PCA Case Nº 2014-07

IN THE MATTER OF THE DUZGIT INTEGRITY ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII
OF THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

- between -

THE REPUBLIC OF MALTA

- and -

THE DEMOCRATIC REPUBLIC OF SÃO TOMÉ AND PRÍNCIPE

AWARD

ARBITRAL TRIBUNAL:

Professor Alfred H.A. Soons (President)
Judge James L. Kateka
Professor Tullio Treves

REGISTRY:

The Permanent Court of Arbitration

5 September 2016

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GLOSSARY OF DEFINED TERMS

AFE	Applicant Factual Exhibit
ALE	Applicant Legal Exhibit
APE	Applicant Photographic Exhibit
ARSIWA	Draft Articles on the Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001
AWS	Applicant Witness Statement
Bifurcation Request	São Tomé's request that the Tribunal rules on the question of jurisdiction and the admissibility of the claims as separate from the merits
Convention	United Nations Convention on the Law of the Sea, 1982
ECHR	European Court of Human Rights
HFO	Heavy Fuel Oil
ICJ	International Court of Justice
ILC	International Law Commission
IMAP	Port and Maritime Institute
ITLOS	International Tribunal for the Law of the Sea
MARPOL	International Convention for the Prevention of Pollution from Ships, 1973
MGO	Marine Gas Oil
MT	Metric ton, equal to one thousand kilograms
Notification	Notification of Arbitration
Criminal Code	Código Penal
PCIJ	Permanent Court of International Justice
Post-Hearing Submissions	Comments submitted by each Party in response to the information submitted by the other Party in response to the Tribunal's question(s) of 23 February 2016

Registry or PCA	Permanent Court of Arbitration
Radar Screen-Shot	Malta's radar screen-shot accompanying the audio-recording played during the hearing on jurisdiction, admissibility, and merits
Reply to Post-Hearing Submissions	Reply to comments submitted by each Party in response to the information submitted by the other Party in response to the Tribunal's question(s) of 23 February 2016
RFE	Respondent Factual Exhibit
RLE	Respondent Legal Exhibit
RWS	Respondent Witness Statement
Settlement Agreement	Settlement Agreement signed between the Government of São Tomé and Príncipe and DS Tankers, 23 November 2013
SOLAS	International Convention for the Safety of Life at Sea, 1974
STCW	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978
STS	Ship-to-Ship
VDR	Voyage Data Recorder
VHF	Very High Frequency
Written Statement	Malta's written statement attaching 16 photographs in response to the questions posed by the Tribunal on 23 February 2016

DRAMATIS PERSONAE

Anuket Emerald	M/T *Anuket Emerald*, a vessel chartered by Monjasa PTE Ltd
Coast Guard	São Tomé Coast Guard
Committee	Negotiation Committee established on 21 August 2013 between the Government of São Tomé, DS Tankers, and Stena Oil
DS Tankers	DS Tankers Limited, a Maltese company and the owner of *Duzgit Integrity*
Directorate	Customs Directorate General
Duzgit Integrity	M/T *Duzgit Integrity*, a chemical tanker registered in Malta, owned by DS Tankers, and chartered by Stena Oil
Energizer	M/T *Energizer*, a vessel owned by Monjasa
IMAP	Port and Maritime Institute
Lefkoniko	*Lefkoniko*, a vessel registered under the Maltese flag
Malta	The Republic of Malta
Marida Melissa	M/T *Marida Melissa*, a fuel oil tanker, registered in the Marshall Islands and chartered by Stena Oil
Monjasa	Monjasa PTE Ltd
Parties	The Republic of Malta and The Democratic Republic of São Tomé and Príncipe
São Tomé	The Democratic Republic of São Tomé and Príncipe
Stena Oil	Stena Oil, a Swedish company that charted and operated *Duzgit Integrity* and *Marida Melissa*

I. INTRODUCTION

A. THE PARTIES

1. The Applicant in the present arbitration is the Republic of Malta ("**Malta**").

2. The Applicant is represented in these proceedings by:

Mr. Ramón García-Gallardo, Agent and Counsel
Mr. Alexander Mizzi, Co-Agent and Co-Counsel
Mr. Alejandro Camacho, Co-Counsel
King & Wood Mallesons LLP
Square de Meeüs 1
Brussels B-1000, Belgium

3. The Respondent in the present arbitration is the Democratic Republic of São Tomé and Príncipe ("**São Tomé**").

4. The Respondent is represented in these proceedings by:

H.E. Manuel Salvador dos Ramos, Minister of Foreign Affairs and Communities, Agent
Avenida 12 de Julho
101 São Tomé
Democratic Republic of São Tomé and Príncipe

H.E. Américo Afonso Lima Viegas, Chargé d'Affaires a.i., Co-Agent
Embassy of the Democratic Republic of São Tomé and Príncipe in Brussels
Avenue Tervurenlaan 175
Brussels B-1150, Belgium

Ms. Juliette Luycks, Co-Agent and Counsel
Mr. Ruud Niesink, Co-Agent and Counsel
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Droogbak 1a
1013 GE Amsterdam, The Netherlands

Mr. Guilherme Posser da Costa, Government Legal Counsel
Posser da Costa & Sociedade de Advogados, RL
Av. Kwame N'Krumah
São Tomé
Democratic Republic of São Tomé and Príncipe

B. THE DISPUTE

5. The present arbitration results from the Parties' disagreement as to the lawfulness of São Tomé's conduct in respect of *Duzgit Integrity*[1]— a Maltese flagged vessel —, its Master, crew, owner and charterer.

II. PROCEDURAL HISTORY

6. Malta and São Tomé are parties to the United Nations Convention on the Law of the Sea ("**Convention**").[2]

7. On 22 October 2013, Malta filed a Notification of Arbitration ("**Notification**") pursuant to Article 287 and Article 1 of Annex VII to the Convention with regard to a dispute concerning the vessel *Duzgit Integrity*.

8. In its Notification, Malta appointed Professor Tullio Treves as a member of the Tribunal in accordance with Article 3(b) of Annex VII to the Convention.

9. On the basis of the Parties' agreement that the procedure for the constitution of an arbitral tribunal composed of three arbitrators is governed by the provisions of Annex VII of the Convention and that Article 3 of Annex VII applies *mutatis mutandis*, the President of the International Tribunal for the Law of the Sea ("**ITLOS**"), in consultation with the Parties, appointed Judge James L. Kateka on 27 December 2013 as member of the Tribunal, and Professor Alfred H.A. Soons on 13 March 2014 as President of the Tribunal.

10. The Parties agreed to appoint the International Bureau of the Permanent Court of Arbitration as the Registry in the arbitration ("**Registry**").

11. Following the constitution of the Tribunal, Terms of Appointment dated 22 May 2014 were signed by the Parties, the President on behalf of the Tribunal, and the Registry.

12. On 27 May 2014, after consultation of the parties, the Tribunal issued Procedural Order No. 1 in which it adopted Rules of Procedure and a provisional Procedural Timetable for the arbitration.

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[1] The official name of the vessel is M/T *Düzgit Integrity*. In this Award it shall be referred to as *Duzgit Integrity*, in keeping with how the Parties have referred to it throughout these proceedings.

[2] São Tomé and Príncipe ratified the Convention on 3 November 1987. Malta ratified the Convention on 20 May 1993.

13. The Registrar sent letters to the Parties on behalf of the Tribunal on 13 October and 27 November 2014, in which in each instance the Tribunal adopted a revised Procedural Timetable in consultation with the Parties and in accordance with Articles 9(1)-(2) of the Rules of Procedure.

14. In accordance with the revised Procedural Timetable, Malta submitted its Memorial and corresponding exhibits and authorities on 12 December 2014.

15. On 29 June 2015, São Tomé submitted its Counter-Memorial and corresponding exhibits and authorities.

16. In its Counter-Memorial, São Tomé raised objections to the jurisdiction of the Tribunal and the admissibility of Malta's claims, and requested that the Tribunal rule on those objections first and separately from the merits of the dispute ("**Bifurcation Request**").

17. By letter dated 3 July 2015, the Tribunal invited Malta to submit comments on São Tomé's Bifurcation Request by 20 July 2015.

18. Between 20 July and 10 August 2015, the Tribunal heard the Parties' views on São Tomé's Bifurcation Request, and suspended the Procedural Timetable in its entirety until determination of the Bifurcation Request.

19. By Procedural Order No. 2 dated 24 August 2015, the Tribunal rejected São Tomé's Bifurcation Request and fixed a revised Procedural Timetable.

20. By letters dated 7 and 8 September 2015, the Parties submitted to the Tribunal an agreed schedule for the document production process. By letter dated 9 September 2015, the Tribunal confirmed the agreed document production schedule.

