region of at least one million Euros" using as reference *The Saiga*, *The Camouco,* and *The Monte Confourco* cases[301]. However, no further explanation as to how this bond amount was determined has been provided.

447. In any case, Panama contends that simply characterizing the quantum of a bond as reasonable does not eliminate its illegitimacy in the first place. If Italy had not breached the Convention with the arrest enforcement of the M/V "Norstar", the bond amount would not be an issue now.

448. In addition, the presentation of Italy is contradictory: On the one hand, Italy claims that the vessel at the time of the arrest "was in anything but good conditions"[302].

449. On the other hand, Italy has demanded a high security deposit of 250 million liras (about 145,000.00 USD) for the release of the vessel. However, if the ship were only scrap, as Italy says, the required guarantee would be disproportionate and, for that very reason, unlawful.

450. In addition, since the arrest of the M/V "Norstar" was unlawful, Italy had the duty to release the M/V "Norstar" without any consideration or security. The demand for a bond for the release of a vessel which was not allowed to be arrested, was therefore unlawful, regardless of its amount.

451. Therefore, it can not be at the expense of Panama or the owner if the owner had not complied with the unlawful request for a security. The posting of a bond was a consequence of a right and not a mandatory act.

452. We have already stated that the shipowner was conducting a business activity which was cut short by the unlawful confiscation of the M/V "Norstar", an action which deprived that vessel of all of its income from the very moment that the arrest was enforced.

453. However, in response, Italy claimed that such an assertion "was not supported by any evidence"[303] and that "only 5 months passed between the ship-owner's request for

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[298] *Supra*, Chapter 4, Section IV, Subsection C, paras. 276-292, pp. 43-45.
[299] Counter-memorial, para. 255, p. 51-52.
[300] *Ibid.*, para. 256, p. 52.
[301] *Ibid.*, para. 261, p. 51-52.
[302] *Ibid.*, para. 293, p. 59.
[303] *Ibid.*, para. 263, p. 53.

release and the actual knowledge by him of the release", this hardly being a 'long detainment'"[304], as a means for suggesting that the causative link was broken at this time as a result.

454. According to the *res ipsa loquitur* doctrine it is unnecessary to show that a ship under arrest could not continue being a productive business entity.[305] It is an established fact that the M/V "Norstar" could not continue its commercial activity after the arrest and, thus, was not in a position to secure its release. The owner, Inter Marine & Co. A/S, also had no other ships to compensate for the loss of income; she had only one ship, the M/V "Norstar".

455. The owner also did not have the option of providing security through its bank. When the M/V "Spiro F" was arrested the owner of the M/V "Norstar" also feared that its vessel could be arrested and asked its bank if it was possible to obtain a guarantee in case of arrest. The bank announced by fax dated 16 September 1998 that this was not possible.[306] Therefore, the owner had neither the opportunity to pay the bond or to provide a bank guarantee.

456. Therefore, Panama and the shipowner were entitled to exercise the option to refuse to post bond and, therefore, did not break the causative link by doing so.

457. Finally, 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.

458. It is unreasonable for a shipowner using a vessel for lawful business purposes to constantly accept a renewed arrest of the ship and to release the ship after each arrest by paying a further bond while the ship –due to the arrests–only generates losses. After all, the fact that the bond was not paid is in no way appropriate to break the causative link.

B. The alleged failure to retrieve the M/V "Norstar" after the Judgment of the Tribunal of Savona of 2003 did not break the causative link either.

459. Italy has also claimed that "the failure by the ship-owner to retrieve the vessel after the Judgement of the Tribunal of Savona on 13 March 2003 would constitute yet another interruption of the causal connection between the arrest of the M/V "Norstar" and the damages complained of by Panama."[307]

460. Italy described the chain of events as follows:

> the Tribunal of Savona acquitted all the defendants in the case; ordered the release from seizure and the unconditional and immediate return of the M/V "Norstar"; transmitted the order of release to the Spanish authorities and

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[304] *Ibid.* para. 264, p. 53.

[305] Black's Law Dictionary, Fourth Edition, p. 1470. Whether we designate *Res Ipsa Loquitur* as a doctrine, principle, maxim, theory or axiom, whether it pertains to substantive or adjectival law, the fact remains that it grew up in a manner similar to the whole of the common law of England. (Fenston, John, "International Air Law: *Res Ipsa Loquitur* in Aviation", http://www.lawjournal.mcgill.ca/userfiles/other/2534783-1.3.Fenston.pdf

[306] Annex 2.

[307] *Ibid.*, para. 266, p. 53.

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.[308]

461. Based on the circumstances described above, Italy has concluded that "any damage suffered by Panama in connection with the arrest and detention of the vessel after 2003 has not been caused by the conduct of Italy, but rather by the conduct of the owner of the M/V "Norstar"."[309]

462. Although Italy has claimed that it "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",[310] the only evidence in this regard made available by Italy was the letter number 415/02 Rg, dated 18 March 2003, sent from Italy to Spain, in copy, with its "request to execute the above-mentioned release order and inform *the custodian*[311] of the ship of the order"[312], *i.e.* neither the flag State or the shipowner. In fact, there are no records that this communication was ever delivered. Certainly, neither the flag State or the shipowner were ever notified.

463. The ship-owner received a document identified as R.G. 415/02 dated 21 March 2003 by registered mail dated 26 March 2003 which was the decision of 13/14 March 2003 that ordered "that the seizure of motor vessel Norstar be revoked and the vessel returned to INTERMARINE A.S. and the caution money released." The same document (415/03) was later on 2 July 2003 delivered by the police.[313]

464. According to the contents of the document referred to by Italy in its Counter-memorial as the "Notification of the Release of the M/V "Norstar" by the Spanish authorities 22 July 2003"[314], a third document, therein identified as "record of number 84/03 dated 21 July 2003", was addressed on 22 July 2003 by the Captain of the Provincial Maritime Service in Spain to the "Judge of the Investigative Tribunal N° 3, Palma de Mallorca"[315]. However, this last document has not been placed into evidence by Italy, so Panama is unable to assess its value.

465. And, despite the name, address, and all the particulars of the ship's owner and manager having been on file with Italy, neither of these parties ever received a copy of this message.

466. On 3 April 2003, the Ministry of Justice in Rome made a request to the Ministry of Justice in Oslo for international judicial cooperation by means of a note dated 21 March 2003.[316]

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[308] *Ibid.*, para. 267, p. 53.
[309] *Ibid.*, para. 268, p. 54.
[310] *Ibid.*, para. 267, p. 53.
[311] Emphasis added.
[312] Memorial, Annex 11.
[313] Cfr. Counter-memorial, Annex P-Q.
[314] Counter-memorial, Annex O.
[315] *Ibidem.* Although this document says that "The document withdrawing the seizure and custody N° 84/03 dated 21 July 2003 is attached", Italy has not disclosed such attachment.
[316] *Ibid.*, Rif. N (NA/1331/2003/CD), Annex P.

