

**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**

**MEMORIAL OF THE REPUBLIC OF PANAMA**

**11 APRIL 2017**

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**PART I**  
**MEMORIAL OF THE REPUBLIC OF PANAMA**



# CHAPTER 1

## INTRODUCTION

1. In an Application dated 16 November 2015 and filed with the Registry of the International Tribunal for the Law of the Sea (hereinafter “The Tribunal”) on 17 December 2015 (hereinafter “the Application”), the Republic of Panama (hereinafter “Panama”) instituted proceedings against the Italian Republic (hereinafter “Italy” and or any of its judicial authorities) in a dispute concerning the interpretation and application of the United Nations Convention on the Law of the Sea (hereinafter “The Convention”) in connection with the arrest by Italy of the M/V Norstar, an oil tanker registered under the flag of Panama.

2. As this Memorial will further explain, this case concerns the unlawful arrest and detention of the M/V Norstar for activities conducted on the high seas, outside Italy’s jurisdiction. At the heart of this case lie the principles of freedom of the high seas and freedom of navigation as the foundation upon which the Convention rests.

Protecting the freedom of the high seas from undue interference is of fundamental importance to *all* States. This case thus bears far-reaching consequences for the interpretation and application of the Convention regarding the rights and duties of States in relation to lawful activities of vessels on the high seas.

3. Pursuant to the Application instituting proceedings and with regard to the Order of the President of the Tribunal which fixed the time limits for filing, Panama requests that the Tribunal consider this Memorial in connection with the dispute between Panama and Italy.

4. Panama submits

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 regarding bunkering activities carried out on the high seas, Italy hindered the Norstar’s ability to navigate and conduct legitimate commercial activities therein. In addition, by filing charges against the persons having an interest in the operations of the M/V Norstar, Italy has breached

1. the right of Panama and vessels flying its flag to enjoy the freedom of navigation and other internationally lawful uses of the sea related to it, as set forth in article 87(1) and (2) and related provisions of the Convention; and

2. other rules of international law such as the human rights and fundamental freedoms of the persons involved in the operation of the M/V Norstar;

SECOND: That by indiscriminately exercising its criminal jurisdiction and the application of its customs laws to bunkering activities carried out on the high seas by the M/V Norstar and by knowingly and intentionally maintaining the detention of the M/V Norstar, Italy acted contrary to international law, breaching its obligations to act in good faith and in accordance with the rights 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 paying compensation *provisionally* amounting to a minimum of 13,721,918.60 USD plus 145,186.68 EUR plus interest; and

FOURTH: That as a consequence of the refusal of Italy to answer any of the communications received from Panama, its failure to comply with its own judicial decisions to release the M/V Norstar in a timely manner, its neglect of proper maintenance of the ship while under detention, its prolonged delay to pay any compensation whatsoever, and its willingness to conceal information from both its counterpart and the Tribunal, Italy has provided ample evidence of its lack of good faith. As such, Italy should also be held liable for the full legal costs derived from this judicial action.

5. Panama makes this submission based on the following statement of facts and in accordance with the provisions of the Convention and other rules of international law as they apply to the wrongful arrest of the M/V Norstar, an oil tanker registered under the flag of the Republic of Panama. .

## PROCEDURAL HISTORY

6. On 16 November 2015, Panama instituted proceedings against Italy before the Tribunal concerning the interpretation and application of the Convention in connection with the arrest and detention by Italy of M/V *Norstar*, an oil tanker registered under the flag of Panama.

7. On 11 March 2016, Italy filed with the Tribunal written Preliminary Objections (hereinafter “the Preliminary Objections”) in which it challenged the jurisdiction of the Tribunal as well as the admissibility of Panama’s claim.

8. In accordance with the Order of the Tribunal dated 15 March 2016, on 9 May 2016, Panama filed “Observations and Submissions of the Republic of Panama to the Preliminary Objections of the Italian Republic”. On 8 July 2016, Italy filed “Written Observations and Submissions of the Republic of Italy in Reply to Observations and Submissions of the Republic of Panama”.

Public hearings on the Preliminary Objections were held by the Tribunal from 20 to 22 September 2016.

9. On 4 November 2016, the Tribunal issued its Judgment on the Preliminary Objections (hereinafter “Preliminary Objections Judgment”).

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

It also rejected the objections raised by Italy regarding the admissibility of Panama’s Application and found that the Application was indeed admissible.

10. In the Preliminary Objections Judgment the Tribunal found that Articles 87 and 300 of the Convention were relevant to the dispute between Italy and Panama.

In relation to the interpretation and application of Article 87 of the Convention, the Tribunal found that “[t]he Decree of Seizure by the Public Prosecutor at the Court of Savona against the M/V “*Norstar*” with regard to activities conducted by that vessel on the high seas and the request for its execution by the Prosecutor at the Court of Savona may be viewed as an infringement of the rights of Panama under article 87 as the flag State of the vessel.”<sup>1</sup>

11. Concerning the potential violations of the Convention, the Tribunal also found that “the right of Panama to enjoy freedom of navigation on the high seas is a right that belongs to

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<sup>1</sup> Preliminary Objections Judgment, paragraph 122.



Panama under article 87 of the Convention, and that a violation of that right would amount to direct injury to Panama”.

It further stated 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.”<sup>2</sup>

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<sup>2</sup> Preliminary Objections Judgment, paragraphs 269-271.

## **CHAPTER 2**

### **STATEMENT OF FACTS**

#### **I. The Panamanian economy relies heavily on maritime activities**

12. The service sector of the Panamanian economy is based largely on maritime activities such as ship registration. With more than 8,100 registered ships, Panama's fleet carries 81 million tons, the largest tonnage in the world and almost 22% of the world's total.

Panama has a duty to provide services to all of the vessels registered in its merchant fleet.

The fact that one of its vessels was unlawfully arrested by another state required Panama to defend its sovereignty by seeking protection under the rule of international law.

#### **II. The M/V Norstar**

13. The M/V Norstar, registered at the Panama Merchant Fleet, with Navigation Permit N° 2399597, was built in 1966 at the Seutelvans Yard, Fredrikstad, Norway, and her dimensions are 39.52m length, 7.40m beam, and 5.09m bow, 405gt.

She was made of steel, held the IMO number 6703056 and call sign 3FBH7. She had two main engines, two ancillary engines, two generators, and six cabins.

She was owned by Inter Marine & Co. A/S, a corporation registered in Norway on 06 October 1993, with an address of Vestfjordveien 73, N-3142 Vestskogen, 0722 Notteroy, Norway, represented by its President, Arve Morch, and operated in cooperation with Rossmare International S.A.S. as bunkering brokers.

14. From 1994 until August 1998, the M/V Norstar had been engaged in the commercial activity of supplying gasoil to megayachts (hereinafter "bunkering") on the high seas beyond the territorial seas of Italy, France, and Spain without interference from any of those states.

The Italian Coast Guard and its Custom Officers had regularly inspected the M/V Norstar, by sea with speed boats and by air with helicopters, without objecting to its offshore bunkering services.

15. On 10 May 1998, a form Shelltime 4 C/P was signed between Inter Marine & Co. (hereinafter "the ship owner") and Nor Maritime Bunker Co. Ltd. (hereinafter "the charterer"), a Maltese-registered company<sup>3</sup>, for the latter to use the M/V Norstar for US\$2,850.00 per day.<sup>4</sup>

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<sup>3</sup> Annex 1.

<sup>4</sup> Annex 2.

### **III. Bunkering is a lawful activity carried out on the high seas**

16. Bunkering is a lawful activity that can take place within a coastal state's waters or on the high seas. The M/V Norstar conducted bunkering activities supplying gas oil to megayachts on the high seas, outside the jurisdiction of any coastal State. As a lawful activity and as a legitimate use of the high seas, the only State that had jurisdiction over the bunkering activities of the M/V Norstar was the flag State, Panama.

### **IV. The decree of seizure, the arrest and detention of M/V Norstar**

17. On 11 August 1998 the Public Prosecutor of the Republic of Italy at the Court of Savona Mr. Alberto Landolfi, issued the Decree of Seizure number 1155/97/21 R.N.R, ordering the arrest of the M/V Norstar<sup>5</sup>. In this order, Italy decided that the M/V Norstar and the oil products it transported should be “acquired as *corpus delicti*”, stating:

...pursuant to Articles 81(2) and 110 crim. code, Articles 40(1)(b) and 40(4) of Legislative Decree no. 504/95, Articles 292-295(1) of Decree of the President of the Republic no 43/3 and Article 4(1)(f) of Law no. 516/82, committed in Savona and in other ports of the State during 1997....

Having also noted that the mentioned goods are subject to mandatory confiscation pursuant to Article 301 of Decree of the President of the Republic no. 43/73...

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

18. The Decree of Seizure number 1155/97/21 also stated<sup>6</sup>:

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);

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<sup>5</sup> Annex 3.

<sup>6</sup> *Ibidem*.

-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.

19. On the same date (11 August 1998), the order was sent by way of international letter rogatory to Spain. In its letter rogatory, Italy asked Spain to “1) Immediately enforce the following Decree of Seizure, issued by this Court, of the motor vessel NORSTAR, as the prosecuted case concerns facts punishable under the law of both States and aimed at affecting the economic interests of the European Union.”

20. Italy grounded its order and request for the arrest of the M/V Norstar in the application of its criminal law system and legal provisions, as identified in the Decree of Seizure number 1155/97/21, dated 11 August 1998, as well as in the wrongful conclusion that the activity the vessel was carrying out on the high seas constituted a crime.

21. Based on the same legal provisions cited in the Decree of Seizure,<sup>7</sup> Italy also initiated criminal proceedings against Silvio Rossi, Captain Renzo Biggio, Arve Morch, Petter Emil Vadis, and Captain Tore Husefest, accusing them of offences of criminal association for smuggling and committing tax fraud in relation to the bunkering activities performed by the M/V Norstar.<sup>8</sup>

22. On 24 September 1998, Spain, at the request of Italy, executed the arrest of the M/V Norstar while she was in the Bay of Palma, Majorca, awaiting orders under the running Time Charter Party entered into by Nor Maritime Bunker Co. Ltd.

23. At the time of its arrest, the M/V Norstar was a seaworthy, legally manned, DNV-classed oil tanker, equipped with a Marpol oil monitor, an IOPP certificate, and an azimuth propeller/rudder system, and operated with the navigation license number 23995-97 and the Radio Station License number 26439-A, both issued by the Panama Maritime Authority.

This vessel and its ship owner had a well-established reputation as an ongoing business with important assets on board and a value of Six Hundred Twenty Five Thousand U.S. Dollars (00/100) (US\$625,000.00) as had been stated in its certification.<sup>9</sup>

At the time of its arrest, the vessel was laden with ... 177,566 MT gas oil in cargo tanks worth US\$612/MT: valued at US\$108.670.39

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<sup>7</sup> The Decree of Seizure cited Articles 81(2) and 110 of the Criminal Code, Articles 40(1)(b) and 40(4) of Legislative Decree no. 504/95, Articles 292-295(1) of Decree of the President of the Republic N° 43/3 and Article 4(1)(f) of Law no. 516/82.

<sup>8</sup> Annex 4.

<sup>9</sup> Annex 5.

24. All the evidence filed with the Tribunal during the Preliminary Objections phase has shown that the activities for which the M/V Norstar was arrested were carried out on the high seas, beyond the territorial sea of Italy and, therefore, outside its jurisdiction, as its Decree of Seizure itself states.<sup>10</sup>

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.<sup>11</sup>

26. Furthermore, Italy knew at the time of the arrest that the order and request of arrest of the M/V Norstar was in contravention of the Convention and other applicable provisions of International Law.

Thus, Italy knew that since the activity for which the M/V Norstar was arrested was conducted on the high seas, it did not have jurisdiction over the vessel and, thus, this activity did not constitute a crime, making the application of its criminal law system and customs laws in this instance an internationally wrongful act.

27. The unlawful conduct of Italy when applying its internal legal order intending to justify its request for the arrest of the M/V Norstar, could have ceased at any time after its execution, because on 4 September 1998 Italy, again, was advised of further relevant facts which could have prevented the damages incurred.

For instance, Italy knew that it had not promulgated a contiguous zone, so that the only zone under Italian jurisdiction was its territorial sea.

It was also reminded of the need to comply with international rules that did not only involve the interests of Italy but also of other states.<sup>12</sup>

28. Nevertheless, an application to lift the arrest of the M/V Norstar was refused by Italy, who on 18 January 1999 offered the release thereof against a security of Two Hundred and Fifty Million Lire (£ 250,000,000), an amount that the owner of the M/V Norstar was unable to provide as the long detainment had consequently led to a loss of all its source of income.<sup>13</sup> This decision was communicated to the ship owner on 29 June 1999.<sup>14</sup>

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<sup>10</sup> Preliminary Objections Judgment, paragraph 122: “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. “ [Emphasis added].

<sup>11</sup> Annex 6.

<sup>12</sup> Annex 7.

<sup>13</sup> Annex 8.

<sup>14</sup> Annex 9.

## **V. The judgments of the Italian courts**

29. On 13/14 March 2003, the Criminal Court of Savona acknowledged the absence of a rationale for believing that an offence had been committed within its territorial waters and decided that any fuel purchased by leisure boats and stored on board outside the territorial sea line was not subject to import duties, thereby absolving the accused of all criminal charges. The Savona court ordered the release of the M/V Norstar, as well as its restitution by being returned to its owner.<sup>15</sup>

30. On 18 March 2003, Italy sent to Spain a request for legal assistance (Magistrado del Juzgado de Instrucción número tres de Palma de Mallorca Via Alemania N.5 Palma de Mallorca) with a certified copy of the operative part of the judgment issued on 14 March 2003, ordering that the M/V Norstar be released and returned to its owner, and asking Spain “to execute the above-mentioned release order and inform the custodian of the ship of the order” and “check whether the property has really been taken back and send me the relevant record.”<sup>16</sup>

31. However, the restitution was not executed. In fact, this was impossible, because the vessel was already a total loss due to the five years that Italy had allowed to elapse without providing the essential maintenance work to keep it operative, and because no efforts were made to update the ship’s certificates and class designation.