21. In accordance with the document production schedule, on 24 September 2015, Malta submitted a set of disputed document production requests to the Tribunal. São Tomé submitted no such document production requests. By Procedural Order No. 3 dated 1 October 2015, the Tribunal ruled upon Malta's disputed document production requests.

22. On 23 October 2015, Malta submitted its Reply and corresponding exhibits and authorities.

23. In paragraph 435 of its Reply and by letter dated 26 October 2015, Malta announced the preparation by an expert of a Confirmatory Report by the end of November 2015 with the aim of "confirming the heads of quantification as accurate, fair, proportionate, and substantiated".

24. By letter dated 3 November 2015, São Tomé submitted, *inter alia*, that, according to paragraph 19(6) of the Rules of Procedure, Malta should have submitted the Confirmatory Report, at the latest, with its Reply; and further submitted that if the Tribunal were minded to grant Malta the opportunity to submit the Confirmatory Report, it should consider deferring the question of damages to a second phase of the proceedings.

25. By letter dated 11 November 2015, Malta requested permission to submit the Confirmatory Report; opposed the deferral of the question of damages to a second phase of the proceedings; and suggested that the Tribunal adopt procedures such that the question of damages could be dealt with in one phase while ensuring the equal treatment of the Parties.

26. By Procedural Order No. 4 dated 19 November 2015, the Tribunal rejected, *inter alia*, Malta's request to submit a Confirmatory Report on damages.

27. On 22 December 2015, São Tomé submitted its Rejoinder and corresponding exhibits and authorities.

28. By Procedural Order No. 5 dated 22 January 2016, the Tribunal instructed the Parties to address at the forthcoming hearing all issues of jurisdiction, admissibility, and merits including the question of Malta's alleged entitlement to any heads of damage, but not the quantification of damages. By the same Procedural Order, the Tribunal invited the Parties to "attempt to agree on a hearing schedule for the Tribunal's consideration by 1 February 2016".

29. By letter dated 25 January 2016, Malta notified the Tribunal that it "wishe[d] to call witness for the Respondent Francisco Mendes Ferreira [] for cross-examination". By email on the same date, São Tomé confirmed that it did not wish to call any of Malta's witnesses for cross-examination.

30. By letter dated 1 February 2016, the Parties submitted to the Tribunal a proposed hearing schedule. While the Parties informed the Tribunal that they reached an agreement on "certain key issues", they were not "able to agree [on] how the hearing of the witness should be conducted". Malta stated that it preferred that the witness be examined immediately after both Parties had made their opening statements, whereas São Tomé was of the view that the witness should be heard after Malta's opening statement.

31. By the same letter, the Parties also expressed their views on the interpretation of Article 20(5) of the Rules of Procedure on the examination of witnesses.

32. By Procedural Order No. 6 dated 4 February 2016, the Tribunal directed the Parties to, *inter alia*, examine the witness after the Tribunal had submitted its questions to the Parties following their Opening Statements of the oral pleadings.

33. By letter dated 17 February 2016, the Tribunal submitted questions to the Parties to be addressed in their Opening Statements of the oral pleadings.

34. On 23 and 24 February 2016, a hearing on issues of jurisdiction, admissibility, and merits, including the question of Malta's alleged entitlement to any heads of damage, and the examination of the witness of the Respondent, Francisco Mendes Ferreira, Adjunct Sergeant of the Coast Guard, was held at the Peace Palace in The Hague.

35. On the first hearing day, during its Opening Statement, Malta played an audio-recording to the Tribunal that was accompanied by a radar screen-shot ("**Radar Screen-Shot**").

36. Following the conclusion of the first hearing day, the Tribunal posed questions to the Parties to be addressed during the Parties' respective Closing Statements the following day.

37. On the second hearing day, in addition to its oral Closing Statement, Malta submitted to the Tribunal a written statement attaching 16 photographs in response to the questions posed to it by the Tribunal on 23 February 2016 ("**Written Statement**").

38. During its Closing Statement, São Tomé stated that it had not previously seen the Radar Screen-Shot and that while it had been provided with a copy of the Written Statement, it had not had an opportunity to review or verify its content.

39. By Procedural Order No. 7 dated 25 February 2016, the Tribunal instructed Malta to submit a copy of the Radar Screen-Shot as well as the 16 photographs submitted with its Written Statement into the record and assign them exhibit numbering.

40. By the same Procedural Order, the Tribunal invited each Party to, *inter alia*, "submit any comments that they may have in response to the oral or written information submitted by the other Party in answer to the Tribunal's question(s) of 23 February 2016" by 9 March 2016 ("**Post-Hearing Submissions**"), and their respective replies to those comments by 16 March 2016 ("**Replies to Post-Hearing Submissions**").

41. By letter dated 9 March 2016, Malta submitted new exhibits and clarifications of these new exhibits.

42. On the same date, each Party submitted its Post-Hearing Submissions.

43. In its Post-Hearing Submissions of 9 March 2016, Malta requested leave to submit "three categories of information all of which is already in the possession of the Respondent, should the Tribunal consider it useful", namely: photographs presented to the Court of First Instance, the radar screen shots submitted by the Public Prosecutor, and the log-book of *Duzgit Integrity*. Malta also requested leave to submit "the full 21 hours of recording of the conversations that took place on public channel VHF 16" as recorded by the Voyage Data Recorder ("**VDR**") of *Duzgit Integrity* "together with an explanatory table which lists each conversation and its duration, should the Tribunal consider it useful".

44. On 16 March 2016, each Party submitted its Reply to the Post-Hearing Submissions.

45. In its Reply to Malta's Post-Hearing Submissions, dated 16 March 2016, São Tomé objected to Malta's requests for leave to submit the three categories of information. São Tomé also objected to the request to submit the 21 hours of recording.

46. In its Reply to São Tomé's Post-Hearing Submissions, dated 16 March 2016, Malta requested leave to submit further "documentation and certification" relevant to the links between the flag State and *Duzgit Integrity* and its owners, "should the Tribunal deem it necessary". Malta further requested leave to submit evidence, "should the Tribunal deem appropriate", of the "final extension of class by Bureau Veritas [which] is not yet part of the evidence before the Tribunal".

47. By Procedural Order No. 8 dated 25 March 2016, the Tribunal rejected Malta's request to submit additional evidence.

III. FACTUAL OVERVIEW

A. MARITIME CONTEXT

1. *Duzgit Integrity*'s owner, charterer, and ship registry

48. The dispute concerns the *Duzgit Integrity*, a chemical tanker built in 2008 with IMO number 9380415, and owned by DS Tankers Limited ("**DS Tankers**"), a Maltese company.[3] The vessel remains registered in Malta under DS Tankers' ownership.[4] The dispute also involves a second

[3] Memorial, para. 8; Transcript of the Maltese Register of Ships of the *Duzgit Integrity*, 19 November 2014 (**AFE 3.1**); Certificate of Malta Registry of *Duzgit Integrity*; Minimum safe manning certificate of *Duzgit Integrity*; and Certificate of Registration of a Private Limited Liability Company of DS Tankers Limited (**AFE 3.2**); Malta's Reply to Post-Hearing Submissions, para. 12.

[4] Memorial, para. 9.

vessel, *Marida Melissa*, a fuel oil tanker with IMO number 9438169 registered in the Marshall Islands.[5]

49. Both *Duzgit Integrity* and *Marida Melissa* were chartered and operated by Stena Oil,[6] a Swedish company that supplies marine fuels in the Scandinavian and North Sea waters[7] as well as off the coast of west-Africa.[8] The owners of the two vessels are not related.[9]

50. According to Malta, in order to operate under a Maltese flag, a ship is required to have a valid statutory certificate issued from a recognised organisation on behalf of Malta.[10] Pursuant to Article 94 of the Convention, Malta exercises its "jurisdiction and control in administrative, technical and social matters over ships flying its flag".[11] Maltese ships are subject to the Maltese Merchant Act as well as the ancillary regulations and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers ("**STCW**") regarding the manning and certification of seafarers.[12]

2. São Tomé and Príncipe's geographic location and maritime limits

51. São Tomé is an island nation located in the Gulf of Guinea, to the west of Gabon and to the south of Nigeria.[13] São Tomé is an archipelagic State within the meaning of Article 46 of the Convention, and consists of two main islands, "São Tomé" and "Príncipe", and some rocky islets.[14] The baselines from which the limits of the archipelagic waters are drawn follow from Articles 2 and 3 of *Decreto-Lei* 1/98.[15] The territorial sea of São Tomé has a breadth of twelve nautical miles, measured from the baseline, the outer limit of which is a line which at every

[5] Memorial, para. 13.