467. The note contained the same information (Judgement by the Tribunal of Savona), and stated that Italy was waiting "to receive receipt of the act demonstrating the communication, or to be informed of the reasons for a failure to communicate"[317]. This document was sent out again on 2 July 2003 by the police[318] and in a reply dated 23 July 2003 sent to the Ministro della Guistizia, Rome, the Royal Ministry of Justice and the Police, Oslo stated: "The documents were delivered to Arve Einar Morch **on 2 July 2003**".[319] (emphasis added)

468. Having confirmed that the documents were delivered on 2 July 2003 to Mr. Morch, it is obvious that the document dated 21 July 2003 was not part of these documents, and therefore the ship-owner was not duly and timely informed of this decision in any of the aforementioned messages.[320] On the other hand, Italy has not presented any other documentation showing there was further communication regarding this matter after 21 July.

469. Although Italy has argued that the ship-owner failed to retrieve the vessel, it is important to note that in order to maintain its license, the M/V "Norstar" needed to undergo a special survey every five years in order to renew its Classification Certificate[321], the last inspection having taken place in June 1996. With the view to prepare for the next survey in 2001, the vessel needed extensive upgrading due to the Italian detention.

470. The vessel had also to undergo annual surveys, and an intermediate survey between two special surveys.[322] Last special survey and drydocking was performed in Valletta, Malta in 1996, where frames and some plating in lower forepeak and floor between upper and lower forepeak were changed, as well as new chainlockers were made.

471. Both propellers, the two main engines and both auxiliary engines were opened for inspection by Det Norske Veritas, and all equipment checked therefore the vessel being submitted to an extensive upgrading in 1996. Also a number of heating coils, not in use for gasoil were removed early 1997 during operation for major oil company Texaco in Gibraltar. In addition, as a result of a recommendation from Det Norske Veritas during annual survey in 1997, a new anchor chain was ordered from China and delivered in Malta the same year. All the documentation concerning the above maintenance records was stored in the vessel's files onboard and under the authority and control of Italy.

472. During operation (offshore bunkering) off Ibiza/Mallorca and before the Italian arrest, the ship had never been alongside in port; it was just anchored in Palma Bay. For a period during upgrading of cooling room (cargo hold) after arrival from Malta the vessel was berthed to a barge in Palma de Mallorca.

473. How could Italy expect the shipowner to take possession of a vessel in 2003, five years after the seizure, when it had not received the necessary maintenance work and had not been the subject of the corresponding mandatory surveys?

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[317] Counter-memorial, Annex P.
[318] *Ibid.*, Annex Q.
[319] *Ibidem.*
[320] Counter-memorial, Annex O.
[321] SOLAS Convention 1974; IACS Req. 1990/Rev.24 2016.
[322] *Ibidem.*

474. If the ship had been issued a valid class and the appropriate certificates in 1999 or any time afterwards, it would have been in position to leave the port of Palma de Mallorca. Unfortunately, this was not the situation. Italy has never shown any acknowledgement of the surveys required for the M/V "Norstar" to maintain its class and, thereby, should be held to account for this oversight.

475. As already mentioned, neither the owner, the charterer, or the flag state, has ever received any confirmation that the ship was ready to be delivered. Whether Italy or Spain was responsible for this does not affect Panama's claim for restitution.

476. Furthermore, neither the Spanish chief engineer living in Palma, the shipowner, or the flag State were even informed about any intention to execute the order of release.

477. Instead, upon request from owners to bring the ship alongside after several months in the Palma de Mallorca Bay, the Port Authority requested a tug with welding equipment to cut the new anchor chain bought from China, and brought the vessel alongside. The Port Authority had refused to berth the vessel the argument being that the ship had dangerous cargo (gasoil) onboard.

478. Due to the arrest, and some time afterwards, it was decided that the remaining officers should go home, and that the Chief engineer who was living in Palma de Mallorca should have the responsibility for the ship laying at the Port of Palma anchorage.

479. The Chief engineer was the only authorized person to start the two main engines (Deutz) and the two auxiliary engines/generators (Lister). This was the reason for using the tug with welding equipment to cut the anchor chain after the decision from the Port Authority to bring the ship alongside. In spite that the authorities knew the particulars (name, address, telephone number) of the Chief engineer, to be found on the documents stored in the captain's office, he was not ever contacted to start the engines or the alternator for lifting the anchor chain by the winch.

480. The Chief engineer was at his home in Palma, and when he arrived to the port, the crew on the tug explained him that upon request from the Port Authority they had cut the anchor chain and brought the ship alongside.

481. The order from the Tribunal of Savona to release the M/V "Norstar" was received both by registered mail, and later by the police on 2 July 2003. No other communication was ever received either by the shipowner, the charterer, the Captain or the flag State.

482. If Italy had effectively decided to execute the release of the vessel as it now maintains, it could have easily sent an official communication to any competent governmental authority of Panama.

483. However, not only was this not done, Italy continued to actively refuse to communicate with Panama about this and any other matter concerning this case, as we have already shown.

484. If Italy did not answer any of the communications we now know it received from Panama since 2001, how can it seriously state that the responsibility to return the M/V "Norstar" after it had been ordered to be released falls on Panama and the shipowner?

485. If Italy truly believed that Panama and/or the shipowner were not complying with their duty to take possession of the vessel, or were unduly avoiding communicating about this, Italy should have conveyed this concern, without delay; it should have also instituted proceedings to reveal the alleged lack of interest of the shipowner, and/or Panama, in the fate of this vessel. Absent of this, there is no evidence that either Panama or the shipowner actively refused to retrieve the M/V "Norstar", either in 1999 or 2003, or any other date and, thus, no causative link was ever broken.

V. The Italian counter-claims of contributory negligence and the duty to mitigate damages

486. A counter-claim 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."[323]

487. Subsection A of the Counter-memorial is titled "Contributory fault and the duty to mitigate." By proposing the existence of contributory fault on the part of Panama "for the purposes of the quantification of the damages invoked"[324] Italy is seeking relief against the former.

488. Panama's contention is that such counter-claims A. are evidence that the damages claimed by Panama are well-founded; B. are procedurally inviable and therefore inadmissible; and C. are legally unsubstantiated.