Instead, on 21 March 2003, Italy threatened the owner of the ship with its judicial sale if he did not withdraw it within the term of thirty days.<sup>17</sup>

32. On 20 August 2003, before this threat was carried out, the Savona Public Prosecutor appealed the decision in front of the Court of Appeal of Genoa<sup>18</sup>, despite having full knowledge of its illegal conduct when ordering and requesting the arrest of the M/V Norstar, as well as of the aggravation of the damages that would accrue for its unlawful decision over the passage of time.

33. On 25 October 2005, the Court of Appeal of Genoa issued its judgment confirming the first instance decision of the Court of Savona. This time the Public Prosecutor did not challenge the decision, making the judgment final after many years of strenuous litigation on behalf of all the persons that had been wrongfully indicted in the arrest or otherwise affected by it.

34. Notwithstanding the decision of the first instance Criminal Court of Savona ordering the release and restitution of the M/V Norstar to her owner, and the confirmation of that

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<sup>15</sup> Annex 10.

<sup>16</sup> Annex 11.

<sup>17</sup> Annex 12.

<sup>18</sup> Annex 13.

decision issued on appeal by the Court of Genoa, Italy continued to refuse to take any active measures to ensure compliance with its own order.

35. On the contrary, Italy failed to instruct Spain as to how to comply with its release order, so that no further action in this regard was taken. Furthermore, it neglected to contact either the ship owner, the charterer, or the flag state so that they could make the necessary arrangements in compliance with the judicial order of restitution to the party entitled.

36. However, even if the ship owner, charterer, or flag state had been informed about the decision to return the vessel, the delivery could not have been made because, due to the seven years that Italy allowed to elapse without use and the necessary maintenance works to keep it operative, the vessel had already experienced such physical decay that it could only be considered as wreckage.

37. On 31 October 2006, the Court of Appeal of Genoa ultimately answered a request by Spain to demolish the M/V Norstar with the following statement:

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).<sup>19</sup>

38. This decision was sent to Spain with a copy to the Court of Savona via a communication from the Clerk of the Court, dated 13 November 2006.<sup>20</sup>

In other words, the Court of Genoa said that the order to return the vessel still had to be executed and that this fell to the Tribunal of Savona. By failing to follow through with this, Italy, in effect, failed to carry out its international obligations.

39. By wrongfully applying its laws while entertaining jurisdiction over the M/V Norstar and detaining it for more than eighteen (18) years, Italy not only prevented the M/V Norstar from continuing its trading operation, but also let it deteriorate to such an extent as to become valueless, except as scrap.

40. As a result of the wrongful arrest, the ship owner was not only deprived of his property, but was also forced to go out of business. Moreover, the owner has been unable to pay the

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<sup>19</sup>Annex 14.

<sup>20</sup>*Ibidem*.

registration rights, which are now valueless, but still owed to the Panama Maritime Authority.<sup>21</sup>

41. Furthermore, as a result of the wrongful application of its laws and jurisdiction to arrest the M/V Norstar, Italy has caused Nor Maritime Bunker Co. Ltd., the charterer, to experience a significant loss of income, ultimately leading to its demise. Additionally, the captain and crew lost their jobs as a result and, therefore, could not continue earning salaries and other labor benefits.<sup>22</sup>

42. As a result of wrongfully submitting Silvio Rossi, Captain Renzo Biggio, Arve Morch, Petter Emil Vadis, and Captain Tore Husefest, to criminal trial, these individuals have suffered significant personal and financial damages. Not only have they incurred a great deal of pain and suffering but they have also had to face a long proceeding in which they had to invest large amounts of money to pay substantial legal fees over the course of the extensive legal proceedings in Italy.

43. In order to protect the rights of the M/V Norstar and of all the persons involved or interested in its operation, it has been necessary for Panama to obtain professional legal advice, start proceedings in Panama, and hire lawyers in Hamburg and Italy.

44. Italy has also failed to note that the Appeals Court of Genoa confirmed the judgment of the lower court of Savona on the grounds that the transfer of supplies occurred on the high seas, outside the territorial waters of Italy, a fact previously confirmed even by the Public Prosecutor of Savona himself.

45. On the other hand, to date Italy has never referred to the reasoning of its Judiciary concerning the improper seizure of the M/V Norstar, nor even to what the grounds for the acquittal of the persons accused were, suggesting that these facts are of no relevance.

46. Between 2001 and 2010, Panama sent several communications to Italy concerning the arrest of the M/V Norstar. In these communications, as in this Memorial, Panama claimed compensation for damages caused by the arrest order and request, because bunkering on the high seas was in accordance with the Principles of Freedom of Navigation and Commerce, rather than in violation of international law.

47. The fact that Italy had not taken any measure to execute the release of the M/V Norstar to the flag state, the charterer, or to its owner after such an unreasonable length of time despite its own order to do so, augments Italy's responsibility to pay fair compensation due to its reckless conduct.

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<sup>21</sup> Annex 15.

<sup>22</sup> See a more detailed information in Chapter 4.



48. Despite all the efforts by Panama to remind Italy that its conduct was contrary to the Convention and that the M/V Norstar had not committed any crime, Italy has insisted on describing the activities carried out by the M/V Norstar as “offences of criminal association aimed at smuggling and tax fraud” in the Statement of Facts section of its Preliminary Objections, contrary to the unequivocal judgments of the presiding Italian courts’ rulings on the case.<sup>23</sup>

49. In its Preliminary Objections, 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.”

This is of course an incorrect representation of the facts and the law. Italy also has continued to ignore what its own Courts have repeatedly affirmed, that the charges against M/V Norstar were dismissed as unfounded, because the activities which formed the basis for the charges brought occurred on the high seas outside its jurisdiction.

50. In spite of all communications received by Italy from Panama, claiming damages caused by the unlawful arrest ordered and requested by Italy against the M/V Norstar, Italy has never demonstrated any interest in complying with its obligation to compensate those with an interest in the Norstar for the damages caused.

51. On the contrary, Italy has consistently avoided any discussion with Panama concerning this case, instead refusing to provide any explanation for its unlawful, unjustifiable, and unreasonable conduct. As the Tribunal stated in its Judgment on the Preliminary Objections, all of the communications Panama sent to Italy concerning this case remained unanswered, with the exception of one Note Verbale dated 25 January 2005, which simply confirmed that Italy had received one of the communications that Panama sent.<sup>24</sup>

52. Thus, the only real response Panama has received from Italy regarding its claim of has been the filing of its Preliminary Objections, which have only prolonged the achievement of a resolution of the present case on its merits and has also deepened the damages caused.

53. During all the years since the execution of the arrest of the M/V Norstar, Italy has acted<sup>25</sup> in bad faith, with full knowledge that damage would result. Italy acts were discriminatory because no proceedings appear to have been brought against those vessels or persons involved in receiving or buying the gas oil supplied to them by the M/V Norstar.

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<sup>23</sup> Italy’s Written Preliminary Objections, paragraph 8.

<sup>24</sup> Preliminary Objections Judgment, paragraph 98.

<sup>25</sup> When we attribute to Italy the commission of an “act”, we include omissions as mentioned in footnote 33 of the General Comments of the Draft Articles which says that “For the purposes of the articles, the term “internationally wrongful act” includes an omission and extends to conduct consisting of several actions or omissions which together amount to an internationally wrongful act. See paragraph (1) of the commentary to article 1.” Commentary (1) to Article 1 of the Draft Articles confirms that “An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both.”

Italy has used delay, silence, and contradictions as its defense against the Panamanian claim for damages, which at least since 2001, has been concealed to us and to the Tribunal.

54. On 12 March 2015, the M/V Norstar was put up for public auction as ordered by the Port Authority of Baleares, with the base price of three thousand euros (€3,000.00), and on 25 March 2015, the auction was published in the official state bulletin.<sup>26</sup> On 26 February the Norstar was sold and withdrawn from the port premises.<sup>27</sup> Incredibly, neither the ship owner, the charterer, or the flag state has ever been informed by Italy that this public auction took place and what its outcome was.

55. The state in which the M/V Norstar had been left by Italy was depicted in the mass media publication “Diario de Mallorca” and also via the internet where it was mentioned that

the legal litigation began when the consignor company, Transcoma, stopped acting as such, settled the pending invoices, and initiated the complaint against the ship owner, Inter Marine & Co. According to the responsible Transcoma, in 2005 it “complied” with its responsibility to satisfy the authorities and the suppliers until the owner stopped paying the invoices.<sup>28</sup>

56. The widespread news published regarding the end of the Norstar not only greatly diminished the reputation of the ship owner, but also had a negative impact on the reputation of Panama, which has always been interested in defending and preserving its fleet for the reasons given in paragraph 5.

57. In sum, the facts of this case demonstrate clearly that Italy acted recklessly, in bad faith, and in a manner contrary to international law by violating the important customary principle of free navigation of the high seas.

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

Eighteen years have elapsed since the wrongful arrest and detention of M/V Norstar for bunkering activities carried out on the high seas. During that time, Panama had tirelessly attempted to communicate with Italy to correct the situation and obtain the release of the vessel. Those communications were not only unanswered but concealed, a behavior far removed from that conducted in good faith. Italy deliberately kept silent from 2001 to 2015 when during the Preliminary Objections phase it was forced to disclose, for the first time, that it had received the written claims from Panama.

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<sup>26</sup> Annex 17.

<sup>27</sup> Annex 16.

<sup>28</sup> *Ibidem*.

The unreasonable delay in releasing the vessel caused irreparable harm to Panama, the ship owner, the charterer, and the crew members. Since none of the offences the M/V Norstar was charged with were sustained, since there are no outstanding public or general interest issues, nor any need to secure the payment of taxes or other contributions or penalties, and since the conduct of Italy has contravened several provisions of the Convention and other rules of International Law, Panama has a legitimate claim to compensation for the damages suffered because Italy has disavowed its obligations towards Panama under the Convention, in particular, and international law, in general.

In the following Chapter, Panama will demonstrate that Italy acted in violation of international law and incurred international responsibility, for which it should provide appropriate reparation in the form of compensation.

## CHAPTER 3

### LEGAL GROUNDS

58. This Chapter discusses the legal grounds applicable to the present case.

While the facts are clear and amply demonstrate the wrongful conduct of Italy towards Panama, the legal issues involved in this case are of utmost importance to the rights of Panama to ensure that States can exercise their freedom of navigation on the high seas without any unlawful interference.

59. In this Chapter, Panama will analyze the substantive violations of the Convention and international law.

This case concerns two fundamental principles of the law of the sea:

1. freedom of navigation on the high seas and
2. the obligation of States to act in good faith and in a manner that does not abuse this right.

60. Panama contends 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 thereby prevented the ability of a registered Panamanian vessel to freely navigate and conduct legitimate commercial activities.

61. Additionally, by filing charges against the persons having an interest in the operations of the M/V Norstar, Italy has breached:

A. Article 87 of the Convention which grants all states the freedom of navigation on the high seas;

B. Article 300 of the Convention pertaining to the obligations of states to act in good faith and in a manner which does not constitute an abuse of right;

C. Other rules of international law concerning the human rights and fundamental freedoms of the persons involved in the operation of vessels such as the M/V Norstar, and consequently,

D. Italy is responsible for the damages incurred by Panama and by all the persons involved in the operation of the M/V Norstar *provisionally* amounting to a minimum of 13,721,918.60 USD plus 145,186,68 EUR plus interest and costs.

## **I. Italy violated article 87 of the Convention. - The responsibility of Italy for the breach of its international obligation concerning the principle of the freedom on the high seas**

### **1. Introduction**

62. It is important to review the rules of jurisdiction under international law which form the context for the discussion of Italy's unlawful conduct. Under international law, a State may exercise jurisdiction within its territory and territorial waters to prescribe rules (prescriptive jurisdiction) and to enforce their laws (enforcement jurisdiction).

63. Relying on general principles of jurisdiction under international law, Panama submits that the arrest of the M/V Norstar and its crew members was unlawful because the ship did not violate any laws or regulations of Italy that were applicable to it.

64. As the Tribunal has stated: "under the Convention, a coastal State is entitled to apply customs laws and regulations in its territorial sea ... In the view of the Tribunal, the Convention does not empower a coastal State to apply its customs laws in respect of any other parts of the exclusive economic zone not mentioned above".<sup>29</sup> Thus, beyond its territory or territorial sea, a State does not have prescriptive or enforcement jurisdiction.

65. In this case, the unlawful arrest and detention of M/V Norstar, a vessel flying Panama's flag, is the issue. Italy cannot unilaterally criminalize conduct that occurs on the high seas, outside its territory. By arresting the Norstar, Italy applied its laws extraterritorially, thereby violating principles of jurisdiction under international law.

66. Therefore, Italy's laws cited in its Decree of Seizure are not applicable to conduct that occurred on the high seas. The fact that the arrest was executed while the vessel was in a port in Spain does not absolve Italy from having unlawfully extended the application of its criminal and customs law to proscribe conduct that occurred outside its jurisdiction.

67. The regulation by Italy of conduct from other States that occurs on the high seas outside its jurisdiction is incompatible with the Convention, namely the freedom of the high seas (Article 87) and the principle of good faith (Article 300).

Having established these jurisdictional principles, this Chapter now turns to the analysis of the freedom of the high seas and the specific violations of the Convention in the present case.

### **2. The nature of Article 87 of the Convention**

68. Article 87 of the Convention establishes this freedom of navigation on the high seas which all states enjoy. It affirms that the high seas are open to all states and reads in the relevant parts as follows:

Freedom of the high seas

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<sup>29</sup> The *M/V Saiga (N° 2) Judgment*, paragraph 127.

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.