[6] Memorial, para. 34.

[7] Memorial, para. 33.

[8] Memorial, para. 33.

[9] Memorial, para. 34.

[10] Memorial, para. 4.

[11] Memorial, para. 4.

[12] Memorial, para. 5.

[13] Memorial, para. 15.

[14] Counter-Memorial, para. 25.

[15] Counter-Memorial, para. 25.

point is twelve nautical miles from the nearest point of the baseline.[16] The total area of archipelagic waters is 3,886 square kilometres.[17]

52. Article 4 of São Tomé and Príncipe's Constitution stipulates that the territory of São Tomé consists of the land territory, territorial sea, and archipelagic waters.[18] Paragraph 2 of that provision grants São Tomé sovereignty over "all of its ground territory".[19] Moreover, São Tomé relies on Article 2 of the Customs Code of Procedure in asserting that "São Tomé's customs jurisdiction extends to its territorial sea"[20] including its archipelagic waters.[21]

3. Ship-to-ship transfers along the west-African shipping route

53. The west-African shipping route, where São Tomé is located, is an active one.[22] Despite its importance, the route's facilities for commercial shipping are very limited.[23] With São Tomé's permission, vessels that cannot enter a harbour of São Tomé can anchor offshore in one of its three port zones.[24] Near Neves, at the north-western side of São Tomé, oil tankers normally anchor to supply oil to São Tomé.[25]

54. In light of the limited port facilities, activities including refuelling, provision of supplies, and transhipment often take place at sea through Ship-to-Ship ("**STS**") cargo transfer.[26] Supply arrangements are made with vessels operating along a specific route. According to Malta, the details of the operation including the location for transhipment are generally agreed upon in advance.[27]

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[16] Counter-Memorial, para. 25; Official Maritime Claims (**RFE 1**); Map showing the archipelagic waters baselines of São Tomé and Príncipe (**RFE 2**).

[17] Counter-Memorial, para. 25.

[18] Hearing Transcript (23 Feb. 2016), 107:3-7; São Tomé and Príncipe's Constitution, 2003 (**ALE 16**).

[19] Hearing Transcript (23 Feb. 2016), 107:7-9; São Tomé and Príncipe's Constitution, 2003 (**ALE 16**).

[20] Hearing Transcript (23 Feb. 2016), 108:21-25.

[21] Hearing Transcript (23 Feb. 2016), 109:1-2. *See* also Act No. 1/98 of 23 March 1998 (**AFE 8**).

[22] Memorial, para. 16; Extracts from the Economic Impact of Maritime Policy, African Bank of Development Group, 14 July 2011 (**AFE 4**).

[23] Memorial, para. 17.

[24] Counter-Memorial, para. 27.

[25] Counter-Memorial, para. 27.

[26] Memorial, para. 19.

[27] Memorial, para. 24.

55. Malta submits that, depending on the circumstances, permission to enter the port "can be obtained during or after the operation" through agents who work closely with São Tomé authorities.[28] Agents often become directly involved when they are contacted by vessels that are unable to reach Port Control by radio or public channel 16.[29] The agents then contact the authorities through phone or other means.[30]

56. The entry of vessels into the port of São Tomé is governed by the *Decreto Lei 04/2010*. It contains the term 'chegada'. According to São Tomé, 'chegada' "concerns the arrival in São Tomé of vessels that intend to do something else than simply navigate through the territorial sea or archipelagic waters in innocent passage".[31] São Tomé submits that for bunkering or other STS operations, the Maritime and Port Institute ("**IMAP**") must be notified in advance; and IMAP will then coordinate with the Coast Guard, the customs and other relevant authorities.[32]

B. EVENTS BEFORE 15 MARCH 2013: *DUZGIT INTEGRITY*'S SCHEDULED OPERATION

57. *Duzgit Integrity* was located in the Gulf of Guinea and was, Malta submits, laden with approximately 1,564 metric tons ("**MT**") of Marine Gas Oil ("**MGO**") and approximately 8,852 MT of Heavy Fuel Oil ("**HFO**"), owned by Stena Oil.[33]

58. *Duzgit Integrity* was scheduled to proceed to dry-dock in the port of Las Palmas for its five-year survey scheduled for 1 April 2013.[34] On its way to Las Palmas, and before proceeding to dry-dock, it was planned that *Duzgit Integrity* would provide approximately 8,200 MT of HFO to four vessels which were operating off the coast of Nigeria. Before that operation, *Duzgit Integrity* was scheduled to meet *Marida Melissa* in the area of São Tomé to transfer to it the approximately 1,555 MT of MGO as well as some equipment.[35]

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[28] Memorial, para. 31.

[29] Memorial, para. 32.

[30] Memorial, para. 32.

[31] Hearing Transcript (23 Feb. 2016), 107:25-108:4.

[32] Hearing Transcript (23 Feb. 2016), 108:4-8. *See* also Examples of a Formulário 42-A and a Formulário 42-C (**RFE 6**); An example of the previously used general entrance form (**RFE 7**).

[33] Memorial, para. 35.

[34] Memorial, para. 36.

[35] Memorial, para. 36. *See* also Supply instructions issued by Stena Oil, 14 March 2013 (**AFE 9**).

59. *Marida Melissa* was located to the north of São Tomé island. The four scheduled subsequent operations were also located to the north.[36] Accordingly, it was decided that *Duzgit Integrity* would meet *Marida Melissa* 25-30 miles north-west of São Tomé island outside of the archipelagic waters of São Tomé on 15 March 2013. Then, it would supply the four vessels waiting off the coast of Nigeria.[37]

60. The first meeting point between *Duzgit Integrity* and *Marida Melissa* was set at 0031N; 0605E to the north-west of São Tomé island.[38] During the voyage to the north, the Master of *Duzgit Integrity* noticed a 1-2 meter swell from the south.[39] Accordingly, the Master decided that waters to the north-east of São Tomé island would be safer and coordinated with *Marida Melissa* to have a new meeting point at 00.31N; 06.45E.[40]

61. *Duzgit Integrity* proceeded to the new meeting point, located within the archipelagic waters of São Tomé. At this point in time the Master tried to communicate with São Tomé's authorities without success.[41] On 14 March 2013, *Duzgit Integrity* drifted overnight while waiting for a response from the São Toméan Coast Guard ("**Coast Guard**").[42]

C. EVENTS ON 15 MARCH 2013: VESSEL DETENTION

62. At 5:16 a.m. on 15 March 2013, *Duzgit Integrity* contacted *Marida Melissa* by radio indicating that its "engine [had] stopped and [its] heading [was] 230. . .".[43]

63. At 6 a.m., the Coast Guard Operation Centre informed the *Arch Angel*, a patrol boat of the Coast Guard on a routine mission,[44] of a radar detection that two oil tankers had entered "the territorial waters of São Tomé from different directions and seemed to be approaching each other in the

[36] Memorial, para. 45.

[37] Memorial, para. 46.

[38] Memorial, para. 47; Information issued by Serviços de Narubga-Capitania dos Portos of São Tomé and Príncipe (**AFE 44**).

[39] Memorial, para. 48.

[40] Memorial, para. 49; Email exchanges between *Duzgit Integrity* and *Marida Melissa* and Stena Oil (charterer), 14 March 2013 (**AFE 10**); Information issued by Serviços de Narubga-Capitania dos Portos of São Tomé and Príncipe (**AFE 44**); Map showing the archipelagic baselines, the intended meeting point of the vessels and the actual point of arrest (**RFE 29**); Close-up map showing the western baseline of the archipelagic waters, the intended meeting point of the vessels and the actual point of arrest (**RFE 30**).

[41] Reply, para. 56; Statement of the Master of *Duzgit Integrity* Mr. Cengiz Gulsen (**AWS 1**).

[42] Memorial, para. 52.

[43] Conversation between *Marida Melissa* and *Duzgit Integrity* at 05:16 a.m. (**AFE 11.1**).