A. The Italian counter-claims show that the damages claimed by Panama exist and are well-founded

489. Italy is claiming that the shipowner's conduct needs "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."[325] and "should at least bear on the quantification of damages sought by Panama".[326]

490. By thus stating that Panama contributed to the damages, Italy is tacitly acknowledging that damages did accrue because without damages having been caused, no counter-claim of contributory fault could have been invoked.

491. By the same token, since Italy is claiming that Panama has breached its duty to mitigate the damages that are being claimed in this case, Italy is also accepting the validity of such damages. A party to a process cannot state that the other has not complied with its duty to mitigate damages if there have been no damages caused.

B. The counter-claims are procedurally inviable and therefore inadmissible.

492. The counter-claims of Italy against Panama state that

> In the present case, the owner of the M/V "Norstar" has contributed with his conduct to the causation of the damage and, in any event, has failed to mitigate

[323] *Osborns's Concise Law Dictionary*, Sixth Edition, By John Burke, Sweet & Maxwell, 1976.
[324] Counter-memorial, para. 270, p 54.
[325] *Ibid.*, para. 270, p. 54.
[326] *Ibid.*, para. 280, p. 57.

any damage that may have been caused. This conduct consists of the following actions or omissions:

> (a) In 1999, the owner of the M/V "Norstar" failed to pay the reasonable security required by the Italian Prosecutor at the Tribunal of Savona, which would have determined the immediate release of the vessel;
>
> (b) While Panama claims that the owner of the M/V "Norstar" was not in a position to pay the required sum of money, he never sought to either have decision to subject the release to the payment of a bond reviewed; nor to have the amount of the bond redetermined. 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 before the Court of the capital of the province where the office of the judicial authority which ordered the measure is situated.
>
> (c) A prompt release procedure under Article 292 of the Convention would have been available to try and secure the immediate release of the M/V "Norstar". Both Panama and the owner of the vessel could have activated a request for prompt release, but chose not to do so.
>
> (d) In 2003, the owner failed to retrieve the vessel, after its unconditional release by the Tribunal of Savona. According to Panama, this happened because the restitution of the M/V "Norstar" was "impossible" for the following reasons: "because the vessel was already a total loss due to the five years that Italy had allowed to elapse"; because Italy did not provide "the essential maintenance work to keep it operative"; "because no efforts were made to update the ship's certificates and class designation.[327]

493. According to the Rules of the Tribunal, in order to allow Panama to defend itself against both of the above claims, *i.e.* contributory fault and duty to mitigate, Italy should have clearly identified these as counter-claims.

494. Article 98 within Subsection 4 of the Rules of the Tribunal governs counter-claims stating in part that "A counter-claim shall be made in the counter-memorial of the party presenting it and shall appear as part of the submissions of that party."

495. In the last paragraph of page 2 of the letter dated 17 August 2017, Italy stated:

> Italy's agreement to postponing the decision on whether a second round of pleadings is necessary until after the submission of Italy's counter-memorial, therefore, should not be construed as agreement with Panama's stated position on the scope of the dispute in the M/V "Norstar" case. In this regards,

[327] Counter-memorial, para. 277, p. 55-56.

> Italy also takes this opportunity to inform the Tribunal and Panama that **it does not intend to bring counterclaims in the present case.** (emphasis added)[328]

496. Despite the express and unconditional statement to the contrary made in the letter above, it now appears that Italy has introduced counter-claims.

497. Furthermore, apart from making the tenuous statement that "the late commencement of these proceedings should at least bear on the quantification of the damages sought by Panama"[329], Italy has not specified any tally of the damages it considers inappropriate, so that Panama could defend itself accordingly.

498. Italy has also stated that "the ship-owner has contributed in a most decisive manner to the causation of any loss that Panama may have suffered and that, therefore, a contributory standard of fault should be applied with respect to the assessment of any damage that Italy may be found to have caused to Panama"[330] and that

> 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.[331]

499. In order to allow Panama to exert its right of defense, Italy should have clearly stated how much of the damages claimed by Panama were alleged to be due to contributory fault and how much were due to the failure to comply with the duty to mitigate such damages.

500. By filing its Counter-memorial without any submission concerning the claim of contributory negligence[332], Italy has also breached article 98(2) of the Rules of the Tribunal which require such as part of any Counter-memorial. This omission also demonstrates conduct contrary to its own promise because in previous communications with the Tribunal Italy assured that it had no intention of instituting counter-claims.[333]

501. It is impossible for Panama to challenge a counter-claim without submissions because it cannot file evidence against it. On the other hand, if Italy intended to quantify such counter-claim by means of its Rejoinder, Panama would also object as it would then not have an opportunity to defend against it.

C. The Italian counter-claims are legally unsubstantiated

502. Italy stated that "the owner of the M/V "Norstar" has contributed with his conduct to the causation of the damage...."[334] and, to this end, it has relied on article 39 of the Draft Articles of Responsibility of States (DARS) and on a commentary to such draft article that says that "[I]f a State-owned ship is unlawfully detained by another State and

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[328] Annex 3, p. 2.
[329] *Ibid.*, para. 280, p 57.
[330] *Ibid.*, para. 17, p. 3.
[331] *Ibid.*, para. 270, p. 54.
[332] At Chapter 1, Section VII (Submissions) of its Counter-memorial, Italy only requested the Tribunal to dismiss all of Panama's claims, either because they fall outside the jurisdiction of the Tribunal, or because they are not admissible, or because they fail on their merits, according to the arguments that are articulated below.
[333] Annex 3, *ibidem*.
[334] Counter-memorial, para. 277, p. 55.

while under detention sustains damage attributable to the negligence of the captain, the responsible State may be required merely to return the ship in its damaged condition".[335]

503. However, Italy has not only failed to identify any specific negligent act or omission on the part of the captain or the owner of the M/V "Norstar", but has also failed to show any intention "to return the ship in its damaged condition"[336] The only references Italy makes are to the alleged failures to retrieve the vessel by its shipowner, something we have already discussed.[337] In addition, the M/V "Norstar" was not a "state-owned ship" (to which article 39 DARS refers) but belonged to a private company. Art 39 DARS thus does not apply.

504. Italy suggests that the shipowner is guilty of contributory fault and the breach of the duty to mitigate, firstly, because it failed to put down security with the Tribunal of Savona in 1999 in order to gain release of the vessel, and secondly, because it never sought to appeal the Court of Cassation judgement, or have the terms of the release reviewed. [338]

505. In its Counter-memorial, Italy referred to numerous provisions of its Criminal Code[339], as well as to article 2043 of its Civil Code[340] stating that these provisions were applicable in terms of the alleged duty of the shipowner to institute proceedings within its internal judicial system. This shows, once again, that Italy is trying to apply its internal legal system to acts occurring outside its territorial jurisdiction.