69. The opening sentence of article 87(1) formulates the general principle that the high seas are open to all states, and continues with a non-exhaustive list of freedoms which come within the scope of the overall concept of the freedom of navigation. Paragraph 2 clarifies that in the exercise of these freedoms, 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. The freedom of the high seas, and freedom of navigation therein have a long history under the law of nations and are the very foundation for the law of the sea.<sup>30</sup>

70. The concept of freedom of navigation has been the object of a number of international arbitral and courts decisions as, for example, the arbitral tribunal decision of 2 December 1921 handed down in a case between Great Britain and the United States, which affirmed that “except by special convention or in time of war, interference by a cruiser with a foreign vessel pursuing a lawful avocation on the high seas is unwarranted and illegal”.<sup>31</sup>

71. The freedom to navigate includes all activities and rights ancillary to, related to, or contained within that freedom itself. This has the consequence that on the high seas the presumption is that the rule of freedom applies not only to activities mentioned in article 87, but also to new or unnamed activities that constitute lawful uses of the sea.<sup>32</sup>

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<sup>30</sup> See generally Hugo Grotius, “*Mare Liberum*”, published in 1916 by the Carnegie Endowment for International Peace with an English translation by R. Van Deman Magoffin. The basic concept of the freedom of the high seas arose in a time of growing importance of maritime commerce. Grotius’ theory, named *mare liberum*, prevailed due to its economic necessity at that time. The original idea was that the gain of all States by unhindered navigation clearly outweighs the benefit of one State which excludes all others from using the ocean for the benefit of a few States barring access to certain parts of the ocean to others. Grotius’ *mare liberum* was originally an opinion delivered as legal counsel for the Dutch East India Company concerning their right of access to the trade of the Indies after Portugal had sought to restrict Dutch commercial activities in the region. Hence, as early as the 17<sup>th</sup> century, there seemed to be common persuasion of the benefits of free trade, at least as far as it concerned the high seas. It was concluded that the greatest benefit would be achieved if all participants were permitted the utmost free access of navigation, subject only to imperative demands for protecting common exclusive interests. (see Philipp Wendel, “State Responsibility for interferences with the freedom of navigation in Public International Law” (Springer Verlag 2007) Volume 11 *Hamburg Studies on Maritime Affairs*, p. 8).

<sup>31</sup> *Owners of the Jessie, the Thomas F. Bayard and the Pescawha (Great Britain) v. United States*, 2 December 1921, Reports of International Arbitral Awards, Vol. VI, p. 58.

<sup>32</sup> Tullio Treves, “High Seas”, in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) page 4.

72. In principle, an activity which is compatible with the status of the high seas, and which involves no claim to appropriation with the rights of other States or the international seabed should be admitted unless prohibited by a specific rule of any provision in the Convention.<sup>33</sup> Bunkering of other vessels on the high seas, which the M/V Norstar conducted outside the jurisdiction of Italy or any other State, is a lawful activity. Panama has the right under the Convention to navigate the high seas without any unlawful interference by third States, such as Italy.

73. The custom of the sea and the law of nature furnished the basis for this rule of general international law and the peremptory obligation of not hampering the free navigation and trade on the high seas expressed by Article 87.

74. The freedom of navigation includes the right to enter upon the oceans and the right to passage 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. Early authors called this aspect *ius communicationis*.<sup>34</sup>

75. In this case, Italy has hindered Panama's right of navigating the oceans, by subjecting the M/V Norstar to Italian laws that apply to its own vessels within its own territorial waters. Such laws are unsupported by general consensus among states and, therefore, are superseded by Article 87 when applied to navigation in international waters.

76. Panama thus submits that the bunkering of gas oil by the M/V Norstar to other vessels, including those of other states, falls within the freedom of navigation and other internationally lawful uses of the sea related to that freedom. As Judge Vukas affirmed in the *Saiga* case, bunkering

“is related to the freedom of navigation “and associated with the operation of ships”. This claim is not difficult to defend from the point of view of navigation as well as international law. Supply of bunkers is the purpose of the navigation of a tanker, and refuelling is essential for further navigation of the ship to which gas oil has been supplied.”<sup>35</sup>

77. Upon a thorough review of the *travaux préparatoires* of the Convention, Judge Vukas confirmed that “[b]unkering should, although as a rather new activity at the time it was not expressly mentioned at the Conference, be considered an “internationally lawful use of the sea.”<sup>36</sup>

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<sup>33</sup> David Attard and Patricia Mallia, “The High Seas” in *The IMLI Manual on International Maritime Law: Volume I: The Law of the Sea* (eds Attard and others) (Oxford University Press 2014) page 243.

<sup>34</sup> Philipp Wendel, “State Responsibility for interferences with the freedom of navigation in Public International Law” (Springer Verlag 2007) Volume 11 *Hamburg Studies on Maritime Affairs*, p. 5-55

<sup>35</sup> *The M/V Saiga (No. 2) Case, Saint Vincent and the Grenadines v. Guinea*, 1 July 1999, Separate Opinion of Judge Vukas, paragraph 17.

<sup>36</sup> *Ibidem*.

78. Thus, bunkering, as a lawful activity, is included in the freedom of navigation and is a lawful use of the seas; in arresting a vessel for carrying out bunkering on the high seas, Italy violated the principle of the freedom of the high seas and Panama's freedom of navigation therein, contravening Article 87 of the Convention.

### 3. The nature of the violation of article 87 of the Convention

79. By ordering and requesting the arrest of the M/V Norstar, in the exercise of its criminal jurisdiction and application of its customs laws to bunkering activities carried out on the high seas, thereby preventing the Norstar's ability to navigate and conduct legitimate commercial activities therein, as well as by filing charges against the persons having an interest in the operations of the M/V Norstar, Italy violated the obligation to respect free navigation on the high seas accorded by the Convention. Italy's conduct breached its obligation by disregarding the interest of another state to enjoy free navigation and the exercise of international trade or commerce<sup>37</sup> on the high seas.

80. Under the Convention, no state is entitled to apply or enforce its customs laws in relation to bunkering activities on the high seas. There is no justification for Italy to apply its customs laws and exercise its criminal jurisdiction beyond its territorial waters.

81. Panama argues that bunkering on the high seas constitutes the exercise of the freedom of navigation and other internationally lawful uses of the sea related to the freedom of navigation, as provided for in article 87.

As it was stated in the *Saiga* case, freedom of navigation "is subsumed under the freedom of the high seas, which is itself based and dependent on a broader freedom of maritime communication and intercourse, given the fact that the sea is essentially an indispensable global highway".<sup>38</sup>

82. The actions taken by Italy were not in conformity with accepted norms and principles of international law and violated article 87(1). Panama argues 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 arrest a vessel in port with the goal to preclude the vessel from returning to the high seas.

83. In exercising its criminal jurisdiction to apply or enforce its customs laws in relation to the bunkering activities to the Norstar, Italy did not act in conformity with its obligations towards Panama under article 87 of the Convention and other rules of international law, a conclusion that will be complemented by the next section.

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<sup>37</sup> The Oscar Chinn case, PCIJ, 1934, p. 83 where the judgment said: "Freedom of navigation implies, as far as the business side of maritime or fluvial transport is concerned, freedom of commerce also".

<sup>38</sup> *The M/V Saiga (No. 2) Case, Saint Vincent and the Grenadines v. Guinea*, 1 July 1999, Separate Opinion of Judge Laing, p. 11.



4. The jurisdictional connection issue (*locus*) and the violation of article 87.

84. The Permanent Court of International Justice has found that

Vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.<sup>39</sup>

85. The activities for which the M/V Norstar was arrested were carried out on the high seas. Italy had to recognize that the activities performed by other states on the high seas are free because they are not subject to the sovereignty of any particular state's jurisdiction except that of their flag State, i.e. Panama. However, Italy did not act on this knowledge.

86. Italy may prosecute criminally or civilly any persons, including seizing their property, when such arrest is for activities performed within its territorial waters. But when Italy, by exercising its criminal jurisdiction and applying its customs laws, orders and requests the arrest of a foreign vessel, such as the M/V Norstar, for activities carried out on the high seas outside its territorial and customs jurisdiction as a coastal state, it breaches its obligation to allow States such as Panama to have legitimate access to and use of the high seas. Thus, such an action is an international unlawful act in violation of article 87 of the Convention and other rules of the law of nations.

87. Article 87 of the Convention precludes Italy from extending the application of its customs laws and regulations to the high seas. Italy's customs laws cannot be applied to ships flying the flag of Panama or of any other state on the high seas.<sup>40</sup> Consequently, the measures taken by Italy against the M/V Norstar were unlawful and directly injured Panama's sovereignty, the M/V Norstar being a productive unit of the fleet organized and operating under its flag.

88. The Tribunal has held that by applying its customs laws to the EEZ and as a consequence seizing a foreign vessel and prosecuting its master, a state acts in a manner contrary to the Convention.<sup>41</sup> If the Court has already ruled that the application of domestic laws in the EEZ is contrary to the Convention, it is even more so with regard to the high seas.

89. Panama argues that the Tribunal will need to consider whether the application of the laws cited by Italy in its Decree of Seizure and appeal are compatible with what the

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<sup>39</sup> *S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, p. 25.

<sup>40</sup> In the *Saiga* case when deciding on the question of the application of Guinea's customs laws in the exclusive economic zone, the Tribunal stated that: "under the Convention, a coastal State is entitled to apply customs laws and regulations in its territorial sea ... In the exclusive economic zone, the coastal State has jurisdiction to apply customs laws and regulations in respect of artificial islands, installations and structures (article 60, paragraph 2). In the view of the Tribunal, the Convention does not empower a coastal State to apply its customs laws in respect of any other parts of the exclusive economic zone not mentioned above", *The Saiga* (N° 2) *Judgment*, paragraph 127.

<sup>41</sup> See *the M/V Saiga* (N° 2) *Judgment*, paragraph 136.

Convention already found in the *Saiga* case. In that case, the Tribunal said that there was “nothing to prevent it from considering the question whether or not, in applying its laws to the *Saiga* in the present case, Guinea was acting in conformity with its obligations towards Saint Vincent and the Grenadines under the Convention and general international law. *Case Concerning Certain German Interests in Polish Upper Silesia*.”<sup>42</sup>

Panama’s contention is that such application of the Italian laws are not compatible with the Convention in this case either.

5. On the high seas, the M/V Norstar was subject to the exclusive jurisdiction of Panama as its flag state

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

91. The principle of exclusive jurisdiction of Panama as the flag State is derived inter alia from articles 92 and 97(1) and (3) of the Convention.

Article 92 states that ships shall sail under the flag of one State only and shall be subject to its exclusive jurisdiction on the high seas.

Article 97(1) expressly confers on Panama, as the flag State, exclusive jurisdiction over matters involving any question concerning the criminal responsibility of its ships and all the persons involved in their operations.

And Article 97(3) states that in the event of any incident of navigation concerning a ship on the high seas, involving the penal responsibility of the master or of any other person in the service of the ship, no arrest or detention of the ship shall be ordered by any authorities other than those of the flag State.

92. By ordering the arrest of the M/V Norstar in the exercise of its criminal and tax jurisdiction for bunkering activities performed by Panama on the high seas, Italy also breached Articles 92, 97(1) and 97(3) of the Convention. The assertion of invocation of jurisdiction from a State additional to the flag State unavoidably results in international friction.

93. The arrest of the M/V Norstar was an extreme, violent, and forceful action on the part of Italy not in conformity with its obligations under the Convention because it denied Panama the ability to freely navigate and trade on the high seas.

94. If Italy had respected article 87, as well as the principle of exclusive jurisdiction established by the Convention, it would have allowed the M/V Norstar continued access to the high seas. The Convention would mean very little if any state were permitted to order and request the arrest of any foreign vessel for an alleged violation occurring outside its own jurisdiction.

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<sup>42</sup> *Ibidem*, paragraph 100.

95. If the freedom of navigation under paragraph 1(a) of article 87 of the Convention is subject to the general responsibility under international law imposed on flag states to act in conformity with their international obligations, it also requires that coastal states do the same. If a State could legislate and arrest another State's vessel for activities that occurred on the high seas, the concept of freedom of the high seas would become meaningless.

96. In article 87 paragraph 2, the requirement of "due regard" is a qualification of the rights of States in exercising the freedom of the high seas. The standard of "due regard" requires all States, in exercising their high seas freedoms, to consider the interests of other States and refrain from activities that interfere with the exercise by other States of their parallel freedom to do likewise.

97. As the International Law Commission stated in its Commentary in 1956, "States are bound to refrain from any acts that might adversely affect the use of the high seas by nationals of other States. The construction in paragraph 2 recognizes that all States have the right to exercise high seas freedoms, and balances consideration for the rights and interests of all States in this regard".<sup>43</sup>

98. Panama argues that the order and request of arrest made by Italy adversely affected the use of the high seas by the Panamanian vessel and all the persons involved in its operation.

The general principle of the Latin maxim *sic utere tuo alienum non laedas* applies in the sense that a State should not cause or permit ships flying its flag to do things on the high seas that interfere, whether maliciously or unreasonably, with the interests of other users.

This was asserted in the *Fur Seal Arbitration*.<sup>44</sup> If a State does not permit ships to interfere with its own interests, it should not interfere with the interests of others, either.

By its wrongful conduct, Italy has interfered unreasonably with the interests of Panama as the flag State with exclusive jurisdiction over M/V Norstar on the high seas.

99. The arrest ordered and requested by Italy in the exercise of its criminal jurisdiction and application of its customs regulations, breached the freedom of navigation accorded to vessels registered under the flag of Panama and, therefore, is not in conformity with the Convention. This conduct constitutes an unlawful act giving rise to international responsibility as explained further in more detail in Section D(1).

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<sup>43</sup> David Anderson, "Freedoms of the High Seas in the modern Law of the Sea", in *Modern Law of the Sea*, Volume 59 (Publications on Ocean Development 2007), page 234.

<sup>44</sup> *Ibidem*.

**III. Italy violated Article 300 of the Convention. The responsibility of Italy for the breach of its international obligations concerning the principle of good faith and the doctrine of abuse of right as described in Article 300 of the Convention.**

1. General remarks on good faith and abuse of rights

100. Article 300 of the Convention states that States shall fulfill in good faith the obligations assumed under the Convention and shall exercise the rights, jurisdiction and freedoms recognized in the Convention in a manner which would not constitute an abuse of right.

As the Tribunal recalled, “it is apparent from the language of article 300 of the Convention that article 300 cannot be invoked on its own.”<sup>45</sup>

101. It has been demonstrated in the present case that Italy breached the rights and obligations governed by article 87 of the Convention concerning the freedom of navigation on the high seas.