[44] Patrol mission report for the *Arch Angel* (**RFE 33**).

archipelagic waters".[45] São Tomé states that the Operation Centre had not received prior notification or request for authorisation from the vessels prior to their presence in São Tomé's territorial and archipelagic waters.[46] The Coast Guard patrol boat was then ordered to make contact with both vessels in order to understand "the reasons for their presence in the territorial waters of São Tomé".[47]

1. First visit by the São Tomé and Príncipe's Coast Guard

64. According to Malta, the Coast Guard patrol boat approached *Duzgit Integrity* at 7:05 a.m.[48] São Tomé contests the reliability of the evidence submitted by Malta in this regard.[49]

65. *Duzgit Integrity* asked *Marida Melissa* by Very High Frequency ("**VHF**") to reduce its speed and indicated that a navy boat was on its port side.[50] Immediately thereafter, Francisco Mendes, the master-sergeant of the Coast Guard boat,[51] communicated with the Master of *Duzgit Integrity* via public VHF[52] without boarding the vessel.[53] At that point, "*Duzgit Integrity* was 6.5 nautical miles from the closest point on the shore".[54]

66. The transcript of the radio conversation provides in the relevant part:

> CB: Coast Guard Boat Officer
> DI: *Duzgit Integrity* Master
>
> . . .
>
> CB: Good morning sir, I want to talk with, I need you speak, what you make the here over?
>
> DI: I commence drifting, drifting about 15 miles north of your island and we will meet with *M/T Marida Melissa* for some equipment transfer, hose and fender. We will meet here if possible. If you not give permission we will proceed to offshore.
>
> CB: Yes OK. We talk with you. My English is not very good. You have any guys in your ship speak Spanish, Spanish or French is good over.

[45] Counter-Memorial, para. 29.

[46] Counter-Memorial, para. 30.

[47] Counter-Memorial, para. 31.

[48] Malta's Letter to the Tribunal, 9 March 2016; Radar Screen-Shot 1 (**AFE 45.1.1**).

[49] São Tomé's Reply to Post-Hearing Submissions, para.7.

[50] Memorial, para. 57.

[51] Counter-Memorial, para. 29.

[52] Memorial, para. 60.

[53] Memorial, para. 59.

[54] Counsel for Malta, Hearing Transcript (23 Feb. 2016), 51:9-11.

> DI: Negative, negative. We can speak just Turkish, English and Russian. Do you know these languages?
>
> CB: OK, you, can you tell me you have, you have [authorisation/representation] in Sao Tome or your agency in Sao Tome.
>
> . . .
>
> DI: We will not port contact; we will not port contact of Sao Tome. We will make just Ship-To-Ship transfer, Ship-To-Ship transfer. And I will proceed offshore again. I will not visit your port. I will not visit your port.
>
> CB: OK, thank you for us. I congratulate your [collaboration/cooperation]. Good morning sir.
>
> DI: Thank you very much, thank you very much. If any problem STS operation on here we can proceed offshore. If you give permission I want to make operation here. Here sea condition very well for Ship-To-Ship transfer.
>
> CB: OK thank you, good morning, good job.
>
> DI: Thank you very much, thank you very much for your good cooperation. You are welcome and your information and navy boat is very well. We are thinking safety in here. Thank you.[55]

67. The Coast Guard patrol boat departed after the end of the conversation.[56] São Tomé points out that "there were a number of protracted silences during the conversation"[57] largely due to the patrol boat commander's contact with his supervisor to inform the Coast Guard Operations Centre, *inter alia*, that the vessel did not appear to have authorisation to enter São Tomé's waters.[58] São Tomé further submits that the language barrier led to a miscommunication between the Master of *Duzgit Integrity* and the Coast Guard.[59] Malta, on the other hand, avers that proper communication was possible despite the flawed level of English.[60]

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[55] Memorial, para. 60; Conversation between *Duzgit Integrity* and Coast Guard around 07:04 a.m. during the Coast Guard's first visit (**AFE 11.2**); Certificate of Service Supplier and Service Report of the recorded data extraction of *Duzgit Integrity* VDI (**AFE 38**); Counter-Memorial, para. 33.

[56] Memorial, para. 65.

[57] Rejoinder, para. 124.

[58] Rejoinder, para. 125; Statement by Adjunct Sergeant of the Coast Guard Mr. Francisco Mendes Ferreira (**RWS 1**); Overview of incoming and outgoing calls of Mr. Francisco Mendes Ferreira on 15 March 2013 (**RFE 34**); Letter from telephone company to Defence and Sea Ministry, 19 December 2015, and overview of outgoing calls from the Commander of the Coast Guard (**RFE 35**); Hearing Transcript (23 Feb. 2016), 171:15 - 172:25. *See* also São Tomé's Reply to Post-Hearing Submissions, para. 27.

[59] Counter-Memorial, para. 35; Rejoinder, para. 127.

[60] Reply, paras 89-96.

68. According to Malta, at that time *Marida Melissa* "was approximately1.7/1.6 nautical miles away"[61] from *Duzgit Integrity*. At that point the vessels were not "arm in arm".[62]

69. At 7:09 a.m., the Master of *Duzgit Integrity* contacted *Marida Melissa*:

> I: *Duzgit Integrity*
> M: *Marida Melissa*
>
> I: Navy boat proceeding to you and I take permission for sts operation for here. I think the navy boat, coast guard asking staying at drifting like that.
>
> M: Ok well noted. We will do same cooperation with navy boat, that information.[63]

70. At around 8:25 a.m.[64] *Marida Melissa* came alongside *Duzgit Integrity*.[65] The Master of *Duzgit Integrity* attempted to contact the Coast Guard without success.[66] Both vessels then prepared to transfer certain equipment (in the form of hose and fenders) and to perform the STS operation.[67] By 9:00 a.m. the vessels were "moored to one another".[68] Malta submits that when the *Marida Melissa* came alongside *Duzgit Integrity*, the vessels communicated on public channel VHF 16, "which the [São Toméan] authorities were able to listen to."[69] In that regard, São Tomé asserts that at that point "the vessel was thought to be simply in innocent passage and there was no reason to…take action".[70]

71. In the meantime, the Coast Guard Operations Centre informed the Commander of the Coast Guard that "the vessels appeared to have no authorisation to carry out any operation . . . and that they did not appear to have any agent".[71] At that point, the intentions of the *Duzgit Integrity*

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[61] Hearing Transcript (23 Feb. 2016), 51:3-4.

[62] Hearing Transcript (23 Feb. 2016), 124:6-25; English Translation of Transcript of court hearings 25, 26 and 29 March 2013 (**RFE 32**).

[63] Conversation between *Duzgit Integrity* and *Marida Melissa* at 07:09 a.m. and 08:25 a.m. (**AFE 11.3**).

[64] Memorial, para. 68; Conversation between *Duzgit Integrity* and *Marida Melissa* at 07:09 a.m. and 08:25 a.m. (**AFE 11.3**).

[65] Memorial, para. 68.

[66] Memorial, para. 68; Reply, para. 61; Statement of the Master of *Duzgit Integrity* Mr. Cengiz Gulsen (**AWS 1**).

[67] Malta's Post-Hearing Submissions, para. 22.

[68] Memorial, para. 69; Counter-Memorial para. 39; Copy of the relevant pages from the logbook of the *Marida Melissa* (**RFE 4**); Print of a radar screenshot including the vessels coordinates as at 8.37 a.m., 15 March 2013 (**RFE 5**).

[69] Malta's Post-Hearing Submissions, para. 19(d).

[70] Rejoinder, para. 148; São Tomé's Reply to Post-Hearing Submissions, para. 40.

[71] Statement by Adjunct Sergeant of the Coast Guard Francisco Mendes Ferreira (**RWS 1**); Hearing Transcript (24 Feb. 2016), 81:14-18, 82:14-17.

were not clear to the authorities of São Tomé.[72] The Coast Guard Operations Centre ordered the patrol boat to continue its mission.[73] Upon consultation with the Commander of the Coast Guard, the Coast Guard Operations Centre instructed the patrol boat to pay a second visit to *Duzgit Integrity*.[74]

2. Second visit by the São Tomé and Príncipe's Coast Guard and vessel detention

72. At 9:16 a.m.[75] or 9:20 a.m.,[76] the Coast Guard patrol boat visited *Duzgit Integrity* a second time.[77] There had been no communication from the Coast Guard to *Duzgit Integrity* between the first and the second visit.[78] The Coast Guard reinitiated the conversation using the same public VHF radio channel 16.[79] The second conversation was also recorded by the VDR system of *Duzgit Integrity*.[80]

73. Malta submits that there was an attempt to contact the Coast Guard at 9:26 a.m.[81] São Tomé, on the other hand, contends that the VDR was no longer recording at that time.[82]

74. According to Malta, at the time of the second visit, *Duzgit Integrity* was 6.78 nautical miles from the closest coastal point on the shore.[83] At that point, *Marida Melissa* was alongside *Duzgit Integrity* [84] and the two vessels were connected by hose.[85] São Tomé submits that the first and

[72] Statement by First Lieutenant of the Coast Guard Hamilton de Sousa (**RWS 2**); Hearing Transcript (24 Feb. 2016), 81:25-82:5.

[73] Counter-Memorial, para. 35.