506. As to the accusation that Panama contributed to its injury and breached its duty to mitigate damages because it never sought to use the Italian domestic judicial remedies pursuant to its internal laws, Panama can only note that the Tribunal has already decided that "the claim for damage to the persons and entities with an interest in the ship or its cargo arises from the alleged injury to Panama" and that "the claims in respect of such damage are not subject to the rule of exhaustion of local remedies."[341]

Therefore, according to the Tribunal, Panama was not under any obligation to seek redress through the Italian judicial system.

507. Italy has also argued that Panama failed to request a prompt release pursuant to article 292 of the Convention, which would supposedly have made the vessel available to both Panama and the owner, thereby mitigating damages.

508. Specifically, article 292 of the Convention states:

> 1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial

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[335] ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries", in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 31, at p. 110, commentary to Article 39, para. 4, Counter-memorial, para. 274, p. 55, fn. 204.
[336] *Ibid.*, Counter-memorial para. 274.
[337] *Supra*, Chapter 6, Section IV, Subsection A, paras. 445-458, pp. 68-69 and Subsection B, paras. 459-485, pp.69-72.
[338] Counter-memorial., para. 277(b), p. 56.
[339] *Ibid.*, para. 277(b), Annex H.
[340] *Ibid.*, para. 279, p. 57.
[341] Preliminary Objections Judgement, para. 270.

> security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.

509. The assumption behind this provision is that the detaining State "has not complied with the provisions of the Convention for the prompt release of the vessel...upon the posting of a reasonable bond or other financial security....". This means that article 292 comes into force only if a bond or other financial security has been posted. This was not the case in this instance.

510. In other words, article 292 contains no provision requiring an application for release or the posting of a bond or other financial security once the amount of such bail has been fixed by the detaining authority. As previously stated, the owner was unable and not obliged to post a bond or other security; moreover, if he had had the financial means, he would not have acted in a reasonable manner by posting the bond or security, since Italy would have arrested the vessel at the next opportunity again.[342]

511. The third Italian counter-claim seeks to lessen the quantification of the damages by repeating the charge that, in 2003, the owner failed to retrieve the vessel, firstly, by referring to the lack of "essential maintenance work" and to efforts "to update the ship's certificates and class designation" that Panama had relied upon in its favor[343], and, secondly, by arguing that Panama failed "to explain how the bad conditions of the ship that Panama claims made the restitution of the vessel "impossible"[344].

512. Italy then added the following passage to support its Counter-claim, using the Separate Opinion of Judge Ndiaye who stated:

> ...it was not for Italy to provide for the essential maintenance works to keep the M/V"Norstar" operative, nor to update the ship's class certificate and designation. Any complaint concerning the modalities of the enforcement of the Decree of Seizure, and possible damages ensuing from it, should not be addressed to Italy.[345]

Italy has used these remarks by the judge taken out of context to absolve itself of responsibility for the ship's maintenance.

513. However, Italy did not state that Judge Ndiaye actually said that

> [I]t is Italy which is responsible for the actions of the Spanish authorities, carried out in its name [...].Spain was accountable only for the manner in which the seizure was carried out; that is for the protection of the integrity of the vessel and crew when seized.[346]

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[342] *Supra*, Chapter 6, Section IV, paras. 437 -485, pp. 67-72.
[343] Counter-memorial, para. 277(b), p. 56.
[344] *Ibid.*, para. 278, p. 56.
[345] *Ibidem.*
[346] *Ibid., para. 278, p.* 56. Cfr. Preliminary Objections Judgement, Separate Opinion of Judge Ndiaye, p.26.

> ...it is for Italy to assume the consequences attaching to its order, as the communication between the two States shows. It indicates that not only did Italy assume full responsibility for the seizure, but also that the two States had assessed the question of Italy's responsibility in the matter.
> ....
> It is Italy which assumes responsibility for its actions since it based its request for judicial cooperation on an alleged offence which was not committed.[347]

As it can be easily concluded, in reality, Judge Ndiaye held Italy entirely responsible for the vessel's care.

514. Panama objects to Italy's line of reasoning because Judge Ndiaye's statement does not make Spain liable for any maintenance work the ship required. The manner in which the seizure was carried out and the protection of the vessel's integrity when seized does not have any relationship with the complete Italian abandonment of the vessel after the fact.

515. At this point, it is impossible to know whether or not Spain damaged the M/V "Norstar" in any way at the time of the seizure, because Italy has not been able to produce a single instance showing concern for the fate of the vessel.

516. Panama contends that it is up to the wrongdoer to make sure that it "wipes out all the consequences of the illegal act and reestablishes the situation which would, in all probability, have existed if that act had not been committed."[348]

517. If Italy had complied with its duty as the arrestor State to keep the vessel intact, it would not have considered Spain entirely responsible for the condition of the vessel when it was seized, nor left it unattended for so long after the fact.

518. Panama would like to have seen its counterpart show concern for the fate of the M/V "Norstar", but, so far, no action has been taken by Italy to this effect.

519. Instead, Italy seems, again, to be using Spain, as it did during the Preliminary Objections,[349] as a means of evading its own responsibility.

520. Ultimately, Italy's attempts in this regard directly contravene what the Tribunal has already decided: that this case concerns Italy only because it was Italy which "adopted legal positions and pursued legal interests with respect to the detention of the M/V "Norstar" through the investigation and proceedings.....held legal control over the M/V "Norstar" during its detention"[350], and it has been "the legal interests of Italy, not those of Spain, that form the subject matter of the decision to be rendered by the Tribunal on the merits of Panama's Application".[351]

521. If the vessel had been returned within a reasonable length of time in the same condition it was in when the arrest was enforced, then no damages would have ensued

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[347] *Ibidem.*
[348] The Chorzow Factory (Indemnity) Case, p. 47.
[349] *Supra*, Chapter 2, Section III, paras. 59-61, p. 9.
[350] Preliminary Objections Judgement, para. 167.
[351] *Ibid.*, para. 173.

and no claim would have been presented. The failure to do so is the sole responsibility of Italy as the arresting State.

522. Even while willing to let Spain take a portion of the blame, Italy has maintained that Panama and the shipowner have been the ones primarily responsible for failing to maintain the vessel, and therefore, are the culpable parties when it comes to any damage caused. But how could either the shipowner or Panama have had access to the vessel if it was under the exclusive jurisdiction and control of Italy through the Spanish authorities?

523. At this point, Panama contends that it no longer makes sense to argue about the condition of the vessel or its maintenance this long after its demise. Rather, the most relevant fact with which we are concerned is that the M/V "Norstar" was never returned, either damaged or undamaged.