In the words of the Tribunal, “the question arises as to whether Italy has fulfilled in good faith the obligations assumed by it under article 87 of the Convention” and thus “article 300 of the Convention is relevant to the present case.”<sup>46</sup>

Panama contends that Italy has not fulfilled the obligations assumed by it under article 87 of the Convention in good faith, thereby invoking article 300.

102. Whereas states enjoy the freedom of navigation on the high seas, they also have the obligation to respect such freedom. In other words, the freedom of navigation established under Article 87 guarantees a right to freedom of navigation on the high seas to all States as well as an obligation to respect other States’ freedom to navigate without undue interference. It is in this context that Article 300 finds application to this case.

103. The International Court of Justice has “observed that the principle of good faith is a well-established principle of international law”<sup>47</sup> which is recognized in article 2(2) of the United Nations Charter.<sup>48</sup>

This principle is also set out in Article 26 of the *Vienna Convention on the Law of Treaties* of 23 May 1969, which noted it was “mentioned as early as the beginning of this century in the Arbitral Award of 7 September 1910 in the *North Atlantic Fisheries case* (United

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<sup>45</sup> Preliminary Objections Judgment, paragraph 131, citing *M/V “Louisa”* (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013, p. 4, at p. 41, paragraph 137.

<sup>46</sup> Preliminary Objections Judgment, paragraph 132.

<sup>47</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I. C.J. Reports 1998, p. 275, paragraph 38.

<sup>48</sup> Article 2(2) of the United Nations Charter provides: “2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.”

Nations, Reports of International Arbitral Awards, Vol. XI, p. 188).<sup>49</sup> Both the International Court of Justice (hereinafter ICJ) and its predecessor, the Permanent Court of International Justice (hereinafter PCIJ), have referred to and affirmed the principle of good faith in their caselaw.<sup>50</sup>

104. Good faith, a General Principle of Law, is defined as

Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. (*Siano v Helvering*, D.C.,-J., 13. F Supp. 776, 780). An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice of benefit or belief of facts which render transaction unconscientious.<sup>51</sup>

105. In other words, good faith means the exercise of rights in a manner compatible with the various obligations arising from the Convention.<sup>52</sup> It follows from this interdependence between rights and obligations that rights must be reasonably exercised. The reasonable and bona fide exercise of a right implies an exercise which is a genuine pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another state.

106. The exact line dividing a right from an obligation is traced to a point where there is a reasonable balance between the conflicting interests involved. This becomes the boundary between the right and the obligation, and constitutes, in effect, the limits of the respective rights of the parties.

107. The doctrine of abuse of rights and the principle of good faith are closely related. Good faith is an obligatory standard of performance for parties to an international convention, and a guiding principle in interpreting their obligations and is a generally accepted principle of public international law pertaining to both the standard of conduct of states in their dealings with each other, and in the settlement of disputes among them.

108. A state does not act in good faith when it is found to have violated or acts in violation of a provision of the Convention. As Article 300 affirms, "States Parties shall fulfil in good faith the obligations assumed under this Convention". The legal reasoning has been expressed as follows:

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<sup>49</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I. C.J. Reports 1998, p. 275, paragraph 38.

<sup>50</sup> *Ibidem*. (References cited therein).

<sup>51</sup> Black's Law Dictionary, Fourth Edition, 1951.

<sup>52</sup> "While a rule answers 'what' and a principle answers 'why', the principle of good faith regulates 'how'. 142 As international law becomes more fragmented and dispersed in 'self-contained' regimes, the role of good faith will extend and create more permutations of this limitation, as, fundamentally, good faith acts to give legal value to the expectations that States have in the actions of other States. Good faith might therefore not be readily definable in abstract terms, it is however indispensable": See Steven Reinhold, Good Faith in International Law, UCL Journal of Law and Jurisprudence, p.63.

The main idea is that when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission.<sup>53</sup>

109. The mutually advantageous, lawful, and cooperative set of rules to which the parties to this dispute have subscribed (i.e. The Convention), has both restricted their liberties and yielded mutual advantages in such a way that those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission.<sup>54</sup>

## 2. The assessment of the actions of Italy

110. The basis for Italy's actions against the M/V Norstar and all the persons having an interest in its operation was the alleged violation of Italian customs laws.

Panama argues that the Tribunal can assess an action taken by national authorities, including a national court, in order to review its conformity with international law. When an action of national authorities under review is that of a national court, the review may resemble a judicial review in the sense that an appellate court reviews a lower court's ruling in domestic law.<sup>55</sup>

111. What ultimately matters is not whether national authorities applied domestic law correctly when making their decisions, but rather whether such decisions, when applied to foreign interests, are in conformity with international law.<sup>56</sup> As was stated in the *Saiga* case "the Tribunal is competent to determine the compatibility of such [domestic] laws and regulations with the Convention".<sup>57</sup>

Panama argues that the Italian authorities, in applying its national laws to conduct that occurred on the high seas did not act in conformity with international law.

112. In the *Virginia G Case*, the Tribunal examined whether the confiscation was necessary to ensure compliance with the laws and regulations of Guinea-Bissau. After analyzing the circumstances and manner in which the confiscation measure was imposed, as well as the legal factors relevant to the case, it concluded that the confiscation of the vessel and the gas oil on board was not necessary within the meaning of article 73 (1) of the Convention, and that Guinea-Bissau was thus violating that provision.

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<sup>53</sup> Rawls. John, *A Theory of Justice*, Harvard University Press, 1971, p. 112.

<sup>54</sup> *Ibidem*.

<sup>55</sup> Jin-Hyun Paik, "Standard of Review in the Law of the Sea: Reflections from the Bench", in *Ocean Law and Policy: 20 years under UNCLOS* (eds. Esposito and others), Brill Publications 2016, p. 361.

<sup>56</sup> *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19.

<sup>57</sup> *The M/V Saiga (No. 2) Case, Saint Vincent and the Grenadines v. Guinea*, 1 July 1999, paragraph 121.

This approach was in line with the Tribunal's previous jurisprudence, among others the decision of the *Camouco Case* (Panama vs. France). In the *Camouco Case*, the Tribunal determined whether the bond imposed by French court was reasonable, considering a number of factors, including the gravity of the alleged offenses, the range of penalties that could be imposed, the value of detained vessels and cargos seized, and the amount of the bond imposed by the detaining state amongst others.<sup>58</sup>

3. Italy has not fulfilled in good faith its obligations under the Convention.

113. Article 300 provides that States Parties shall fulfill in good faith the obligations assumed under the Convention.

In the *cases concerning Nuclear Tests (Australia v. France) (New Zealand v. France)* the ICJ said that "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation".<sup>59</sup>

114. In the case under consideration, Italy has not acted in good faith. Italy breached its obligation first by violating its obligation to allow free navigation under Article 87 by arresting and detaining M/V Norstar and its crew when it had no jurisdiction to do so.

Second, Italy has not acted in good faith by delaying these proceedings, failing to respond to communications, and neglecting to release the vessel when its own courts had decided that no crime had been committed.

Even if M/V Norstar or its crew members had committed a crime under Italian law, a point which Panama does not concede, by detaining the vessel as *corpus delicti* for an unreasonable period of time and disregarded the decisions of its own courts, Italy would still not have acted in good faith.

115. Panama also submits that Italy has acted in bad faith not only by bringing the persons involved in the operation of the M/V Norstar to trial, but also by letting criminal proceedings endure for 5 years, from 1998 until 2003. Although the Italian courts dismissed the claims of the Prosecutor, none of the accused has received any offer of compensation.

116. By criminally prosecuting and applying its customs laws to the M/V Norstar and the persons involved in its operations willfully and wrongfully, Italy only took into account its own interests. If Italy had also considered the interests of Panama, it would have not ordered and requested the arrest of the M/V Norstar when this vessel was merely performing its lawful commercial activities.

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<sup>58</sup> Jin-Hyun Paik, *op. cit.*, p. 365.

<sup>59</sup> Judgment, I.C.J. Reports 1974, p. 268, paragraph 46, and p. 473, paragraph 49.

117. Italy has stated that the reason for which it ordered and requested the arrest of the M/V Norstar was its “bunkering activity off the coasts of France, Italy and Spain”.<sup>60</sup>

This attitude of Italy does not reflect good faith either but rather is an intentional act of evading the actual and relevant facts of this case because it has been demonstrated by the evidence filed in the Preliminary Objections<sup>61</sup> that Italy knew that the *locus* where this vessel performed the activities for which Italy ordered and requested its arrest was the high seas.

118. Italy knew that the M/V Norstar carried out such bunkering “from 1994 to 1998”, and did not take any steps to criminally prosecute this activity during those four years. Therefore, its decision to suddenly treat the Norstar’s actions as a crime could hardly be considered as good faith.

119. 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.

120. By ordering and requesting the arrest of the M/V Norstar, prior to the date its criminal courts had found the unlawfulness of such an order, and just before the Norstar was about to sail to the high seas, Italy did not act in good faith either, but in a disproportionate manner, to the detriment of Panama as a sovereign state, as well as to all the persons having an interest on its registered vessel.

Italy took advantage of the fact that the vessel was docked in port, which made the arrest and detention easier, to unlawfully extend its jurisdiction to acts committed on the high seas.

121. As the Tribunal has concluded<sup>62</sup>, Italy did not answer any of the communications sent by Panama concerning this claim. There is no excuse for its failure to respond to any of the Panamanian efforts to communicate. The failure to respond to a request for negotiation constitutes by itself a breach of an international obligation and reflects a lack of good faith.

With its unforthcoming approach regarding this issue, Italy prevented Panama from even knowing whether it had received Panama’s formal communications concerning this claim. It is now clear that Italy had received these communications and simply failed to acknowledge receipt of or deem to respond to them.

122. Panama now knows that Italy’s silence reflects an intentional lack of good faith on its part and that, by not answering any of the communications sent concerning the wrongful

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<sup>60</sup> Italy’s Preliminary Objections, paragraph 7.

<sup>61</sup> Annex 2 (Decree of Seizure number 1155/97/21 R.N.R dated 11 August 1998 Annex C, Preliminary Objections of Italy); Annex 12 (Appeal of Public Prosecutor, Italy’s Preliminary Objections, Annex J); Annex 9, Savona’s First instance Court judgment (Annex B, Italy’s Preliminary Objections), and Genoa Court of Appeal Judgment (Annex K Italy’s Preliminary Objections).

<sup>62</sup> Preliminary Objections Judgment, paragraph 98.



arrest of the M/V Norstar, and particularly by concealing this, Italy acted contrary to Article 300 of the Convention.

123. Since the arrest of the M/V Norstar, Italy has been aware of the consequences of its conduct *vis à vis* Panama and those with an interest in its operation. However, even after 18 years Italy has yet to justify its silence and concealment.

Thus, Panama respectfully requests the Tribunal to expressly find that Italy has failed to act in good faith and that this behavior is not only contrary to international law, but also that it has legal consequences.

4. Italy has exercised its jurisdiction in a manner which constitutes an abuse of rights

124. Abuse of rights, a doctrine widely used in international law, is defined as “a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State”.<sup>63</sup>

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

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

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

127. No state is allowed to exercise a right in a way which causes damage to another state. International law treaty obligations dealing with abuse of rights are a legitimate and necessary source of law. Panama also contends that Italy exceeded its authority because the seizure was not even contemporaneous with the bunkering activity.

Any justification of Italy’s actions cannot be based solely on the exercise of a particular right, when that right was employed in a manner that constitutes an abuse of such right.

128. In conclusion, Italy breached Article 300 of the Convention by exercising its authority and jurisdiction in contravention of the Convention, and in such a manner that acted to the

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<sup>63</sup> A. Kiss, "Abuse of Rights" in R. Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 1 (Amsterdam: North-Holland, 1992) at 4. See *The “Enrica Lexie” Incident (Italy v. India)*, Request for the prescription of provisional measures, Order, 24 August 2015.

detriment of Panama and persons involved in the operation of the M/V Norstar, thereby constituting an abuse of its authority and jurisdictional rights.

**IV. Italy also violated its international obligations concerning the human rights and fundamental freedoms of the persons involved or interested in the operations of the M/V Norstar.**

129. The Tribunal has previously affirmed its “view that States are required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances”.<sup>64</sup> It is in this context that Panama now turns to Italy’s obligations under international law, and international human rights law in connection to the arrest and detention of M/V Norstar.

130. Under Article 293 of the Convention, the Tribunal “shall apply this Convention and other rules of international law not incompatible with this Convention.” In the *Saiga* case the Tribunal stated that it “must take into account the circumstances of the arrest in the context of the applicable rules of international law... Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of Article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances”<sup>65</sup>.

131. The *Saiga* case involved the use of force by Guinea in the arrest of the vessel, Panama submits that the same principles are relevant in the present case, and thus, the Tribunal, by virtue of Article 293, can take into consideration the circumstances of the arrest within the context of applicable rules of international law. Panama now turns to a discussion of the relevant rules of international law that are applicable in the circumstances of the arrest and detention of the M/V Norstar.

132. Panama asks the Tribunal to take into consideration human rights aspects, in particular procedural rights, when reviewing the actions of Italy.

Human rights treaties are applicable at sea. The Convention does not contain any provisions precluding their applicability. On the other hand, Article 311 provides that the Convention “shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention”.

133. Panama contends that by applying its customs laws and ordering and requesting the arrest of the M/V Norstar, Italy breached its international obligations concerning the human rights, fundamental freedoms, and the performance of the obligations of the persons involved or interested in the operations of the M/V Norstar and so did not conform to the

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<sup>64</sup> *The M/V Louisa Case, Saint Vincent and Grenadines v. Spain*, Case 23, Judgment, paragraph 155.

<sup>65</sup> *The M/V Saiga (No. 2) Case*, Judgment, paragraph 155.

due process of law. As the Tribunal has previously affirmed, “[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law.”<sup>66</sup>

134. When States exercise limited temporary power over a vessel in the context of the right of visit, interdiction operations etc. they are under the obligation to secure for individuals involved the rights and freedoms that are relevant to their situations.