[74] Counter-Memorial, paras 36-37.

[75] Malta's letter of 9 March 2016; Radar Screen-Shot 2 (**AFE 45.2.1**).

[76] São Tomé's Reply to Post-Hearing Submissions, para. 8.

[77] Memorial, para. 71; Conversation between *Duzgit Integrity* and Coast Guard around 09:16 a.m. during the Coast Guard's second visit (**AFE 11.4**); Sworn translation into Portuguese of the conversation between *Duzgit Integrity* and the Coast Guard during its second visit at 9:16 a.m. as submitted to the São Tomé and Príncipe courts (**AFE 11.9**).

[78] Memorial, para. 71; Malta's Post-Hearing Submissions, para. 21.

[79] Memorial, para. 72.

[80] Memorial, para. 72.

[81] Malta's letter of 9 March 2016.

[82] São Tomé's Reply to Post-Hearing Submissions, para. 8.

[83] Hearing Transcript (23 Feb. 2016), 54:1-5.

[84] Hearing Transcript (23 Feb. 2016), 53:20-23.

[85] A copy of the relevant pages from the logbook of the *Marida Melissa* (**RFE 4**); Hearing Transcript (23 Feb. 2016), 55:5-6.

the second visit took place in the same location, approximately 6.4 nautical miles from the nearest point on the shore.[86]

75. The Coast Guard patrol boat informed the Master of *Duzgit Integrity* that the Master had no "authorisation to stop" in the waters of São Tomé.[87] The Coast Guard requested that the Masters of both vessels proceed to the Coast Guard depot.[88] The Master of *Duzgit Integrity* explained that no operation was underway and that, in any event, the vessel received permission "2 hours ago" by radio from a Coast Guard boat.[89] The Master also proposed to make the transfer offshore if the Coast Guard refused to give permission.[90] According to São Tomé, "[t]he Coast Guard . . . wanted the [M]asters to come ashore, to be able to properly investigate the matter further and to verify whether the assumption that they were infringing São Tomé's laws was correct".[91] After a lengthy discussion,[92] the Masters of both *Duzgit Integrity* and *Marida Melissa* anchored the vessels in the anchorage area (00.22.27N; 06.46.31E)[93] near Ana Chaves Bay,[94] and proceeded onshore to the Coast Guard depot.[95]

76. According to Malta, the Masters of the vessels were greeted by journalists and a camera crew.[96] São Tomé, on the other hand, disputes this assertion, but concedes that "the sight of two oil tankers anchoring near shore . . . will likely have drawn attention".[97]

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[86] Hearing Transcript (23 Feb. 2016), 103:23-104:3.

[87] Conversation between *Duzgit Integrity* and Coast Guard at 09:44 a.m. (**AFE 11.5**).

[88] Conversation between *Duzgit Integrity* and Coast Guard at 09:44 a.m. (**AFE 11.5**); Statement by First Lieutenant of the Coast Guard Mr. Hamilton de Sousa (**RWS 2**).

[89] Conversation between *Duzgit Integrity* and Coast Guard at 09:44 a.m. (**AFE 11.5**).

[90] Conversation between *Duzgit Integrity* and Coast Guard at 09:44 a.m. (**AFE 11.5**).

[91] Hearing Transcript (24 Feb. 2016), 84:7-10.

[92] Counter-Memorial, para. 42; Conversation between *Duzgit Integrity* and Coast Guard at 09:44 a.m. (**AFE 11.5**); Conversation between *Duzgit Integrity* and Coast Guard at 09:57 a.m. (**AFE 11.6**); Conversation between *Duzgit Integrity, Marida Melissa* and Coast Guard at 10:17 a.m. (**AFE 11.7**).

[93] Conversation between *Duzgit Integrity, Marida Melissa* and Coast Guard at 10:17 a.m. (**AFE 11.7**).

[94] Counter-Memorial, para. 43.

[95] Memorial, para. 78; Conversation between *Duzgit Integrity, Marida Melissa* and Coast Guard at 10:17 a.m. (**AFE 11.7**); Counter-Memorial, para. 42.

[96] Memorial, para. 80.

[97] Counter-Memorial, para. 43.

77. In the meantime, Stena Oil along with the owners of both vessels appointed Mr. Wilson Morais of Agência Equador,[98] a local agent, to assist with proceedings and "attempt to broker a solution"[99] to "regularise the vessels' situation".[100]

78. The Masters were then interrogated at the Coast Guard Operation Centre.[101] During the interrogations, according to São Tomé, it was revealed that "*Duzgit Integrity* and *Marida Melissa* had not notified the authorities prior to entering São Tomé archipelagic waters and that . . . they had not obtained prior written authorisation for the transhipment of cargo they had commenced, but not completed as a result of the Coast Guard's intervention".[102] Malta submits that no STS operation had commenced.[103]

79. The Masters were suspected of having committed or attempted to commit the crime of smuggling under Article 274 of the *Código Penal* ("**Criminal Code**").[104] According to Malta, the certificates of *Duzgit Integrity* and *Marida Melissa* along with the seamen's books and passports were confiscated and no receipt of the confiscated documents was issued.[105] The Masters were apprehended and ordered to stay in a hotel until the start of the criminal proceedings.[106] Malta contends that the Masters were also requested to sign documents in Portuguese without proper translation.[107]

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[98] Memorial, para. 79; Email from Stena Oil to Agency Ecuador of 15 March 2013 (**RFE 31**).

[99] Memorial, para. 79.

[100] Statement of Stena Oil agent Mr. Wilson Morais, p. 3 (**AWS 4**).

[101] Counter-Memorial, para. 43.

[102] Counter-Memorial, para. 44.

[103] Memorial, para. 81.

[104] Counter-Memorial, para. 51. Article 274 of the Criminal Code provides that the crime of smuggling is committed by "[a]ny party that imports or exports prohibited goods or merchandise or, in other cases, evades the customs duties due for the entry or exit of goods or merchandise, whether as a whole or in part", and by "[a]ny party that imports or exports goods or merchandise without a licence where under a legal ruling a licence is required from any entity for the importation or exportation or without passing through customs" *in* Overview of relevant provisions of São Tomé law (**RLE 2**).

[105] Memorial, para. 82.

[106] Memorial, para. 83; Counter-Memorial, para. 52; Statement of the Master of *Duzgit Integrity* Mr. Cengiz Gulsen (**AWS 1**); Statement of Stena Oil agent Mr. Wilson Morais (**AWS 4**).

[107] Reply, para. 192 referring to Statement of Identity and Residence of the Master, 19 March 2013 (**AFE 27**).

D. EVENTS AFTER 15 MARCH 2013: INSTITUTION OF JUDICIAL PROCEEDINGS AND IMPOSITION OF PENALTIES

80. Various legal proceedings were instituted against the Masters of *Duzgit Integrity* and *Marida Melissa*.

1. Port and Maritime Institute administrative penalty

81. On 16 March 2013, both vessels were fined (each for an amount of EUR 28,875) for failing to notify IMAP of their arrival in São Tomé waters 24 hours in advance in accordance with the provisions of *Decreto-Lei 04/2010*.[108] The fine was fixed pursuant to the same decree.[109] Malta contends that the fine was "excessive and unjustified" on the grounds that it "never entered, nor intended to enter" the port of São Tomé.[110]

82. The decision was not appealed.[111] Stena Oil sent funds to Mr. Wilson Morais to pay the fines on a "without prejudice basis" in exchange for the release of the Masters and the vessels without delay.[112] The fine was paid on 8 November 2013.[113]

83. On 19 March 2013, *Lefkoniko*, a vessel registered under the Maltese flag, was also stopped by the São Toméan authorities, according to Malta in similar circumstances to *Duzgit Integrity*.[114] While in São Toméan territorial waters, *Lefkoniko* was ordered to cease operations and to proceed to port.[115] An administrative fine was imposed against *Lefkoniko* on the same basis as

[108] Counter-Memorial, para. 66 referring to Article 12 of *Decreto-Lei* 04/10 *in* Overview of relevant provisions of São Tomé law (**RLE 2**). Article 12 establishes that "[t]he Vessel Protection Officers of national and foreign ships covered by this decree-law shall notify their arrival to the Port Installations Protection Officer, as well as to the Coast Guard at least 24 hours in advance"; IMAP fine of EUR 28,875 against *Duzgit Integrity* and the *Marida Melissa*, 16 March 2013 (**AFE 12**); Letter from the Maritime and Port Institute of São Tomé to Agência Equador, 18 March 2013 (**RFE 12**); Fine of EUR 28,875 issued against the *Marida Melissa*, 16 October 2013, and receipt of payment, 7 October 2013 (**AFE 42**).