524. The vessel was effectively confiscated from its owner, forcing a perfectly legal business to go to ruin without providing the owner the opportunity to salvage it.

525. It has been shown that there was no duty to seek redress through the Italian domestic judicial system and that article 292 of the Convention would only apply if there had been a violation of the provisions of the Convention for the prompt release of the vessel upon the posting of a bond or other financial security, which was not the case. Thus, the use of this article does not bolster Italy's defense in the least.

526. Nor does the citation of Judge´s Ndiaye´s comments[352] strengthen Italy's argument because the maintenance of the vessel was an Italian, rather than a Spanish, duty as the State holding legal control of the M/V "Norstar".

527. Because Italy wrongly seized and held on to a foreign vessel for such a prolonged period, there was eventually no chance to avoid its being ultimately auctioned as scrap. Thus, Italy forced the collapse of a legitimate business. Its objections to the contrary in the form of counterclaims have neither validity nor legal standing.

VI. The legitimacy of the quantum of each of the damages claimed by Panama

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

528. Italy considered the damage claimed as substitution of the M/V "Norstar" ($625,000.00) as "flawed" because it stated that "the assessment was not based on a physical inspection of the M/V "Norstar" and/or examination of its class records"[353] and that "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".[354]

529. Such reasoning about the vessel state does not take into account that by having to navigate from Italy and other countries through the high seas to Spain, the M/V "Norstar"

[352] *Supra*, Chapter 5, Section VI, paras. 512-514, pp. 77-78.
[353] Counter-memorial, para. 291, p. 59.
[354] *Ibid.*, para. 290-291, p. 59.

had to be seaworthy and with class. Providing a Statement for estimation of its value is *prima facie* evidence of the seaworthy condition of the vessel.

530. Moreover, it is inexact to state that C.M. Olsen A/S did not know the M/V "Norstar". It may have not investigated it immediately before the Statement of Estimation of Value in 2003.[355] However this had not made much sense since the condition of the vessel had already deteriorated significantly due to its arrest.

531. C.M. Olsen AS had seen the photos of the vessel taken before the Italian detention, and knew very well the M/V "Norstar" as it had also fixed the tanker which was under a time charter for the major oil company Brega Petroleum Co.Ltd.

532. Those photos of the M/V "Norstar" had been made before the arrest.[356] In addition, C.M. Olsen A/S knew the M/V "Norstar" before entering into the charter contract of 10 May 1998 because it had inspected it prior to the signature of the contract.

533. Panama's position is that by providing such a standard of evidence, the burden of proof now shifts to the respondent to prove that this assessment was wrong.

534. In addition, while in the *Diallo* case Mr. Diallo was unemployed and therefore a loss of remuneration was not proven, in the present case the M/V "Norstar" had a current charter contract. This proves that without the arrest, a profit in the amount of the agreed charter (after deduction of costs) would have been achieved. The loss of profit is therefore proven by reason and in the amount, by the charter contract existing at the time of the arrest.

535. If Italy does not discharge this burden, the *prima facie* evidence should be deemed sufficient, particularly in light of the fact that after the enforcement of the arrest, Italy has been the only party that has had access to all documents concerning the M/V "Norstar", and that it has only been producing these as suits its interests.[357]

536. As the seizing State, Italy should have meticulously appraised the property after subjecting it to such a forceful action. During the enforcement of a vessel's arrest, a thorough survey and inventory of all the goods is evidence of good practice.

537. This inventory should have been signed by the Captain and the enforcing authorities, precisely to avoid any conflict concerning the condition of the vessel. The absence of such document shall not prejudice any of the claims concerning the vessel or any other person therewith connected.

538. Italy asserts, without any further explanation, that Panama "confuses the criteria used for estimation of the damage for the direct loss with the criteria used for estimation of *lucrum cessans*".[358] Without detailed reasoning, however, it is just as impossible for Italy to sustain its argument as it is for Panama to oppose it.

539. Finally, "it is a litigant seeking to establish a fact who bears the burden of proving it."[359] It is the duty of the accusing party to prove the facts on which it relies. As a

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[355] Memorial, Annex 5.
[356] Annex 4.
[357] *Infra*, Chapter 6(VII), paras. 573-591, pp. 89-92.
[358] Counter-memorial, para. 294.
[359] *Case Concerning and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Judgment on Jurisdiction and Admissibility dated 26 November 1984, para. 101, p. 437.

counter-claimant, Italy bears the burden of proof concerning such facts on which it relies to make its case. Italy has not complied with such duty.

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

540. Italy cited the *Diallo* case before the International Court of Justice (ICJ) to support its response to Panama's claim of damages due to the owner's loss of revenue. However, because that case referred to the loss of professional remuneration for a detention of a manager,[360] not the loss of profits for the vessel, it has no bearing on this case.

541. In addition, while in the *Diallo* case Mr. Diallo was unemployed and therefore a loss of remuneration was not proven, in the present case the M/V "Norstar" had a current charter contract. This proves that without the arrest, a profit in the amount of the agreed charter (after deduction of costs) would have been achieved. The loss of profit is therefore proven by reason and in the amount, by the charter contract existing at the time of the arrest.

542. Italy also states that Panama has "failed to provide any objective quantification of the profits allegedly lost"[361], that they are "entirely speculative" and "based on events that are, at best, uncertain."[362]

543. This assertion is unfounded. As already stated, the amount of the loss of profit is proven on the basis of the charter contract. Concerning the possibility of twice exercising the option of renewal for one year, Panama has set out in detail the content of the agreement.[363] Therefore, Italy's assertion that the loss of profit is entirely speculative in nature and based on events that are, at best uncertain, is incorrect.

544. Italy further argues that figures are "exaggerated" and "hardly realistic" because "every ship requires, at least, periodical dry-docking for maintenance and administrative purposes"[364], concluding by adding that Panama's claim for damages "fails to deduct from the revenues generated by the ship-owner all costs directly or indirectly stemming from the operation of the M/V "Norstar""[365] as well as other costs such as those "related, inter alia, to: a) maintenance and dry-docking of the ship which, under the Time Charter Party, were the responsibility of the ship-owner; b) safety, such costs stemming from IMO's guidelines; c) corporate taxes and other taxes or duties".[366]

545. These expenses are already a part of the calculations and withdrawn from the revenue in the time charter hire.

546. Notwithstanding these criticisms, the Loss of Profit Calculation did take "lube oil consumption, freshwater consumption, stores consumption, provision consumption, communication expenses, monthly insurance expenses and management fee" into

[360] Counter-memorial, para. 297, p. 60.
[361] *Ibid.*, para. 298, p. 60.
[362] *Ibid.*, para. 300, p. 59.
[363] Memorial, para. 207 and Annex 2 therein.
[364] Counter-memorial., para. 302, p. 61.
[365] *Ibid.*, para. 303, p. 61.
[366] *Ibidem.*

consideration, assessing the sum of these expenses at $224,799.96 per annum.[367] Therefore, the objections by Italy are unfounded. T

547. Italy alleges Panama overestimated the potential use of the M/V "Norstar", stating that it was a 32-year old vessel at the time of seizure, accordingly requiring frequent maintenance. As well as not providing any evidence for, or calculations of, the extent of maintenance required, Italy did not give any reason why such a vessel could not be still a prosperous navigating enterprise.[368]

548. On 10 October 2017 Panama submitted to the Tribunal an Economic Report. The calculations will be updated taking into account the probable date of the hearing, the date of the judgment and the date on which Italy actually fulfills its obligation and effectively pays the amount that the Court decides.