In such instances, human rights that typically come into play are, for example, the right to personal freedom, the right to a fair trial, and the (procedural) right to an effective remedy and actual reparations.<sup>67</sup>

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

136. In this case, Italy did not secure the rights of the individuals involved relevant to the situation. Panama submits that Italy disregarded each individual’s right to a fair trial or an effective remedy for an unreasonable length of time represents bad faith.

Moreover, the remnants of the *M/V Norstar* had to be sold at public auction because Italy failed to ensure that the vessel was properly maintained according to safety standards. It is widely recognized that enforcement actions by States need to observe such standards.

Recent international instruments regulating enforcement actions by States against vessels usually contain a safeguard provision, aimed at protecting human life and the dignity of the persons on board the vessels.

For example, the 1995 *Fish Stocks Agreement* affirms that the inspecting State shall require its inspectors to observe generally accepted international regulations, procedures and practices relating to the safety of the vessel and the crew.<sup>68</sup> This did not occur in the case of the *M/V Norstar*.

137. In the *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, the International Court of Justice stated that the principle of universal human rights obligates Member States to protect and promote human rights as an integral element of their obligations under the United Nations treaties that address property rights and freedom of movement. It is this principle which Italy has breached when it arrested and detained the *M/V Norstar*.<sup>69</sup>

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<sup>66</sup> *Ibidem*. See also *The “Enrica Lexie” Incident (Italy v. India), Request for the prescription of provisional measures, Order, 24 August 2015*.

<sup>67</sup> Irini Papanicolopulu, “Human Rights and the Law of the Sea”, in *The IMLI Manual on International Maritime Law, Volume I*, (Oxford University Press 2014), p. 3, text to fn.89.

<sup>68</sup> See generally, the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001), art. 21(10) and art. 22 (1).

<sup>69</sup> The International Court of Justice has applied human rights provisions. See *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, judgment of 30 November 2010.

138. Every person involved with or interested in the operations of the M/V Norstar, such as the ship owner, the captain, the crew, the operator, and the charterer, have the right to enjoy the human rights and fundamental freedoms granted by International Law.

These persons, who are treated as parts of the entity of the M/V Norstar and linked to Panama as the flag State, have been deprived of the peaceful enjoyment of property as accorded by article 17 of the Universal Declaration of Human Rights<sup>70</sup>, by article 17 of the Charter of Fundamental Rights of the European Union,<sup>71</sup> by article 1 of the Protocol to the European Convention on Human Rights and Fundamental Freedoms,<sup>72</sup> and by article 2 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>73</sup>. These articles will be discussed in more detail in the next section.

#### 1. The violation of the right to Property in the case of the M/V Norstar

139. Article 17 of the Universal Declaration of Human Rights states:

- “(1) Everyone has the right to own property alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of his property.”

140. In addition, Article 17 of the Charter of Fundamental Rights of the European Union states:

Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions....

141. Article 54 of the Charter of Fundamental Rights of the European Union also prohibits the abuse of rights by saying that

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized in this Charter or at their limitation to a greater extent than is provided for herein.

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<sup>70</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) (hereinafter: “Universal Declaration of Human Rights”).

<sup>71</sup> European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02 (hereinafter: “Charter of the Fundamental Rights of the European Union”).

<sup>72</sup> Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9 (hereinafter: “Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms”).

<sup>73</sup> Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, 16 September 1963, ETS 46 (hereinafter: “Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms”).

142. Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as signed at Paris on 20 March 1952, further addresses the right to property stating:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

143. All the above provisions guarantee and protect generally the right to property. Paragraph 1 of Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms affirms Italy's right to enforce its customs and taxation rights only in the public interest and subject to the conditions provided for by law and by the general principles of international law.

This provision tacitly allows Italy to apply its laws within its own territory. However, Paragraph 2 prohibits control of the use of property to secure the payment of taxes or other penalties even within its own territory.

144. The positive obligation of Italy with respect to the right to property operating outside its boundaries, such as in the case of the M/V Norstar, requires it to take the necessary measures to avoid violating the rights of the individuals involved.

The failure of Italy to comply with its international obligation to take all reasonable and suitable measures to prevent any violation of the right to property, interfered with the above mentioned obligation.

The provisions cited above as they applied to the M/V Norstar have been breached by Italy because all the persons having an interest in its operations have been wrongfully deprived of their possession.

145. In this case, Italy was required to minimize any trespass of human rights by at least trying to communicate with Panama or with the persons involved in the operation of the M/V Norstar to achieve its aims in the least onerous manner.

146. A genuine and effective exercise of the rights of Italy would not only depend on the duty not to interfere with the freedom of navigation, but would require positive measures to maintain property that has been seized.

This should have been particularly the case when there is a direct link between the measures a property owner may legitimately expect and the effective enjoyment of his or her possessions.

Italy did not exercise any of these expected duties to keep the Norstar in the same condition that it was when it was detained, thus compromising the rights associated with it.

## 2. The violation of the freedom of movement

147. By wrongfully applying its customs laws and ordering and requesting the arrest of the M/V Norstar, Italy also unlawfully deprived its owner, the charterer, the captain, and its crew of the international obligation to ensure its freedom of movement.

148. Article 2 of the Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Strasbourg on 16 November 1963 states:

### Freedom of movement

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. ....

149. Due to the arrest of the M/V Norstar, its owner, operator and charterers have been unable to enjoy the freedom of movement because of the restrictions placed by Italy on the vessel.

If Italy had complied with its obligations, it would have not ordered and requested the arrest of the M/V Norstar when it was in the Spanish territory. The restrictions placed on the exercise of the freedom of movement of this vessel within the territory of Spain and its prohibition to sail to the high seas were not in conformity with the rights granted by this provision.

None of the exceptions provided for by this provision, such as national security or public safety, maintenance of ordre public, prevention of crime, protection of health or morals, or the protection of the rights and freedoms of others, are lawful defences of Italy's actions. In any case, Italy did not even invoke any of these reasons as the basis for its decision to arrest the M/V Norstar.

**V. 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.**

1. The responsibility of Italy and its duty to make reparation by equivalent compensation.

150. It has long been a general and undisputed principle of international law that “where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded”<sup>74</sup>. Panama has demonstrated that Italy violated primary obligations contained in Article 87 and Article 300 of the Convention through its wrongful conduct. It therefore follows that Italy has the duty to provide reparation to Panama.

International law sets in motion the application of secondary rules such as those contained in the International Law Commission’s Draft Articles on Responsibility of States for International Wrongful Acts<sup>75</sup> (hereinafter: “DARS”). As stated in Article 1 of DARS, “Every internationally wrongful act of a State entails the international responsibility of that State”.

151. Those primary rules do not spell out the consequences of their breach. Instead, Panama is entitled to redress on the basis of wrongfulness as well as the rules and law of State responsibility which govern the legal relationship arising from the internationally wrongful acts of Italy as the wrongdoing State and Panama as the injured State.

152. In the *Phosphates in Morocco Case*, the PCIJ said that in the case of an act “attributable to [one] State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States.”<sup>76</sup>

Panama’s right to reparation for the damage caused arises because Italy’s responsibility has as consequence and finality reparation for the prejudice caused.

153. DARS portray a general obligation of nations to cease any wrongful act, to restore the situation prevailing before the wrongdoing, and to provide full reparation. Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation, and satisfaction, either singly or in combination, in accordance with Chapter I on General Principles.<sup>77</sup>

154. The internationally wrongful act attributed to Italy<sup>78</sup> has created a new legal relationship between it and Panama. The Commentary to Article 29, dealing with the

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<sup>74</sup> William Blackstone, Commentaries, Book 3, Chapter 3, p. 2.

<sup>75</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

<sup>76</sup> (Preliminary Objections) (1938), p. 28.

<sup>77</sup> Article 34 of DARS.

<sup>78</sup> Article 4 of DARS affirms the principle of attribution of responsibility under international law:

“1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the

continued duty of performance, affirms the distinction between consequences arising from the commission of an internationally wrongful act, and consequences arising from the breach of an international obligation stating:

As a result of the internationally wrongful act, a new set of legal relations is established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal relation established by the primary obligation disappears. Even if the responsible State complies with its obligations under Part Two [dealing with the content of the international responsibility of the State] to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby from the duty to perform the obligation breached.<sup>79</sup>

155. Since the application of its customs laws to arrest the M/V Norstar did not fall within any of the exceptions to its exclusive jurisdiction, Panama has the right, as the flag State, to seek and obtain reparation from Italy for loss and/or damage caused by its internationally unlawful conduct.

156. The right of reparation has been expressly recognized by the PCIJ, such as its decision in the *Case Concerning the Factory at Chorzow (Claim for Indemnity) (Jurisdiction)* which stated:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.<sup>80</sup>

157. The same court also said that “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”<sup>81</sup> The guiding principle was laid down in the following terms:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.<sup>82</sup>

Furthermore, as the Tribunal affirmed: “Reparation may also be due under international law as provided for in article 304 of the Convention, which provides: [t]he provisions of this Convention regarding responsibility and liability for damage are without prejudice to the

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organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

<sup>79</sup> Paragraph 2, Commentary to Article 29 of DARS.

<sup>80</sup> *Chorzow Factory (Indemnity) case*, p. 21.

<sup>81</sup> *Ibidem*, p. 29.

<sup>82</sup> *Ibidem.*, p. 47.



application of existing rules and the development of further rules regarding responsibility and liability under international law.”<sup>83</sup>

158. Furthermore, Article 31 (1) of DARS states that “the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”

159. Although restitution in kind is the preferred form of reparation, this is not possible under the circumstances due to the deteriorated situation of the M/V Norstar and the long time that has elapsed. Additionally, due to the debts of the ship owner to the Port Authority of Palma, Majorca, the Norstar was sold in public auction, thereby making it impossible to go back to the *status quo ante*. As a result, monetary compensation is now the most reasonable form of assuring a full reparation for all the damage suffered.

This situation was also analyzed by the PCIJ as follows:

Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.<sup>84</sup>

The court added that restoration could have no other effect but that of substituting payment of the value for restitution.<sup>85</sup>

160. Article 35 of DARS states that a State responsible for an internationally wrongful act is under an obligation to make restitution provided restitution is not materially impossible. To pay the value at the time of offsetting has the role of replacing restitution which has become impossible. If restitution is not possible, reparation has to be completed by compensation in order to ensure full reparation.

Concerning the form of reparation, the Tribunal referred to Article 42 of DARS and concluded that it may be:

“restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination” (article 42, paragraph 1, of the Draft Articles of the International Law Commission on State Responsibility). Reparation may take the form of monetary compensation for economically quantifiable damage as well as for non-material damage, depending on the circumstances of the case. The circumstances include such factors as the conduct of the State which committed the wrongful act and the manner in which the violation occurred. Reparation in the form of satisfaction may be provided by a judicial declaration that there has been a violation of a right.”<sup>86</sup>

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<sup>83</sup> *The Saiga (No. 2) Case, Judgment*, paragraph 169.

<sup>84</sup> *Chorzow Factory (Indemnity) case*, p 47.

<sup>85</sup> *Ibid.*, p. 48.

<sup>86</sup> *The Saiga (No. 2) Case, Judgment*, paragraph 171.

161. Considering that the reparation due to Panama from Italy, as a result of the internationally unlawful acts for which the latter is responsible, must be complete and must, so far as possible, reflect the entire damage suffered, and since the vessel was a total loss and became the object of a public auction in Spain, its title having passed to a third person through a universal judgment, the reparation of the damage suffered can only take place in the form of a pecuniary indemnity by way of compensation.

162. In the *Case Concerning the Gabčíkovo-Nagymaros Project* between Hungary and Slovakia, the ICJ held that “It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.”<sup>87</sup>

163. Article 36 (1) of DARS states that the State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

164. It has been demonstrated that Italy has an obligation to make reparation by way of compensation based on the nature and the extent of the damage which must serve as a basis for the calculation of the amount of the indemnity. In the next section we will analyze the range within which Panama deems compensation should be adjudicated.

## 2. The causal relationship between injury and damage.

165. The obligation of the responsible state to fully compensate for any damage, either material or moral, caused by an internationally wrongful act is reiterated in DARS articles 31 (2), 34, and 36 (1).

166. As to the well-recognized principle whereby loss of profits (*lucrum cessans*) can be awarded as damages, in the *Cape Horn* case it was held that the claimant was entitled to compensation for profits it would have collected were it not for the wrongful act.<sup>88</sup>

167. Professor Ian Brownlie, an expert in international public law, recognized an intrinsic connection between remoteness and the measure of damages, on the one hand, and, on the other, the rules of substance which have been breached: “The particular context of a breach of duty, i.e. the nature of the duty itself and the mode of breach, may determine the approach to the question of damages.”<sup>89</sup>

168. Therefore, the test questions that follow are: Would damages have occurred if Italy had not ordered and requested the arrest of the M/V Norstar? Or, is there anything which

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<sup>87</sup> Judgment of 25 September 1997, paragraph 152.

<sup>88</sup> *Whaling and Sealing Claims against Russia*, p. 21.

<sup>89</sup> Ian Brownlie, *Principles of Public International Law*, *supra*, note 55 at 446, 447.

could preclude the treatment of the order and request of arrest issued by Italy as the cause of the damages?<sup>90</sup>

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

Without such an order the responsibility and claim for damages would have not ensued. Moreover, this unlawful conduct of Italy did extend in time; it did not occur in a single moment. As an offence of a continuing character the arrest and prolonged detention of the Norstar should have consequences in terms of the quantification of the compensation.

Having been demonstrated that there is an obligation to repair the damage to the M/V Norstar, it must be ascertained whether, and to what extent, the injury asserted by Panama is the consequence of wrongful conduct by Italy with the result that Italy should be required to make appropriate reparation. If Panama seeks redress for damages, it has to demonstrate that the internationally wrongful acts of Italy were the cause of such damages for which reparation is sought.

3. The breach of the international obligations of Italy has been a continuing wrongful act which has thereby aggravated its effects and which is relevant for determining the amount of compensation.

Article 14 (2) of DARS refers to the extension in time of the breach of an international obligation, stating that "The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation."