[109] Counter-Memorial, para. 66 referring to Articles 21 and 22 of *Decreto-Lei* 04/10, which contain the rules for determining the amount of fines to be applied *in* Overview of relevant provisions of São Tomé law (**RLE 2**).

[110] Memorial, para. 87.

[111] Counter-Memorial, para. 67.

[112] Memorial, para. 88.

[113] Remittance note stating payment as a result of the Settlement between the Government of São Tomé and Príncipe and DS Tankers, 8 November 2013 (**AFE 43**).

[114] Memorial, para. 112.

[115] Memorial, para. 113.

the one imposed on *Duzgit Integrity* and *Marida Melissa*.[116] *Lefkoniko* was released two days after its detention.[117]

2. Customs Directorate General administrative fine

84. On 27 March 2013, the Customs Directorate General ("**Directorate**") decided that both vessels breached Article 37(3) of the Customs Code of Procedure by moving "goods without fulfilling the applicable legal procedure"[118] in Article 318 of the same Code, which consists of obtaining clearance by paying the custom duties.[119] Accordingly, the Directorate imposed a penalty of EUR 1,08 million,[120] six times the value of the customs duties that would have been due over the total cargo on board *Duzgit Integrity*[121] even though according to Malta "only a fraction [1.555 metric tonnes] of the cargo on board *Duzgit Integrity* was intended to be transferred to *Marida Melissa* ".[122]

85. In the meantime, the Civil Court of First Instance ordered the seizure of the vessels and cargo in parallel proceedings brought by the Directorate against the Masters.[123]

86. The Masters appealed the Directorate's decision. On 26 April 2013, the appeal was dismissed and the Masters were ordered to pay the fine within 5 days.[124] However, the order was withdrawn when the owners of both vessels reached a settlement with São Tomé in October and November 2013.[125]

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[116] Memorial, para. 114; Statement issued by the IMAP authorizing the vessel *Lefkoniko* to leave São Tomé and Príncipe, 21 March 2013 (**AFE 34**); Memorandum issued by IMAP of São Tomé and Príncipe, 21 March 2013 (**AFE 35**).

[117] Memorial, para. 114.

[118] Counter-Memorial, para. 72. Article 37(3) of Customs Code of Procedure provides that "[t]he circulation of goods which, not being free circulation, is carried out without the processing of the relevant payment slips or other required documents or without the application of duty stamps, marks or other legally prescribed signs" *in* Overview of relevant provisions of São Tomé law (**RLE 2**); Decision taken by São Tomé and Príncipe Ports and Maritime Institute, 27 March 2013 (**AFE 13**).

[119] Hearing Transcript (23 Feb. 2016), 109:9-16 referring to Article 318 of the Customs Code of Procedure *in* Overview of relevant provisions of São Tomé law (**RLE 2**).

[120] Memorial, para. 91; Customs Directorate General fine of EUR 1,080,000 million, 2 April 2013 (**AFE 14**).

[121] Counter-Memorial, para. 72 referring to Article 38 of the Customs Code of Procedure *in* Overview of relevant provisions of São Tomé law (**RLE 2**).

[122] Hearing Transcript (23 Feb. 2016), 137:21-25; Hearing Transcript (24 Feb. 2016), 7:6-10.

[123] Memorial, paras 93-94.

[124] Memorial, para. 91.

[125] Counter-Memorial, para. 77; Settlement Agreement signed between the Government of São Tomé and Príncipe and DS Tankers, 23 November 2013 (attached to **AFE 26; AFE 41**); *See infra* paras 116-118.

3. Criminal proceedings against the Masters

87. On 18 March 2013, the Coast Guard filed a report ''Auto de Notícia' with the Public Prosecutor of São Tomé accusing the Masters of smuggling under Article 274 of the Criminal Code.[126] According to the report, the vessels were caught alongside each other "performing transhipment operation".[127] Malta contends that the report "failed to mention the first visit by the Coast Guard [and that] no transhipment had occurred".[128]

88. On 20 March 2013, the Masters were escorted from the hotel to the office of the Public Prosecutor pursuant to a detention order.[129] The Masters were represented by Messrs. Alberto Paulino and Pascoal Daio, two lawyers selected by Agência Equador.[130] An interpreter appointed by the Court provided English translation for the Masters.[131] A first hearing was held on the same day "when accusations, the facts and evidence were presented before the judge of the Singular Court".[132] The Masters were subsequently released upon payment of bail.[133]

89. Summary criminal proceedings commenced on 22 March 2013.[134] A hearing was held on 25 March 2013 and lasted until the next day.[135] On 29 March 2013, the Singular Court found the Masters guilty of the crime of smuggling and issued a sentence of three years of imprisonment.[136] The Singular Court established that the Masters were aware that transhipment of goods had commenced prior to obtaining authorisation and paying the required customs duties.[137]

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[126] Memorial, para. 96; Official Statement of facts issued by São Tomé and Príncipe's Coast Guard, 18 March 2013 (**AFE 15**).

[127] Memorial, para. 97; Official Statement of facts issued by São Tomé and Príncipe's Coast Guard, 18 March 2013 (**AFE 15**).

[128] Memorial, para. 97.

[129] Memorial, para. 99; Order of detention of Master Cengiz Gulzen, 19 March 2013 (**AFE 16**).

[130] Counter-Memorial, para. 80.

[131] Counter-Memorial, para. 80. *See* also Resume of the interpreter Mr. João Dias dos Ramos (**RFE 16**).

[132] Counter-Memorial, para. 80.

[133] Memorial, para. 99.

[134] Memorial, para. 101; Accusation of the Masters issued by the Prosecutor as amended on 22 March 2013 (**AFE 36**).

[135] Memorial, para. 102; Minutes of the hearing on the 25 March 2013 before the Court of First Instance (**AFE 37**).

[136] Counter-Memorial, para. 82 referring to Article 274 of the Criminal Code *in* Overview of relevant provisions of São Tomé law (**RLE 2**); Judgement of the Court of First Instance, 29 March 2013 (**AFE 17**).

[137] Counter-Memorial, para. 82; Judgement of the Court of First Instance, 29 March 2013 (**AFE 17**).

90. In the same decision, the Singular Court convicted the owners of the vessels and the charterers jointly with the Masters to pay an indemnification of approximately EUR 5 million to São Tomé.[138] The Singular Court further declared the vessels and cargo "lost in favour of São Tomé".[139]

91. The Court indicated that the three-year prison sentence would be reduced to two years' probation provided that the Masters jointly pay the above-mentioned indemnification within 30 days.[140] The Masters appealed the decision before the Supreme Court.[141]

92. The Singular Court proceedings were held in Portuguese.[142] Malta contests the quality of the English translation provided to the Masters during the proceedings.[143] Malta also points out that DS Tankers and Stena Oil were not made party to the proceedings and were not called to defend themselves.[144] Malta further contends that the VDR record of the Coast Guard's first visit[145] was not among the evidence considered[146] by the Singular Court.[147] In this respect, São Tomé contesting the authenticity of the VDR recordings,[148] however, claims that these recordings were nonetheless admitted as evidence.[149]

93. On 23 April 2013, Malta sent a *Note Verbale* requesting the São Toméan authorities to review the case "in order to reach an equitable solution".[150] In its response, São Tomé indicated that "legal proceedings were still ongoing and that the Ministry would await the decision of the

[138] Memorial, para. 105; Counter-Memorial, para. 83 referring to Article 126 of the Criminal Code and Articles 483, 497, 562 of the Civil Code *in* Overview of relevant provisions of São Tomé law (**RLE 2**); Judgement of the Court of First Instance, 29 March 2013 (**AFE 17**).

[139] Counter-Memorial, para. 83 referring to Article 104(1) of the Criminal Code *in* Overview of relevant provisions of São Tomé law (**RLE 2**).

[140] Memorial, para. 105; Counter-Memorial, para. 83.

[141] Counter-Memorial, para. 84.

[142] Memorial, para. 103.

[143] Memorial, para. 103.

[144] Memorial, para. 103.

[145] Sworn translation into Portuguese of the conversation between *Duzgit Integrity* and the Coast Guard during its first visit at 7:04 a.m. as submitted to the São Tomé and Príncipe courts (**AFE 11.8**)

[146] Statement of Removal of the procedural materials in the proceedings of the criminal case and invoices presented by São Tomé and Príncipe (**AFE 32**); *Relatório* of the Customs Directorate, 27 March 2013 (**AFE 33**).

[147] Memorial, para. 103.

[148] Rejoinder, para. 168.

[149] Hearing Transcript (24 Feb. 2016), 85:7-16.