549. In addition, the loss-of-profit calculation takes into account a mandatory class survey in drydock for 5 days ("*less: 5 off-hire days for mandatory class survey in drydock in 2000*") at a deduction of $ 15,710.65.[369]

C. Continued payment of wages

550. Italy objects to being held liable for lost wages due to its perceived lack of a direct causal link and an alleged absence of evidence.[370] In response, Panama cites the *res ipsa loquitur* doctrine, because no vessel is allowed to sail without a crew, and that after having entered into labor contracts, the shipowner is liable to continue paying the salaries of the crew for a reasonable period even when a vessel is arrested.

551. Therefore, the labor contracts for the crew remained in effect after the termination of the activities of the vessel for which they were hired, and consequently the crew is owed back wages. As the State responsible for this unjustified seizure, Italy bears total responsibility for this.

552. In addition, the causal link results from the fact that the owner - without the seizure of the M/V "Norstar" - could have paid the crew wages from the charter income. In the loss-of-profit calculation[371], the expected charter income in the period from 25 September 1998 was taken as a basis. The costs *i.e.* the crew wages have been deducted. The crew wages for the period from 25 September 1998 are therefore not included in the loss of profit. However, as the contracts with the crew did not end after the arrest, the wages actually paid must be taken into account as additional claims.

D. Costs and legal fees

553. Although Italy relies on the fact that this Tribunal has never departed from the rule that each party shall bear its own costs, it has not countered any of the grounds on which Panama based its claim related to this item.[372]

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[367] Memorial, Annex 18; Economic Report dated 9 October 2017.
[368] There are bunkering vessels built abt. 1950 still in good condition. For example, M/T *Bunkerservice*, call sign LLQB IMO Number 7017351; M/T *Griptank*, call sign LAQB, IMO Number 8331405;both of them fly Norwegian flag and are in operation today.
[369] Memorial, Annex 18, p. 1.
[370] Counter-memorial, para. 305, p. 62.
[371] Memorial, Annex 18.
[372] *Infra*, Chapter 6, Section VII, paras. 573-591, pp. 85-88.

554. Instead, Italy has only stated that "it leaves 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".[373]

555. Italy has completely avoided addressing any of the particular details that Panama's Memorial included concerning its costs.[374] Since Italy has not responded to any of the specifics, Panama requests the Tribunal to consider this as a tacit acceptance of its accounting, including that of its legal fees, as valid.

556. After all, Panama 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.

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

557. The Statement of Account from the Panama Registry shows the amount of taxes that are owed to the Panama Maritime Authority. However, Italy objects to being asked to cover these taxes and related fees, claiming the lack of a causal link between its conduct and the damages claimed.

558. If the M/V "Norstar" had not been arrested, it would have paid all the taxes and fees it owed to the Panama Merchant Marine in a timely fashion, as it had done until 1998.

559. Since in order to appear before this Tribunal it was necessary to prove that the M/V "Norstar" was registered in Panama, all such fees and taxes owed to Panama as certified by the Panama Maritime Authority are still owed and still part of the damages directly resulting from the vessel's arrest. The causal link arises from the fact that the owner without the seizure of the M/V "Norstar" could have paid the fees and taxes to the Panama Maritime Authority from the charter income.

F. Loss and damages suffered by the Charterer of the M/V "Norstar"

560. Italy stated that Panama did not provide evidence as to the amount and value of the fuel on board of the M/V "Norstar" at the time of its seizure in the Report of Seizure dated 25 September 1998[375]. Consequently, Italy does not consider itself not to be liable for the charterer's losses in this regard.

561. However if the vessel arrived to Palma it is unlikely that it did not have any fuel on board. Panama contends that the Italian conclusion does not hold because if a *prima facie* evidence has been provided about the amount of fuel on board, it is up to the arrestor State to provide evidence by means of an inventory of all goods on board, including fuel, at the moment of the arrest, which was initiated without any prior notice.

562. The vessel arrived Palma de Mallorca almost full of gasoil in separate bunkertanks. During operation on the high seas between Mallorca and Ibiza and during loading port in Algeria, transfer of bunkers was made according to clause in the time charterparty as a part of charterers responsibility.

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[373] *Ibid.*, para. 310, p. 62.
[374] *Ibid.*, para. 188-192.
[375] *Ibid.*, para. 315, p. 63.

563. As a proof of the amount of fuel on board of the M/V "Norstar" at the time of the seizure, we present an email report sent on 27 May 2001 by Mr. Emil Petter Vadis, at that time Managing Director of the Intermarine A.S.[376]

564. On 25 March 2013 a Power of Attorney was granted by the shipowner to Mr. Kjell Hagen to inspect the vessel, once known that it was going to be sold in public auction.[377]

565. The vessel should be issued a Certificate/Statement for the remaining cargo and slop/ballast onboard because the remaining cargo had to be discharged if it was going for scrap. Such remaining bunkers had to be contaminated and therefore destructed. Otherwise taxes should have to be paid. During the inspection on 1 April 2013, all hatches for cargo tanks had been opened and probably some bunker could have been discharged to boats by using portable pumps.

566. Panama has argued that the loss of revenue of the charterer can only be estimated because, due to the long time lapsed, documents are no longer available. Nevertheless, 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.

567. Italy's assertion that Panama's estimates are "not credible, as they are based on the oral assertions of individuals who were involved in the operation of M/V Norstar and in the alleged criminal plan in which it was involved"[378], is incomprehensible. Italy is clearly saying that Mr. Silvio Rossi's oral statements were not credible because he was accused in the criminal proceedings.

568. Italy once more disregards the fact that Mr. Silvio Rossi was acquitted of all charges and Panama strongly objects any *further* reference of Italy to any crime and any criminal conduct of any of the persons involved in the operation of the M/V "Norstar", and of this vessel itself, because no crime was ever committed.