170. The wrongful act of Italy that the unlawful application of its customs laws and order and request for arrest of the M/V Norstar represent, has persisted and remains in violation of its international obligation contained in article 87 of the Convention, because since the enforcement of such customs laws and arrest, Italy has never ceased to wrongfully exercise jurisdiction over this foreign vessel.

171. As a result of the incompatibility of the application of its customs laws as the basis to issue the order and request for the arrest of the M/V Norstar, Italy now has the obligation to effectively return this Panamanian-registered vessel. The breach of the Italian obligation, no matter on what date it was first committed, still subsists until compensation is effectively paid and received by Panama.

172. If Italy had effectively returned the M/V Norstar when it was still seaworthy, the extent of the damage caused by its unlawful order and request for arrest would not have

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<sup>90</sup> Ilias Plakokefalos, *Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity* Eur. J. Int. Law. (2015) 26 (2): 471-492 states

"The most convincing alternative to the but-for test is the so-called necessary element of a sufficient set (NESS) test. Herbert Hart and Tony Honoré, on the basis of the work of David Hume and John Stuart Mill, first propounded the test, later to be refined by Richard Wright.

been so severe, and obligations as well as liability would have not accrued as much as they have.

173. By maintaining that the application of its customs laws to arrest the M/V Norstar was justified, and by the failure to comply with the order of its own judicial authorities in a timely manner, Italy has aggravated the damage caused to all the persons that were involved with its shipping operations.

#### 4. The scope of the compensation

174. Compensation shall include all the economically quantifiable (material and non-material, or moral) damage.

175. As to the extent of the award, draft Article 36 of DARS provides the following guidance:

##### Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

176. If wrongful acts occur when an injury is a) caused by conduct consisting of an action or omission which is attributable to a State under international law; and b) that conduct constitutes a breach of an international obligation of that State, the state responsible for the internationally wrongful act is under the obligation to compensate for any damage caused by that act. Compensation should be paid for damage to property which, under principles of international law or in equity, should be made good by the responsible State.<sup>91</sup>

177. According to the Principle of *restitutio in integrum*, all the victims should be placed in as good a financial position as they would have been in had the vessel not been a total loss, precluded from sailing, and dedicated to the economic activity that was carrying out when it was arrested.

178. It follows from the application of the general rules of state responsibility, as reflected in DARS, that Italy is liable to provide reparation which wipes out all the consequences of its illegal acts occasioned by the violation of the rights under the Convention.

179. Because of the passage of time, the M/V Norstar experienced such a serious reduction in its value and deteriorated to such extent that it became a total loss, so that Spain requested Italy its authorization to demolish it.

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<sup>91</sup> Paragraph 11 of UN General Assembly Resolution 194 (III), adopted December 11, 1948.

The huge economic loss resulting from the deprivation of the Norstar's livelihood, as well as the reduction in its economic value, has resulted from its arrest and prolonged confinement infringing on its freedom to navigate-freely and pursue its livelihood for the benefit of the persons involved in its legitimate operation.

180. The persons involved in the operation of the Norstar have seen their losses exacerbated by the implicit refusal of Italy to promptly return the M/V Norstar after a reasonable time when it was still operational.

Now that no legal justification nor valid reason has been given by Italy after 18 years 7 months and counting, and since the title of the vessel has been transferred by means of a public auction to a third party, the only possible and reasonable manner to repair the damages caused is the payment of a fair compensation.

181. Since the restriction on the use of the M/V Norstar has been so extensive that it is tantamount to confiscation of the property, damages should include the market value of the vessel (including cargo), the loss of profits (actual and future), the financial damage to the ship owner and charterer, the pain and suffering of all persons wrongfully prosecuted and being deprived or dispossessed of property, the expenses incurred for representation by legal counsel in Italy, Panama and Hamburg, the registration fees owed to the Panama Maritime Authority, and all the expenses incurred until the filing of the Application.

## 5. Interest

182. Panama argues that the conduct of Italy in terms of time and opportunity should strongly affect the sum to be compensated in terms of interest based on the damages that has accrued over the period of over eighteen years since the arrest was made. The issue of interest has been considered by the DARS as follows:

### “Article 38 Interest

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

183. Instead of effectively returning the M/V Norstar, there has been total inaction on the part of Italy concerning compliance with its international obligation under the Convention and even with its own judicial decisions.

This inactivity of Italy has placed an added burden on the parties interested in the Norstar that they have not been able to overcome. Thus, unless Italy pays the necessary and lawful interest for the delay on compensating the damages caused by its conduct contrary to international law, justice will not be served.

184. The degree of responsibility of Italy has increased by its prolonged detention of the *Norstar*. Therefore, Panama requests that the compensation due includes interest reflecting the delay on the part of Italy to resolve this case.

185. The Tribunal has already held as generally fair and reasonably “that interest is paid in respect of monetary losses, property damage and other economic losses” although, it did not find “necessary to apply a uniform rate of interest in all instances.”<sup>92</sup>

186. In The *Saiga* case the Tribunal set interest rates of 3%, 6% and 8% in respect of award of compensation on account of commercial conditions prevailing in the countries where the expenses were incurred or the principal operations of the party being compensated are located.

Panama contends that these commercial conditions are similar to the present case, and therefore requests an interest rate of 8% applied to the value of the gas oil, a lower rate of 6% for the vessel, and a rate of 3% for compensation for pain and suffering and psychological damage due to the wrong prosecution of the persons interested in the operation of the vessel.

## 6. Costs

187. Article 34 of the Statute of the Tribunal states that “unless otherwise decided by the Tribunal, each party shall bear its own costs”.

This rule was applied in the *Saiga* case by the Tribunal saying that it did not “see the need to depart from the general rule that each party shall bear its own costs”.

188. Panama argues that in this case, having due regard to the conduct deployed by Italy along all these years of disputes there are sufficient reasons that the Tribunal should consider for a departure from the above mentioned general rule and that the legal costs of defending the rights of Panama and of all persons involved in the operation of the *M/V Norstar* should be entirely borne by Italy.

189. Panama has conclusively demonstrated that Italy has violated its rights under the Convention since 11 August 1998 when by wrongfully applying its customs laws and ordering and requesting the arrest of the *Norstar*, as a consequence of the wrong exercise of its jurisdiction to bunkering in the high seas, it started to inflict damages to Panama and the persons interested in its operations.

Panama has also shown that the conduct of Italy has been contrary to good faith and constituted an abuse of its rights which respond to an intentional deviation from the conduct that is expected of any state in its international affairs.

190. By refusing to effectively face its responsibility and duty to minimize the damages caused, by neglecting to answer all and any of the communications from Panama over 18

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<sup>92</sup> *The Saiga N°2* case, judgment, paragraph 173.

years, and by vehemently opposing to the legitimate claims of Panama, affecting not only the human rights of the persons involved in the operations of the vessel, Italy has *inter alia*, and with knowledge that damage would probably result, intentionally and consistently acted in a manner contrary to the Convention and other rules of international law and in the same form has delayed compliance with its own legal decisions.

191. Italy's actions regarding the initial arrest, coupled with its prolonged inaction in terms of responding to the complaint, have put an exceptional burden in terms of legal work and litigation expenses on the claimant. This constitutes sufficient cause for the Tribunal to consider that in this case Italy should be liable for all legal costs of both sides.

192. In conclusion, as a party to the Convention, Italy has the right to apply its laws within its territorial waters. But it also follows from the Convention, namely Article 87, that Italy has the obligation not to interfere with freedom of navigation on the high seas which includes avoiding injury to the interests of ships, such as the M/V Norstar.

Instead, Italy exceeded its authority and jurisdiction by the application of its customs laws to order and request the arrest and detention of this vessel. Any justification of Italy's actions cannot be based solely on the exercise of a particular right, when that right was employed in a manner that causes injury, in this case to Panama and all the persons involved in the operation of the M/V Norstar by curtailing its freedom of navigation, trade and sovereignty on the high seas.

Given that the parties to this dispute are in agreement that the bunkering activities for which the M/V Norstar was apprehended were not carried out within Italian jurisdiction. The conduct Italy exhibited when applying its customs provisions to support its order and request for arrest of the M/V Norstar, is not in conformity with the conduct required of it by its obligation to respect the freedom of peaceful navigation, and in accordance with the Convention. This constitutes an abuse of right because vessels on the high seas are subject to no authority except that of the State whose flag they fly.

Italy acted with reckless bad faith, and abused its rights when it arrested and maintained the detention of M/V Norstar for an unreasonably long period of time, despite the judgments of its own courts which unequivocally affirmed that Italy was wrong in bringing criminal charges against those interested in this vessel's operation.

Eighteen years have elapsed since the wrongful arrest and detention of M/V Norstar for bunkering activities carried out on the high seas. During that time, Panama had tirelessly attempted to communicate with Italy to correct the situation and obtain the release of the vessel, but such communications have been unanswered and even concealed with malice.

The unreasonable delay in releasing the vessel caused irreparable harm to Panama, the ship owner, the charterer, and the crew members. Since none of the offences the M/V Norstar was charged with were sustained, since there are no outstanding public or general interest issues, nor any need to secure the payment of taxes or other contributions or penalties, and since the conduct of Italy has contravened several provisions of the Convention and other rules of International Law, Panama has a legitimate claim to compensation for the damages suffered because Italy has disavowed its obligations towards Panama under the Convention, in particular, and international law, in general.

In the following Chapter, Panama will demonstrate that Italy acted in violation of international law and incurred international responsibility, for which it should provide appropriate reparation in the form of compensation.



## **CHAPTER 4**

### **QUANTIFICATION OF DAMAGES**

#### **I. Introduction**

193. This section addresses the basis for the claim by Panama for an award of monetary compensation and intends to serve as an explanation for its quantification.

The wrongfulness of the conduct of the respondent has caused severe damages to the shipowner, the charterer, and the crew, none of whom have been able to pursue the commercial activities they were engaged in at the time of the arrest. The damage payments are meant to remedy this.

194. On the basis of the facts set out in Chapter 2, and the legal reasons given and explained in Chapter 3 of this Memorial, the claim for loss and damages made by Panama on its own behalf and on behalf of others with interest in the M/V Norstar falls under the following headings: 1) Damages as substitution for the loss of the vessel and the cargo, 2) damages for loss of revenue, 3) legal fees, 4) fees due the Panama Maritime Authority, 5) fees due the Port Authority of Palma, Majorca and 6) non-material damages to natural persons.

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

##### **1. Damages as substitution for the loss of the vessel**

195. At the time of the seizure on 24 September 1998, the M/V Norstar was in very good condition and was valued at 625,000.00 USD.<sup>93</sup>

196. From the date of the seizure, Italy was responsible for maintaining the vessel in the same condition. By failing to carry out maintenance procedures and allowing the vessel to fall into disrepair, Italy has breached this duty. When the vessel was released by the Court in Savona in 2003, it was in a very bad state, no longer seaworthy, and lacking valid certificates and class designation.

197. Without notifying the owner, the charterer, or the flag state, the Port Authority of Palma, Majorca auctioned off the vessel with a base price of three thousand Euros. The proceeds from this sale have never been paid to either the owner, the charterer, or the flag state.

198. As a consequence of the seizure, the lack of maintenance and the auctioning off of the vessel, the vessel is a total loss for the owner. Therefore, damages must be estimated in the full amount of 625,000.00 USD. Furthermore, interest in the amount of 6 % per annum since the following day of the seizure (25 September 1998) must be added to this amount.

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<sup>93</sup> Annex 5.

The claim for damages regarding the total loss of the M/V Norstar therefore amounts in total to:

**625,000.00 USD**

with interest at the rate of 8%,<sup>94</sup> and payable from 25 September 1998:

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

200. As a result of the seizure of the M/V Norstar, her owner was unable to earn any further charter income. Pursuant to Clause 21 (a) (v) of the charter party agreement<sup>95</sup>, the vessel has been "off-hire" since the date of the seizure. Therefore, by virtue of the seizure of the M/V Norstar, the owner has suffered damage in the amount of lost profits.

201. In calculating this loss of revenue, the charter hire which was agreed in the charter contract must be taken as a basis. Pursuant to Clause 8 and 46, the charter hire up to June 1999 amounted to 2,850.00 USD per day and this subsequently increased by 5% each year.<sup>96</sup>

202. The costs, for which the owner would have been liable in relation to the income, are to be deducted from the charter income. These are crew wages and other crew related expenses, the costs for lube oil, freshwater, stores, provisions, communication expenses, insurance, and management. In addition, deductions must be made for off-hire days for repairs, maintenance and docking.

203. The loss of revenue has been calculated on this basis in the Loss-of Profit Calculation<sup>97</sup> as follows:

CONCEPT	DATE	AMOUNT
Lost profit related to the original term of the charter party	25 September 1998 - 19 June 2003	4.394.611,51 USD
Lost profit related to the one-year renewal option of the charter party	20 June 2003 – 19 June 2004	1.043.093,54 USD
Lost profit related to the second one-year renewal option	20 June 2004 – 19 June 2005	1.039.629,34 USD
Lost profit after the second one-year renewal option	20 June 2005 - 19 June 2010	5.198.150,00 USD
<b>TOTAL</b>		<b>11.675.484.39 USD</b>

<sup>94</sup> This percentage was fixed by the Tribunal in The Saiga's case for reparation to the ship, paragraph 175(a).

<sup>95</sup> Annex 2.

<sup>96</sup> *Ibidem*.

<sup>97</sup> Annex 18.

204. The following applies to the issue of which period should be taken as the basis for the lost profit:

205. On the one hand, it must be presumed that the charter party would have been performed until the end of its term (26 June 2003) and that the charterer would have extended the contract by twice exercising the option of renewal for one year (until 26 June 2005). The offshore bunkering of megayachts was a very profitable business model.

206. There is, therefore, no obvious reason why the charterer would not have extended the contract for as long as possible, had Italy not confiscated the M/V Norstar and prosecuted the persons involved for alleged tax offences under criminal law. Mr. Silvio Rossi, an agent/operator in the offshore bunkering of megayachts in the Mediterranean for Rossmare International S.A.S since 1993 has extensive knowledge of and experience with this market.