[150] Memorial, para. 118; *Note Verbale* from Malta to São Tomé and Príncipe, 23 April 2013 (**AFE 2.1**).

Supreme Court in order to inform the Maltese embassy in Brussels".[151] On 15 May 2013, Malta sent another *Note Verbale*[152] to which São Tomé did not respond on the grounds that legal proceedings were ongoing.[153]

94. On 20 June 2013, the Supreme Court dismissed the appeal and confirmed the decision of the Singular Court.[154] Unsuccessful applications for clarification and nullity followed, and the decision was again upheld by the Supreme Court on 9 July 2013 and 7 August 2013.[155] Stena Oil issued a press release on 9 July 2013 stressing that, among other things, "[the Masters were] victims of an unscrupulous government trying to enrich themselves by confiscating assets from foreign businesses".[156] Stena Oil also explained that it was "warning"[157] those of the international community who were conducting business in or near São Tomé.[158] On 17 July 2013, the Supreme Court decision was considered *res judicata*.[159]

95. On 5 August 2013, the Supreme Court granted the São Toméan State Attorney's request to sell the cargo on board *Duzgit Integrity*.[160] Malta notes that the cargo was only confiscated in October 2013.[161] *Duzgit Integrity* remained registered to DS Tankers under the Maltese flag at all times.[162]

96. Throughout and following the legal proceedings, several States (including Ukraine, the Marshall Islands, Sweden, and Turkey) expressed their concerns and hopes for a beneficial solution between Malta and São Tomé.[163]

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[151] Counter-Memorial, para. 90; *Note Verbale* from São Tomé and Príncipe to Malta, 29 April 2013 (**AFE 2.2**).

[152] Memorial, para.120; *Note Verbale* from Malta to São Tomé and Príncipe, 15 May 2013 (**AFE 2.3**).

[153] Counter-Memorial, para. 92.

[154] Counter-Memorial, para. 85; Judgement of the Supreme Court, 20 June 2013 (**AFE 18**).

[155] Counter-Memorial, paras 85-87.

[156] Counter-Memorial, para. 101; Press Release issued by Stena Oil, 9 July 2013 (**RFE 21**).

[157] Press Release issued by Stena Oil, 9 July 2013 (**RFE 21**).

[158] Counter-Memorial, para. 101; Press Release issued by Stena Oil, 9 July 2013 (**RFE 21**).

[159] Counter-Memorial, para. 78; Letter from the Minister of Foreign Affairs of São Tomé to Malta, 12 December 2013 (**AFE 2.10**).

[160] Counter-Memorial, para. 88; Copy of the request of 5 August 2013 for authorisation to sell the cargo (**RFE 17**).

[161] Memorial, para. 109.

[162] Memorial, para. 110.

[163] Memorial, paras 129-137; Letter from Ukraine to São Tomé and Príncipe, 5 April 2013 (**AFE 19.1**); Letter from the Marshall Islands to São Tomé and Príncipe, 8 April 2013 (**AFE 19.2**); Letter from the Ministers of Foreign Affairs of Turkey and Ukraine to São Tomé and Príncipe, 28 June 2013 (**AFE 19.3**); Letter from the Marshall Islands to São Tomé and Príncipe, 10 July 2013 (**AFE 19.4**); Letter from the Marshall Islands to São

E. EFFORTS TO REACH A SOLUTION

1. Settlement discussions in the summer of 2013

97. On 21 August 2013, São Tomé created a Negotiation Committee ("**Committee**") "entrusted with the task of representing the government [of São Tomé] with the . . . owners of the vessels and Stena Oil to find an amicable solution".[164] Mr. Guilherme Posser da Costa acted as President of the Committee.[165]

98. On 22 and 23 August 2013, a meeting was held between representatives of the Government of São Tomé, Mr. Wagner Mesquita (representative of the owners of *Marida Melissa*), and Mr. Ramon Garcia Gallardo (in his capacity as representative of Stena Oil and DS Tankers as well as Malta and the Marshall Islands).[166] Malta contends that it took five months for São Tomé to establish the Committee[167] and that the owners, the legal representatives and the respective States have been "labouring for a reasonable solution" prior to the creation of the Committee.[168]

99. São Tomé proposed to grant presidential pardon to the Masters on the condition that:

> (i) Formal apologies would be presented to the Government of São Tomé by Stena Oil, which had publicly and falsely portrayed São Tomé and Principe as a Pirate State;
>
> (ii) No judicial proceedings would be brought against the State of São Tomé, its organs or any public entity and any proceedings already instituted would be terminated.[169]

100. In the same proposal, São Tomé suggested to release the vessels but enforce the part of the Supreme Court decision relating to the forfeiture of the cargo on board.[170] Mr. Garcia Gallardo rejected the proposal on the grounds that the loss of cargo was "unacceptable".[171]

Tomé and Príncipe, 18 September 2013 (**AFE 19.5**); Letter from Sweden to São Tomé and Príncipe, 19 September 2013 (**AFE 19.6**); Letter from the Prime Minister of Turkey to São Tomé and Príncipe's Prime Minister, 13 November 2013 (**AFE 19.7**).

[164] Counter-Memorial, para. 95. *See* also E-mail of Mr. Posser da Costa of 5 August 2013 (**RFE 19**); Letter of Mr. Garcia Gallardo and Mr. Mesquita of 7 August 2013 (**RFE 20**).

[165] Counter-Memorial, para. 95.

[166] Counter-Memorial, para. 98; Letter from the Marshall Islands to São Tomé and Príncipe, 10 July 2013 (**AFE 19.4**).

[167] Memorial, para. 141; São Tomé and Príncipe's Prime Minister's decision setting up an ad hoc negotiation committee, 21 August 2013 (**AFE 20**).

[168] Memorial, para. 141.

[169] Counter-Memorial, para. 102.

[170] Counter-Memorial, para. 102.

[171] Counter-Memorial, para. 103.

101. The negotiations continued between the Committee and Mr. Garcia Gallardo [172] until 10 September 2013 when Mr. Garcia Gallardo informed the Committee that Stena Oil would continue to "expose the wrongful actions" through a media campaign,[173] absent a positive move from the side of São Tomé.[174] At this point, São Tomé considered that the negotiations had failed with Stena Oil.[175]

102. On 13 September 2013, on behalf of the owner of the vessel, Mr. Garcia Gallardo requested São Tomé to unconditionally release *Duzgit Integrity*, or in the alternative, to discharge the cargo to either *Marida Melissa* or to a third party ship.[176]

103. On 18 September 2013, the Agents appointed by Malta indicated to São Tomé that Malta would proceed to arbitration and expressed Malta's willingness to resolve the dispute amicably.[177] By a *Note Verbale* of 27 September 2013, São Tomé accepted Malta's invitation of 18 September 2013 to continue settlement discussions and proposed a meeting to be held in São Tomé.[178] Malta responded on 4 October 2013 and proposed that the meeting be held in Brussels, Lisbon, Luanda, or Praia instead.[179]

104. On 16 October 2013, the President of the Committee sent a letter to Mr. Garcia Gallardo stating that the negotiations were closed in view of Stena Oil's continuing pressure.[180] Malta contends that São Tomé not only terminated negotiations with respect to Stena Oil but also with respect to *Duzgit Integrity*.[181]

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[172] Counter-Memorial, paras 104-105; Copy of e-mail from Mr. Ramon Garcia Gallardo, 25 August 2013 (**RFE 22**).

[173] Email from Mr. Ramon Garcia Gallardo, 10 September 2013 (**RFE 23**), including the draft letter.

[174] Counter-Memorial, para. 107; E-mail from Mr. Ramon Garcia Gallardo, 10 September 2013 (**RFE 23**).

[175] Counter-Memorial, para. 110.

[176] Bureau Veritas Classification certificate of *Duzgit Integrity*, 28 June 2013 and accompanying correspondence from ship owners to São Tomé and Príncipe's authorities (**AFE 25**).

[177] Letter from Malta's Agents to São Tomé and Príncipe, 18 September 2013 (**AFE 2.4**).

[178] Counter-Memorial, para. 111; Letter from Malta's Agent to São Tomé and Príncipe, 18 September 2013 (**AFE 2.5**); *Note Verbale* from São Tomé and Príncipe to Malta, 27 September 2013 (**AFE 2.6**).

[179] Counter-Memorial, para. 111; Letter from Malta's Agent to São Tomé and Príncipe, 4 October 2013 (**AFE 2.7**).

[180] Counter-Memorial, para. 127; Letter of the President of the Committee, 16 October 2013 (**RFE 26**); Stena Oil's press release, 16 October 2013 (**RFE 25**).