G. Material and non-material damage to natural persons

569. Italy argues that there is no causal connection between the criminal proceedings followed in Italy, and the Convention, because those criminal proceedings would have been carried out, quite apart from the question of the seizure of the M/V "Norstar".[379]

570. However, article 87 has not only been violated by the seizure but also by unlawfully charging innocent persons for performing legal activities.

571. This was explicitly stated in the Memorial[380] and also explicitly included in the submissions.[381] These unlawful accusations resulted in material and immaterial damages, in particular significant psychological stress and expense due to the need to engage lawyers in their defense in the criminal proceedings.

572. These 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

[376] Annex 1.
[377] Annex 5.
[378] Counter-memorial para. 319, p. 64.
[379] *Ibid.*, para. 321, p. 64.
[380] Memorial, para. 79, p. 24.
[381] Memorial, para. 260, p. 66, first and third submissions.

acts performed beyond its territorial waters. Therefore, both the material and non-material damages of the natural persons as well as all legal expenses claimed by Panama in connection with the criminal proceedings are a result of the violation of the Convention.

VII. Italy´s procedural conduct

573. In addition to the arguments Panama has made in Chapter 4 concerning Italy's lack of compliance with its duty to act in good faith, Panama contends that Italy´s conduct throughout this trial has been aimed at stymieing Panama's efforts to cooperate and exchange evidence.

574. Instead of acting cooperatively as it had pledged it would, Italy has only provided feeble excuses and placed unreasonable conditions on Panama's access to documents that would shed light on the events of this case.

575. On 11 April 2017, Panama included in its Memorial a request for evidence from Italy as follows:

> 1. Certified copies of the file pertaining to the arrest of the M/V "Norstar" handled by the Ministry of Justice, Department of Justice for Business, Directorate of Criminal Justice (Ministero Della Giustizia, Dipartimento Per Gli Affari Di Giustizia, Direzzione Generale Della Giustizia Penale)
>
> 2. Certified copies of the file pertaining to the arrest of the M/V "Norstar" handled by the Ministry of Foreign Affairs, Legal Service of Treaties and Legislative Affairs (Ministero Degli Affari Esteri, Servizio Del Contenzioso Diplomatico Dei Trattati E Degli Legisl Legislative)
>
> 3. Certified copies of the file pertaining to the arrest of the M/V "Norstar" and the prosecution of Silvio Rossi, Captain Renzo Biggio, Arve Morch, Petter Emil Vadis, and Captain Tore Husefest at the Court of Savona (Corte di Savona).[382]

576. Since nearly four months had elapsed without an answer, Panama sent another communication on 8 August 2017, this time by means of a *Note Verbale*.[383] It was not until 19 September 2017 that Italy finally answered stating it had received "the request for disclosure and production of evidence formulated by Panama in Part IV of Panama´s Memorial of 11 April 2017" and "its letter dated 17 April 2017."[384]

577. It is notable that Italy, without even referring to any of the particular documents requested by Panama, stated that the identification of the relevant files "may be lengthy or, in some cases, impossible."[385]

578. Italy denied access to all of the files that Panama had requested and justified its refusal by interpreting such a request as encompassing "the entirety of a respondent´s file, or to all the documents in its possession….".[386]

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[382] Memorial, Part IV, Request for Evidence.
[383] Annex 6.
[384] Annex 7.
[385] *Ibidem.*
[386] *Ibidem.*

579. On 6 October 2017, another request was sent to the Tribunal which Italy received on 11 October 2017.[387] In this letter Panama stated that

> Since Italy knows that Panama has not ever had access to such files it was difficult to accept the validity of the Italian restraint" but that "there had lapsed enough time for Italy to state whether it will allow access to those files or if it is impossible to do so in respect of any of them.[388]

580. On the same date 11 October 2017, Italy sent another letter stating that

> a) Panama is asking Italy to produce 'the file regarding the arrest M/V Norstar'. Since the entire case before the Tribunal concerns the arrest of the M/V "Norstar", Panama is asking Italy to share all of the documents in its possession.[389]

581. In this letter, Italy accused Panama, once again, of "asking Italy to share the entirety of the documents concerning M/V Norstar case", and claiming that such a request "should not go to the detriment of fundamental principles of procedure", while failing to identify any of those principles

582. In order to further justify its denial, Italy then conflated the concept of "specific and precisely identified files" with the concept of "document".[390]

583. In fact, Panama has not requested all documents in the possession of Italy as Italy wrongly assumed, but just three specific files.

584. Panama proposed Italy allowed access "to the above precisely identified files to then allow Panama to ascertain the specific documents to be used at the hearing, if any."[391] Unfortunately, Italy did not satisfy this request.

585. The prosecution of this case was based on the application of Italian domestic law to activities carried out on the high seas by a foreign vessel and the persons involved. The specifics of those legal and judicial proceedings are contained within the particular files that Panama has identified and requested as evidence.

586. Italy has systematically denied access to the relevant documents, despite lacking support for its obstructionism from either the Convention or its Rules of Procedure.

587. Therefore, on 6 November 2017, Panama sent a message to the Registrar concerning the Italian conduct stating its position as follows:

> Panama requests access to files under the control of three different official branches of Italy as already mentioned in its own pleadings and documents, some of them even of unrestricted access to the parties interested such as criminal files already closed.

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[387] Annex 8.
[388] *Ibidem.*
[389] Annex 9.
[390] *Ibidem.*
[391] *Ibidem.*

Italy excuses its procedural conduct of denying access to potential evidence, based in some provisions which Italy itself characterizes as not applicable to the present case stating that Panama turns to Italy "to prove its own case."

Beyond its character of applicant, Panama is of the view that the burden of proof falls on both parties, especially on the one which is in better conditions to produce it. This does not ignore the classic rules but complement and refine them, making its eventual application more flexible in cases in which, as the present, the party which should produce the evidence according to the traditional rule, may be unable to do so for reasons completely alien to its will. This is based on the duty of cooperation and solidarity that parties must have towards the Tribunal, and put its weight on the shoulder of who can best do it.

Italy is the only party having the requested documentary evidence under its control. Therefore, there is a valid reason to urge it to cooperate[392] in order to ensure fairness in the eventual application of the rule on burden of proof.[393] Panama needs to have access to the requested evidence because it is aware of the rule *actori incumbit probatio* and needs to take every lawful reasonable step to comply with it.

It has already been held that this rule "does not relieve the respondent from its obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be."[394] The Tribunal must ensure that neither party obtains some unfair advantage over the other, and the best way to accommodate the need for fairness is through a flexible rule on burden of proof which should mean to request access to the litigant with the best possibilities.