207. The option of two, one-year contract extensions had been verbally agreed to by Mr. Arve Einar Mørch (Chairman of the Board of the owner) and Mr. Petter E. Vadis (Managing Director of the owner) and the charterer's Managing Director, Mr. Frithjof Valestrand, at the conclusion of the original charter party. Although the written contract erroneously described this in the following way: *"Owners agree to let and Charterers agree to hire the vessel for a period of 5 (five) years time charter with Charterers option for further 1 (one) option 1 (one) year."*<sup>98</sup>

208. In accordance with the maxim, *"falsa demonstratio non nocet"* this incorrect wording does not damage the contract, since both parties understood that there was mutual agreement that two renewal options, each of one year, had been stipulated. Therefore this is deemed to have been the agreement desired by both parties and, so, should be taken as evidence of the existence of two renewal options, each for one year.

209. By virtue of the fact that offshore bunkering of megayachts is a successful business model it must be presumed that it would have been likely that, subsequent to the termination of the charter party in effect until 2005, the M/V Norstar would have been chartered again and that further profits would have accrued. In fact, had Italy acted lawfully and had neither confiscated the M/V Norstar nor instituted criminal proceedings against it for alleged tax offences, the M/V Norstar could have been chartered out *sine die* and for as long as possible.

210. In accordance with the Loss-of-profit Calculation<sup>99</sup> the loss of revenue from 25 September 1998 up to June 2010 was 11,675,484.39 USD.

Interest in the amount of 8% per annum must be paid on top of this amount.

211. The claims for damages regarding the owner's loss of revenue therefore amount in total to:

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<sup>98</sup> Annex 2.

<sup>99</sup> Annex 18.

**11,675,484.39 USD**

with the following interest:

FROM	ANNUAL RATE	AMOUNT
20 June 1999	8 %	598.741,40 USD
20 June 2000	8 %	870.455,04 USD
20 June 2001	8 %	922.077,44 USD
20 June 2002	8 %	979.418,94 USD
20 June 2003	8 %	1.023.918,69 USD
20 June 2004	8 %	1.043.093,54 USD
20 June 2005	8 %	1.039.629,34 USD
20 June 2006	8 %	1.039.629,34 USD
20 June 2007	8 %	1.039.629,34 USD
20 June 2008	8 %	1.039.629,34 USD
20 June 2009	8 %	1.039.629,34 USD
20 June 2010	8 %	1.039.629,34 USD
<b>TOTAL</b>		<b>11,675,484.39 USD</b>

### 3. Continued payment of wages

After the seizure of the vessel, the owner had to pay the following crew wages until the end of December 1998 without being able to finance these charges through charter income:

Master (paid until end of November 1998):	6,600.00 USD
Chief Officer (paid until end of Nov. 1998):	5,500.00 USD
Chief Engineer (paid until end of Dec. 1998):	6,400.00 USD
Cook:	300.00 USD
Able Seaman:	300.00 USD
Gross amount:	19,100.00 USD

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

The following gross amount is therefore asserted:

**19,100.00 USD**

with interest at the rate of 8 % %, payable from 01 January 1999.

#### 4. Legal fees

##### *a) Legal fees for Abogados Bufete Feliu, Palma de Majorca*

212. In order to obtain surrender of the M/V Norstar, the owner engaged the legal firm of Abogados Bufete Feliu in Palma de Majorca and paid to them legal fees in a total amount of 12,200.00 USD.

Italy is responsible for these costs, which have resulted from the unjustified seizure of the M/V Norstar and must therefore reimburse them.

This amount is also subject to interest at the rate of 8 % with effect at least from the date of the Application.

213. The compensation for damages arising from the legal costs of lawyers Abogados Bufete Feliu in Palma de Majorca therefore amounts to:

**12.200,00 USD**

with the following interest:

FROM	INTEREST (ANNUAL RATE)	AMOUNT
16 November 2015.	8%	12.200,00 USD
TOTAL		12.200,00 USD

##### *b) Legal fees for the period between the arrest and the application made before the International Tribunal for the Law of the Sea*

214. In 2000, jointly with the owner of the M/V Norstar, Panama engaged the lawyer Nelson Carreyo to obtain the return of the M/V Norstar and gain compensation for the damages incurred.

215. Because Italy did not respond in a reasonable manner to the numerous letters sent regarding this case, Panama and the owner of the M/V Norstar became convinced that it would be necessary to resort to the Tribunal in order to obtain appropriate redress.

In preparation for bringing this matter before the Tribunal, the law firm, Rechtsanwälte Remé in Hamburg, who already had the relevant experience of appearing before the Tribunal, were additionally engaged in 2003.

216. The following costs were incurred for the activity of the lawyers Nelson Carreyo and Remé Rechtsanwälte:

- AMOUNT	SOURCE	FROM
- 3000.00 USD	Panama International Lawyers	06 March 2000 <sup>100</sup>
- 1.996.50 EUR	Remé Rechtsanwälte	08 May 2003 <sup>101</sup>
- 1916.31 USD	Remé Rechtsanwälte	27 January 2004
- 1895.69 USD	Nelson Carreyo	27 January 2004
- 2.703.33 EUR	Remé Rechtsanwälte	28 February 2005 <sup>102</sup>
- 2.510.00 EUR	Remé Rechtsanwälte	27 December 2005 <sup>103</sup>
- 3.500.00 USD	Nelson Carreyo	March 2009
- 3.500.00 EUR	Remé Rechtsanwälte	31 March 2009 <sup>104</sup>
- 2.300.00 USD	Nelson Carreyo	25 June 2009 <sup>105</sup>
- 3.355.00 EUR	Remé Rechtsanwälte	01 December 2009 <sup>106</sup>
- 1.721.66 EUR	Remé Rechtsanwälte	17 September 2010 <sup>107</sup>
- 4.051.66 EUR	Remé Rechtsanwälte	19 September 2010
- 20.793.83 USD	Nelson Carreyo	22 December 2015 <sup>108</sup>
TOTAL		33,405.83 USD plus 19.838,15 EUR

217. Italy is responsible for these costs, which have been incurred due to the unjustified seizure of the M/V Norstar and must therefore reimburse Panama and the Norstar's owner for the full amount plus interest at the rate of 8 % with effect from the date of each invoice.

218. Compensation in damages arising from the legal costs for the lawyers Nelson Carreyo and Remé Rechtsanwälte up to the preparation of the legal action before the Tribunal the following gross amount is therefore asserted to be:

**33,405.83 USD plus 19.838,15 EUR**

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<sup>100</sup> Annex 19.

<sup>101</sup> Annex 20.

<sup>102</sup> Annex 21.

<sup>103</sup> Annex 22.

<sup>104</sup> Annex 23.

<sup>105</sup> Annex 24.

<sup>106</sup> Annex 25.

<sup>107</sup> Annex 26.

<sup>108</sup> Annex 27.

with the following interest

FROM	ANNUAL RATE	AMOUNT
06 March 2000	8%	3000.00 USD
08 May 2003	8%	1.99650 EUR
27 January 2004	8%	1916.31 USD
27 January 2004	8%	1895.69 USD
28 February 2005	8%	2.703.33 EUR
27 December 2005	8%	2.510.00 EUR
01 April 2009	8%	3.500.00 USD
31 March 2009	8%	3.500.00 EUR
25 June 2009	8%	2.300.00 USD
01 December 2009	8%	3.355.00 EUR
17 September 2010	8%	1.721.66 EUR
19 September 2010	8%	4.051.66 EUR
22 December 2005.	8%	20.793.83 USD
TOTAL		33,405.83 USD plus 19.838,15 EUR

*c) Legal fees in relation to the procedure before the Tribunal*

219. For the legal action before the Tribunal, the additional services of the lawyers, ALP Rechtsanwälte, in Hamburg were engaged, since the lawyer from Remé Rechtsanwälte, Mr. Hartmut von Brevern, who had hitherto been in charge of the procedure, had retired from his chambers on the grounds of age.

220. For representation before the International Tribunal for the Law of the Sea the following costs have been incurred to date<sup>109</sup>:

AMMOUNT	SOURCE	FROM
3.627.50 EUR	Rechtsanwalt v. Brevern	25 February 2015
5.084.17 EUR	Rechtsanwalt v. Brevern	16 September 2015
4.072.50 EUR	Rechtsanwalt v. Brevern	13 January 2016
7.439.06 EUR	Rechtsanwalt v. Brevern	21 March 2016
236.50 EUR	Mareike Klein Castillo	15 April 2016

<sup>109</sup> Annex 28.

4.728.76 EUR	Rechtsanwalt v. Brevern	21 May 2016
20.796.00 USD	Nelson Carreyo	17 July 2016
2.977.50 EUR	Rechtsanwalt v. Brevern	10 August 2016
741.73 EUR	Mareike Klein Castillo	03 October 2016
10.780.00 EUR	Rechtsanwalt v. Brevern	10 October 2016
5.829.99 EUR	ALP Rechtsanwälte	07 July 2016
14.224.72 EUR	ALP Rechtsanwälte	16 September 2016
22.000.00 EUR	ALP Rechtsanwälte	11 November 2016
11.279.05 EUR	ALP Rechtsanwälte	17 March 2017
2.530.00 EUR	Rechtsanwalt v. Brevern	05 April 2017
TOTAL		20,796.00 USD plus 95.551,48 EUR

Gross amount: 20,796.00 USD plus 95.551,48 EUR

221. Italy is responsible for these costs, which have been incurred by the unjustified seizure of the M/V Norstar and must therefore pay reimbursement, as well as interest in the amount of 8 % with effect from the date of each invoice.

Compensation in damages arising from the legal costs up to the preparation of the legal action before the Tribunal the following gross amount is therefore asserted:

**20,796.00 USD plus 95.551,48 EUR**

with the following interest:

FROM	ANNUAL RATE	AMOUNT
from 25 February 2015	8 %	3.627,50 EUR
from 16 September 2015	8 %	5.084,17 EUR
from 13 January 2016	8 %	4.072,50 EUR
from 21 March 2016	8 %	7.439,06 EUR
from 15 April 2016	8 %	236,50 EUR
from 21 May 2016	8 %	4.728,76 EUR
from 17 July 2016	8 %	20.796.00 USD
from 10 August 2016	8 %	2.977,50 EUR
from 03 October 2016	8 %	741,73 EUR
from 10 October 2016	8 %	10.780,00 EUR
from 07 July 2016	8 %	5.829,99 EUR
from 16 September 2016	8 %	14.224,72 EUR
from 11 November 2016	8 %	22.000,00 EUR
from 17 March 2017	8 %	11.279,05 EUR
from 05 April 2017	8 %	2.530,00 EUR
TOTAL		<b>20,796.00 USD plus 95.551,48 EUR</b>



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

222. The owner owes to the Panama Maritime Authority in fees and taxes for the M/V Norstar, in the total amount of 122,315.20 USD as itemized in a Certification from the Panama Maritime Authority dated 30 March 2017.<sup>110</sup>

223. The amount thus represents an additional loss for the owner, which must also be reimbursed by Italy. The damages shall therefore also be asserted in the name of the State of Panama.

224. The following gross amount is therefore asserted as compensation in damages for the fees and taxes paid and to be paid to the Panama Maritime Authority:

**122,315.20 USD**

6. Payment due for fees to the Palma de Majorca Port Authority

225. In the eyes of Spain, the ship owner remains responsible for all matters relating to the vessel. It is possible that the Palma Port Authority will therefore charge fees for the time period from August 1998 up until the auction in 2015, when the M/V Norstar lays in the port of Palma, Majorca.

226. Since Italy has caused these costs by virtue of the unlawful seizure of the M/V Norstar it must therefore pay these costs as part of its compensation for damages.

Neither the owner nor Panama have been notified as to whether and in what amount the Palma Port Authority will assess against the owner. Therefore, the damage cannot be quantified precisely at this time.

However, by way of damages the owner may assert the claim of equitable indemnity and thus require that Italy pays all the claims which the Palma Port Authority could impose in relation to the M/V Norstar since 24 September 1998 on his behalf.

227. As the Tribunal has stated in Case No. 2 (*The Saiga*), reparation must “as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”.<sup>111</sup>

228. Had the illegal act (here: the seizure of the M/V Norstar) not taken place, the owner would have had no need to fear claims from the Palma Port Authority. Italy is obliged to

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<sup>110</sup> Annex 15.

<sup>111</sup> See *The Saiga* (N° 2) *Judgment*, paragraph 170

remedy this situation, by indemnifying the owner against all claims by the Palma Port Authority.

229. Application is therefore made for the Tribunal to include in its judgement the obligation of Italy to indemnify the owner as required.

### **III. Loss and damages suffered by the charterer of the M/V Norstar**

#### **1. Loss and damage compensation for the cargo**

230. At the time of the seizure, the M/V Norstar had a cargo of 177,566 mt gas oil with a value of 612 USD per mt on board. The value of the cargo on the date of the seizure on 24 September 1998 therefore was 108,670.39 USD.

This gas oil should have been surrendered by Italy to the charterer. Instead, the gas oil was recycled or disposed of. Therefore, Italy must reimburse the value of the gas oil as of the date of the seizure, plus 8% interest on the amount with effect from that date.

The claim for damages relating to the loss of the cargo is therefore:

**108,670.39 USD**

FROM	INTEREST (ANNUAL RATE)	AMOUNT
25 September 1998.	8%	108,670.39 USD
TOTAL		108,670.39 USD

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

231. As a consequence of the seizure of the M/V Norstar, the charterer was unable to use the M/V Norstar for his business activity. Therefore, he sustained damage in the form of lost profits.

232. The charterer could have used the vessel during the entire term of the charter party and, by virtue of the renewal options, which we referred to above, for a further two years.<sup>112</sup>

Accordingly, recompense for profits unrealized from the time of the seizure on 24 September 1998 up to the end of the seven-year term (25 June 2005) must be paid by Italy.

233. The amount of the loss of revenue can in this instance only be estimated, because documents relating to the profits realised by the charterer are no longer available.

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<sup>112</sup> Annex 2.

234. In the period from 1998 to 2005, however, the charterer of a vessel such as the M/V Norstar could easily expect a profit of at least 150.000,00 USD per annum through offshore bunkering of megayachts.