An asymmetry in the parties' ability to produce evidence to support their claims and defences is inherent in this case. Therefore flexibility is needed where Italy is the party having a monopoly over access to written evidence.[395]

588. Openness and transparency promotes the efficiency of justice and improves the confidence in the system and its authorities. Judicial activities may be unfathomably opaque or fully transparent. In the first case, the process is dominated by the principle of clerical secrecy, in the second – by the principle of publicity.

589. In the interests of openness and transparency, there should be no reason for Italy to sequester the requested files from Panama and the Tribunal. In the interim, because it has been materially precluded from furnishing direct proof of certain facts by Italy's overt protectionism of its judiciary, Panama has requested that the Tribunal accept circumstantial evidence.

590. In the interests of reciprocity and cooperation, Panama has opened all of its files related to this matter to Italy. Yet, Italy has responded by saying that Panama

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[392] "It may be of some help to recall a litigant's duty to cooperate with international courts and tribunals in bringing forward evidence that will help them to decide the case." See A Riddell and B Plant, *Evidence Before the International Court of Justice* (2009), p. 49.

[393] Cfr. ICJ, Judgement on the *Case Concerning Pulp Mills on the River Uruguay*, para. 163:

> It is of course to be expected that the Applicant should, in the first instance, submit the relevant evidence to substantiate its claims. This does not, however, mean that the Respondent should not co-operate in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it.

[394] *Mexican-United States General Claims Commission (1923),* para. 6, p. 39.

[395] Annex 10.

"entirely misinterprets Italy's communication dated 11 October 2017", adding that "what is disputed is the extent to which a Respondent should be asked to assist the Claimant in proving its own case", and characterizing Panama's request as one demanding "the entire file regarding the arrest of the M/V "Norstar"" which exceeds "the reasonableness which presides over the application of any legal principle."[396] As explained above, this misrepresents both Panama's intention and its actions.

591. Instead, what Panama is requesting is what any party in such a dispute would be entitled to, namely, the facts. It is difficult to understand how the principle, *audiatur et altera pars,* has been respected given Panama's lack of access to the relevant files, despite the fact that they are intended to be public.

[396] Annex 11.

CERTIFICATION

Pursuant to articles 64(1) and 64(3) of the Rules of the Tribunal, I hereby certify that the copies of this Reply are true and that the translations into the English language made by Panama are accurate.

Nelson Carreyo
Agent

SUMMARY

592. There is ample evidence that by wrongfully exercising its criminal jurisdiction and its customs laws with regard to the bunkering activities of the M/V "Norstar" on the high seas, and by ordering and requesting its arrest, thereby preventing this foreign vessel to conduct legitimate commercial activities on the high seas, Italy has breached the right of Panama to enjoy the freedom of navigation on the high seas contained in article 87(1) and (2) of the Convention.

With a craving argument, and contravening the reference of all the documents presented by Italy itself, it has unsuccessfully intended to conflate the terms "bunkering activities" used by Panama with the crimes of smuggling and tax evasion, candidly stating that it has not disputed the legality of bunkering, and unreasonably using "bunkering" and "smuggling" as interchangeable words.

Before arresting the M/V "Norstar" Italy had to turn to the arguments of the indivisibility of acts and the doctrines of genuine link and constructive presence in order to try justifying it, and afterwards, although it was warned that it would be wrong to proceed, Italy went ahead and arrested. But it is even more serious to behave in such a way so as to insist on grounding its pleadings on the same arguments that had already been evaluated by its own jurisdictional authorities.

The arrest of the M/V "Norstar" was unlawful because its activities did not breach any laws or regulations of Italy that were applicable to it. The conduct of Italy, particularly concerning the unreasonably lapse passed without compensation has placed a severe burden on Panama in terms of the extensive legal work in litigating this case.

Since Italy arrested the M/V "Norstar" in exercise of its jurisdictional powers and based on the infringement of its customs and tax laws for the activities carried out by this vessel on the high seas, Italy has abused its rights in breach of Article 300 because it has used its authority for an end different from, and alien to, the right granted by the Convention to coastal States, a right created to protect such activities exclusively within the territorial sea.

Again with its desire to justify its behaviour concerning the wrongful arrest, Italy has then tried to put into the shoulders of the shipowner the aggravation of the damages caused by stating that in spite of its release it did not retrieve the vessel without evidencing any positive acts to effectively return the ship either to the shipowner, the charterer or the flag State.

Based on the above and the DARS Italy is to be held responsible for the above mentioned violations, and liable for the repair of the damages incurred by Panama and by all the persons involved in the operation of the M/V "Norstar" by way of compensation due for the breach of its international obligations in an amount which takes into account both, conduct that constituted a continuing wrongful act, and that which has indefinitely deepened such act's effects, all of which is relevant for determining the amount of compensation required.

The conduct of Italy over time has increased the amount of this claim both in terms of damages which ultimately led to its sale as scrap at public auction and in terms

CHAPTER 7
SUBMISSIONS

593. Panama requests the Tribunal to find, declare, and adjudge

FIRST: that by ordering and requesting the arrest of the M/V "Norstar", in the exercise of its criminal jurisdiction and application of its customs laws to bunkering activities carried out on the high seas, Italy has thereby prevented its ability to navigate and conduct legitimate commercial activities therein, and that by filing charges against the persons having an interest on the operations of this Panamanian vessel, Italy has breached

1. the right of Panama and the vessels flying its flag to enjoy freedom of navigation and other internationally lawful uses of the sea related to the freedom of navigation, as set forth in article 87(1) and (2) and related provisions of the Convention; and

2. other rules of international law that protect the human rights and fundamental freedoms of the persons involved in the operation of the M/V "Norstar";

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

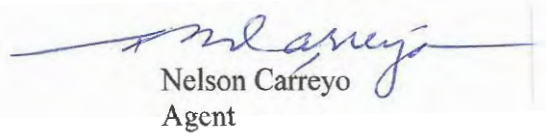
THIRD: that as a consequence of the above violations, Italy is responsible to repair the damages incurred by Panama and by all the persons involved in the operation of the M/V "Norstar" by way of compensation amounting to Twenty-six million four hundred ninety-one thousand five hundred forty-four U.S. dollars 22/100 (USD26.491.544.22) plus 145.186,68 EUR with simple interest; and

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

Nelson Carreyó
Agent

CERTIFICATION

Pursuant to articles 64(1) and 64(3) of the Rules of the Tribunal, I hereby certify that the copies of this Reply are true and that the translations into the English language made by Panama are accurate.



Nelson Carreyo
Agent