As an agent/operator in the business of offshore bunkering of megayachts in the Mediterranean, Mr. Silvio Rossi has confirmed this.

235. Therefore, 150,000.00 USD per annum is claimed as loss of revenue for the charterer.

This is equivalent to the following gross damages:

DATE	AMOUNT PER YEAR	PRORATED
25 Sept 1998–19 June 1999 (268 days)	150,000.00 USD	110,136,98 USD
20 June 1999–19 June 2005 (6 years)	150,000.00 USD	<u>900,000.00 USD</u>
<b>TOTAL</b>		<b>1,010,136.98 USD</b>

Furthermore, interest in the amount of 8% per annum must be paid on top of this amount.

The claims for damages regarding the charterer's lost profit therefore amount in total to:

**1,010,136.98 USD**

with the following interest:

FROM	ANNUAL RATE	AMOUNT
20 June 1999	8 %	110,136.98 USD
20 June 2000	8 %	150,000.00 USD
20 June 2001	8 %	150,000.00 USD
20 June 2002	8 %	150,000.00 USD
20 June 2003	8 %	150,000.00 USD
20 June 2004	8 %	150,000.00 USD
20 June 2005	8 %	150,000.00 USD
<b>TOTAL</b>		<b>1,010,136.98 USD</b>

#### **IV. Material and non-material damage to natural persons**

236. Italy has charged the following persons with alleged tax offences in connection with the bunkering activities of the M/V Norstar before the Court of Savona<sup>113</sup>:

- Mr. Silvio Rossi

Mr. Silvio Rossi was the general manager of Rossmare International S.A.S. (Savona) and still is today. Rossmare International S.A.S. was the local operator for the M/V Norstar in Italy.

- Mr. Renzo Biggio

Mr. Renzo Biggio was the former second captain of the M/V Norstar until 1997.

- Mr. Arve Einar Mørch

Mr. Arve Einar Mørch was the Chairman of the Board of the Intermarine A.S., which until the time of the seizure was the owner of the M/V Norstar.

- Mr. Emil Petter Vadis

Mr. Emil Petter Vadis was the Managing Director of the Intermarine A.S., which until the time of the seizure was the owner of the M/V Norstar.

- Mr. Tore Husefest

Mr. Tore Husefest was the former first captain of the M/V Norstar.

237. The charges against all of the above were unsubstantiated, since all of the defendants have been found not guilty.<sup>114</sup>

Italy must, therefore, reimburse all of these defendants for material and non-material damages, which has been incurred by the seizure and the criminal charges against them.

238. In addition, both captains, who at the time of the seizure were employed on the M/V Norstar, Mr. Odd Falck and Mr. Tor Tollefsen, have suffered damage, because by virtue of the seizure of the M/V Norstar, they have lost their jobs. Italy must therefore also compensate them for this.

239. Specifically the following compensation is claimed for the natural persons affected:

1. Legal fees

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<sup>113</sup> Annex 10.

<sup>114</sup> *Ibidem*.

*a) Lawyers' fee for lawyers, P. Giannella and A. L. Germano*

240. Rossmare International S.A.S. engaged the lawyers, Pietro Giannella and Angelo Luciano Germano for the legal defence of Mr. Silvio Rossi before the Court of Savona and before the Court of Genoa.

241. The other defendants engaged their own lawyers. However, it was agreed that the lawyers, Pietro Giannella and Angelo Luciano Germano would carry out the bulk of the work, in order to rebut the accusations of the Public Prosecutor's Office.

242. The lawyers, Pietro Giannella and Angelo Luciano Germano invoiced the following amounts for their services<sup>115</sup>:

INVOICE DATE	AMOUNT
07 December 2001	3.000.000 ITL (1.549,37 EUR)
01 April 2003	5.207,68 EUR
15 May 2003	7.680,00 EUR
09 November 2005	7.680,00 EUR
25 November 2005	7.680,00 EUR
TOTAL	29.797,05 EUR

Gross amount: 29.797,05 USD

243. These costs were incurred by the defendants through no fault of their own. Therefore, Italy must fully compensate these expenses and, in each case interest at the rate of 8% must be added to the damages.

244. Therefore, compensation in damages by virtue of the lawyer's fees for the lawyers, Pietro Giannella and Angelo Luciano Germano, in the following gross amount is claimed:

**29.797,05 EUR**

with the following interest:

DATE	ANNUAL RATE	AMOUNT (Euros)
From 7 December 2001	8%	1.549,37
From 1 April 2003	8%	5,207.68
From 15 May 2003	8%	7,680.00
From 9 November 2005	8%	7,680.00
TOTAL		29,797.05

*b. Lawyers' fees for Mr. Arve Einar Mørch's lawyer, Aurelio Palmieri*

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<sup>115</sup> Annex 30.

245. After the seizure of the vessel, Mr. Arve Einar Mørch engaged the lawyer, Aurelio Palmieri in Savona to defend him before the Court of Savona and to release the M/V Norstar from the arrest.<sup>116</sup>

246. In a letter dated 28 October 1998, the lawyer, Aurelio Palmieri, requested payment for his services of 2,000.00 USD.<sup>117</sup> The receipt of payment was confirmed in a letter dated 13 November 1998.<sup>118</sup>

In a letter dated 11 March 1999, Mr. Palmieri requested further payment for his services of 2,000.00 USD.<sup>119</sup> This sum was paid on 14 April 1999.<sup>120</sup>

247. The lawyers' costs were required for defence of Mr. Mørch against the charges brought by the Italian Public Prosecutor's Office, now invalidated.

Therefore, Italy must reimburse the costs of Mr. Mørch's legal representation, as well. These damages total 4,000.00 USD.

Interest must be added to the above amount with effect from the request for payment.

Therefore, damages relating to the legal costs for Mr. Arve Einar Mørch, the following gross amount is hereby claimed:

**4,000.00 USD**

with the following interest:

FROM	INTEREST (ANNUAL RATE)	AMOUNT
28 October 1998	8%	2,000.00 USD
11 March 1999.	8%	2,000.00 USD
<b>TOTAL</b>		<b>4,000.00 USD</b>

## 2. Other professional fees

a. Memorial English Language revisions fee for Panama's English language expert, Douglas Glenn. <sup>121</sup>	330.00USD
b. Damage calculation revision fee for Panama's economic expert, Guido Olmos. <sup>122</sup>	4,000.00USD

<sup>116</sup> Annex 31.

<sup>117</sup> Annex 32.

<sup>118</sup> Annex 33.

<sup>119</sup> Annex 34.

<sup>120</sup> Annex 35.

<sup>121</sup> Annex 36.

### 3. Pain and suffering

248. By the unlawful seizure of the M/V Norstar and the criminal proceedings brought, Italy has also caused pain and suffering to several persons. Italy must pay compensation for this.

Specifically:

#### *a) Mr. Silvio Rossi*

249. By virtue of the charges brought against him, Mr. Silvio Rossi was exposed to seven years of criminal proceedings (1998 to 2005), resulting in considerable psychological stress, since he had to live in a prolonged state of uncertainty as to whether he would be convicted or not.

250. As compensation for this stress, damages in the amount of 25.000,00 USD, plus 3 % interest with effect from 24 September 1998 are claimed.

#### *b) Mr. Renzo Biggio*

251. By virtue of the charges against him, Mr. Renzo Biggio was also exposed to seven years of criminal proceedings (1998 to 2005), which resulted in considerable psychological stress.

As compensation for this stress, damages are claimed in the amount of 10.000,00 USD, plus 3 % interest with effect from 24 September 1998.

#### *c) Mr. Arve Einar Mørch*

252. By virtue of the unsubstantiated charges that Italy brought against him, Mr. Arve Einar Mørch was exposed to seven years of criminal proceedings (1998 to 2005), resulting in considerable psychological stress.

As compensation for this stress, damages in the amount of 12.000,00 USD, plus 3 % interest with effect from 24 September 1998 are claimed.

#### *d) Mr. Emil Petter Vadis*

253. By virtue of the charges brought against him, Mr. Emil Petter Vadis was exposed to seven years of criminal proceedings (1998 to 2005), which resulted in considerable psychological stress.

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<sup>122</sup> Annex 37.

As compensation for this stress, damages in the amount of 10.000,00 USD, plus 3 % interest with effect from 24 September 1998 are claimed.

*e) Mr. Tore Husefest*

254. As a result of the false charges brought against him, Mr. Tore Husefest was exposed to seven years of criminal proceedings (1998 to 2005), which resulted in considerable psychological stress.

As compensation for this stress, damages in the amount of 10.000,00 USD, plus 3 % interest with effect from 24 September 1998 are claimed.

*f) Mr. Odd Falck*

255. Mr. Odd Falck was the captain of the M/V Norstar at the time of the seizure on 24 September 1998. As a result of the seizure, he lost his job.

As restitution for this, compensation in the amount of 10.000,00 USD, plus 3 % interest with effect from 24 September 1998 is claimed.

*g) Mr. Tor Tollefsen*

256. Mr. Tor Tollefsen was the second captain of the M/V Norstar at the time of the seizure on 24 September 1998. As a result of the seizure, he lost his job.

As restitution for this, compensation in the amount of 10.000,00 USD, plus 3 % interest with effect from 24 September 1998 is claimed.

*h) Total sum of the damages for pain and suffering*

257. In total as compensation for the pain and suffering the following gross amount is asserted:

**87.000,00 USD**

with the following interest:

FROM	INTEREST (ANNUAL RATE)	AMOUNT
24 September 1998.	3%	87.000,00 USD
TOTAL		87.000.00 USD



## V. Total damages

258. Italy must pay compensation in damages in the total amount of 13,721,918.60USD plus 145.186,68 EUR with interest as specified above.

Additionally Italy has to indemnify the owner against all possible claims by the Palma Port Authority in relation to the M/V Norstar made since 25 September 1998.

The total amount is shown in the following table:

QUANTIFICATION OF DAMAGES SUMMARY	PARAGRAPH	AMOUNT
M/V Norstar value	195	625000
Loss of revenue	203	11675484.4
Continual payment of wages	211	19100
Legal costs of lawyers Abogados Bufete Feliu in Palma de Majorca	213	12200
Costs for the lawyers Nelson Carreyo and Remé Rechtsanwälte:	216	33405.83
Legal fees in relation to the procedure before the Tribunal	220	20796
Payment due for fees and taxes to the Panama Maritime Authority	222	121795.01
Loss and damage compensation for the cargo	230	108670.39
Loss and damage for loss of revenue (lucrum cessans)	235	1010136.98
Other profesional fees	244	4330
Damages relating to the legal costs for Mr. Arve Einar Mørch	247	4000
Compensation for the pain and suffering	257	87000
<b>TOTAL</b>		<b>13, 721,918.60USD 145,186.68 Eur</b>

## SUMMARY

259. It has been demonstrated that by wrongfully exercising its criminal jurisdiction and the application of 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 as an incidental procedural measure, thereby preventing the Norstar's ability 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. Subsequent to this violation, Italy also acted in a manner contrary to Article 300 of the Convention, regarding its obligation to act in good faith.

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 laws cited by Italy as applicable to the activities of the M/V Norstar have been held as incompatible with the Convention and other rules of international law.

It has also been evidenced that Italy has violated its international obligations concerning the human rights and fundamental freedoms of the persons involved with or interested in the operations of the M/V Norstar in terms of their right to property and their freedom of movement.

The actions of Italy before, during, and after the fact and the unreasonably long time that has passed since Panama first raised its complaint regarding the treatment of the M/V Norstar, have placed a severe burden on Panama in terms of the extensive legal work involved and the very high costs that have been incurred while litigating this case. This is a legitimate reason to conclude that the conduct of Italy has been indefensible.

Based on the Draft Articles on International Responsibility of States for International Wrongful Acts Italy is 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 aggravated that act's effects, all of which is relevant for determining the amount of compensation required.

Panama, therefore, submits a claim against Italy for the damages incurred in the amount of 13,721,918.60 USD plus 145.186,68 EUR with interest.

It has been shown that the conduct of Italy over time has increased the amount of this claim both in terms of additional damages due to the depreciation of the M/V Norstar, which ultimately led to its sale as scrap at public auction and in terms of the interest that has accrued due to prolonged length of time it has taken to resolve this case.

It is now inconceivable that Italy could have extended its detention of the M/V Norstar without knowing that such damage would occur. Nevertheless, it has also been demonstrated that the respondent has avoided its duty to minimize the damages caused, not only by neglecting to answer all and any of the communications from Panama, during the eighteen years that has elapsed since the arrest, but also by vehemently contesting the legitimate claims of Panama, thereby depriving the persons involved in the operations of the vessel and their human rights, while also unjustly tarnishing the image of Panama, the sovereign flag state.

## CHAPTER 5

### SUBMISSIONS

260. The applicant requests the Tribunal to admit this Memorial and to find, declare, and adjudge

FIRST: that by ordering and requesting the arrest of the M/V Norstar, in the exercise of its criminal jurisdiction and application of its customs laws to bunkering activities carried out on the high seas, Italy has thereby prevented its ability to navigate and conduct legitimate commercial activities therein, and that by filing charges against the persons having an interest on the operations of this Panamanian vessel, Italy has breached

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

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

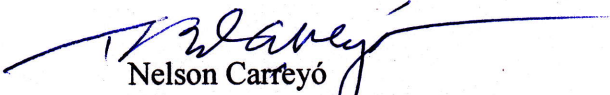
THIRD: that as a consequence of the above violations, Italy is responsible to repair the damages incurred by Panama and by all the persons involved in the operation of the M/V Norstar by way of compensation *provisionally* amounting to 13,721,918.60 USD plus 145.186,68 EUR with interest; and

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

  
Nelson Carreyó  
Agent

## CERTIFICATION

In accordance with article 63, paragraph 1, and 64, paragraph 3, of the Rules of the Tribunal, I herewith certify that the documents reproduced in the Annexes to these observations and Submissions are true copies of the documents referred to and that the translations provided by the Republic of Panama are accurate.

A handwritten signature in blue ink, appearing to read 'N. Carreyó', with a long horizontal stroke extending to the right.

Nelson Carreyó  
Agent of the Republic of Panama  
9 April, 2017