[181] Reply, para. 413; Letter of the President of the Committee, 16 October 2013 (**RFE 26**).

2. Pardon of Masters

105. On 26 September 2013, the President of São Tomé issued a decree by which both Masters were pardoned with respect to the prison sentence.[182] The pardon did not affect the decision on compensation and the confiscation of the vessels and cargo in favour of São Tomé.[183] São Tomé notes that the President does not have authority to grant a pardon in respect of civil liabilities and accessory penalties.[184]

106. The Masters were released from prison on 2 October 2013 but were prohibited from boarding their vessels.[185] On 10 October 2013, the Masters' passports were returned and they left São Tomé.[186]

F. DISCHARGE OF OIL CARGO FROM *DUZGIT INTEGRITY*

107. São Toméan authorities proceeded to execute the part of the court decision ordering the forfeiture of the cargo.[187] São Tomé considered that the large amount of oil on board posed a significant environmental risk.[188] Accordingly, it decided to sell the cargo in a private sale "as a matter of urgency".[189]

108. São Tomé received two expressions of interest in respect of the cargo. The first was from Monjasa PTE Ltd. ("**Monjasa**"), a Singapore based bunkering company (which according to São Tomé is part of a Danish group of companies) that operated a chartered vessel, *M/T Anuket Emerald* ("***Anuket Emerald***").[190] The second expression of interest was from the owner of *Duzgit Integrity*.[191] São Tomé submits that it had already reached an agreement with Monjasa

[182] Counter-Memorial, para. 113; Pardon to the Master issued by the President of São Tomé and Príncipe, 26 September 2013 (**AFE 21**).

[183] Memorial, para. 146.

[184] Counter-Memorial, para. 113.

[185] Memorial, para. 148; São Tomé and Príncipe's Coast Guard's prohibition against Master re-boarding *Duzgit Integrity*, 7 October 2013 (**AFE 22**).

[186] Memorial, para. 149. *See* also Statement of the Master of the *Duzgit Integrity* Mr. Cengiz Gulsen (**AWS 1**).

[187] Counter-Memorial, para. 114; Court's authorisation of 8 August 2013 (**RFE 18**). *See* also Court order of 8 October 2013 authorising the sale of the cargo on board *Duzgit Integrity* under article 851 of the Civil Procedure Code (**AFE 30**); Email sent by the Counsels to São Tomé and Príncipe regarding how Monjasa was informed of the availability of the cargo for sale (**AFE 31**).

[188] Counter-Memorial, para. 115.

[189] Counter-Memorial, para. 115 referring to Article 851 of the Code of Civil Procedure.

[190] Counter-Memorial, paras 116-117; Hearing Transcript (23 Feb. 2016), 129:21-25.

[191] Counter-Memorial, para. 116.

before it was approached by the owner of *Duzgit Integrity*.[192] In that respect, Malta contends that Monjasa Dubai "is not a tanker operator, nor a manager; it is a bunker trader"[193] and does not hold valid safety management certificates and documents issued by Maltese authorities.[194] São Tomé observes that Monjasa is also "a group that supplies, among other things, bunkering services in West Africa".[195] Additionally, São Tomé avers that it demanded an explicit safety guarantee from Monjasa.[196]

109. On 11 October 2013, the São Toméan Coast Guard boarded *Duzgit Integrity* to oversee the transhipment operation to *Anuket Emerald*.[197] São Tomé submits that the Chief Officer of *Duzgit Integrity* refused to follow the instructions of the Coast Guard and tried to sabotage the operation.[198] Malta contends that all communications from and to *Duzgit Integrity* were banned by the "armed guards"[199] (or the Coast Guard).[200] In spite of the ban, the Chief Officer successfully sent messages to the owners of the vesselin order to inform them of the situation.[201] The Coast Guard considered the Chief Officer's conduct as threatening to the safety on board and decided to lock him in a separate room.[202]

110. According to Malta, the *Duzgit Integrity* crew warned the Coast Guard that there was no permission to conduct a STS transfer, nor was it safe to do so on the grounds that there was no Master or any sufficiently qualified personnel to oversee the operation.[203] Malta contends that the crew was forced to unmoor *Marida Melissa* without safety precautions.[204] In this respect,

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[192] Counter-Memorial, para. 116. *See* also Sale and Purchase agreement signed by São Tomé and Príncipe Government and Monjasa DMCC on 9 October 2013 and receipt of payment (**AFE 29**).

[193] Hearing Transcript (24 Feb. 2016), 20:16-18.

[194] Hearing Transcript (24 Feb. 2016), 21:3-4.

[195] São Tomé's Post-Hearing Submissions, para. 30.

[196] São Tomé's Post-Hearing Submissions, para. 29 referring to Sale and Purchase agreement signed by São Tomé and Príncipe Government and Monjasa DMCC on 9 October 2013 and receipt of payment (**AFE 29**), Clause 4.

[197] Counter-Memorial, para. 117.

[198] Counter-Memorial, para. 120.

[199] According to Malta Memorial, para. 166

[200] According to São Tomé.

[201] Memorial, para. 163; Statement of the Chief Officer of *Duzgit Integrity* Mr. Sedat Ihtiyaroglu (**AWS 2**).

[202] Memorial, para. 168; Counter-Memorial, para. 121; Statement of the Chief Officer of *Duzgit Integrity* Mr. Sedat Ihtiyaroglu (**AWS 2**); Statement of the Second Officer of *Duzgit Integrity* Mr. Umut Kirmizigedik (**AWS 3**).

[203] Memorial, para. 155.

[204] Memorial, para. 159.

São Tomé maintains that "no weapons were used and no physical threat of force was made against the crew of . . . *Duzgit Integrity*".[205]

111. The transhipment operation was later cancelled.[206] According to Malta, it appears that the owners of *Anuket Emerald* refused to follow the instructions of Monjasa based on the warnings of *Duzgit Integrity*'s crew.[207] São Tomé, on the other hand, submits that Monjasa refused to take the cargo because of the pressure exercised by Stena Oil.[208]

112. On 19 October 2013, Monjasa sent another vessel, *Energizer*, to receive the cargo from *Duzgit Integrity*.[209] The transhipment operation was led by the Second Officer of *Duzgit Integrity* and supervised by the São Toméan Coast Guard.[210]

113. According to São Tomé, it "took reasonable measures, to the best of its abilities, to avoid any unreasonable risk to the marine environment and it did not ignore the risks to the environment or to the safety of life at sea".[211] Malta contends that the Second Officer was not qualified to lead the operation[212] and that no preparations or precautions were taken in relation to the STS transfer.[213]

114. Malta further contends that São Tomé failed to demonstrate that both *Anuket Emerald* and *Energizer* applied for the necessary documentation and authorisation to anchor alongside *Duzgit Integrity* and paid the taxes due in relation to a commercial STS transfer.[214] In that regard, São Tomé submits that, in light of the agreement between São Tomé and Monjasa, the authorities "obviously" knew that *Anuket Emerald* and *Energizer* would come to São Tomé to perform STS

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[205] Rejoinder, para. 195.

[206] Counter-Memorial, para. 118.

[207] Memorial, para. 164 referring to *Duzgit Integrity*'s Vessel Suitability Checklists STS, 11 October 2013 (**AFE 24**). *See* also E-mail from the *Duzgit Integrity*, 12 October 2013 and Conversation between the charterer Stena Oil and its agent Wilson Morais, 11 October 2013 (**AFE 23**).

[208] Counter-Memorial, para. 122. *See* also Stena Oil's letter to São Tomé and Príncipe, 13 October 2013 (**RFE 24**).

[209] Counter-Memorial, para. 123.

[210] Counter-Memorial, para. 123.

[211] Rejoinder, para. 189.

[212] Memorial, para. 173; Malta's Reply to Post-Hearing Submissions, para. 34.

[213] Reply, paras 248-255 referring to STS operation plan of the vessel *Duzgit Integrity* (**AFE 39**), Statement of the Chief Officer of *Duzgit Integrity* Mr. Sedat Ihtiyaroglu (**AWS 2**) and Statement of the Second Officer of *Duzgit Integrity* Mr. Umut Kirmizigedik (**AWS 3**).

[214] Reply, para. 161.

operations; and that authorisation was issued accordingly.[215] São Tomé further observes that the operation "went smoothly" and both crewmembers of *Energizer* and *Duzgit Integrity* "worked together as one team".[216]

115. As a result of the events, *Duzgit Integrity* failed to undergo its scheduled dry-dock operation and re-classification on 1 April 2013.[217] Malta notes that by correspondence dated 13 and 23 September 2013, the *Duzgit Integrity* owner alerted São Toméan authorities that the class certificates were to expire imminently leading to an invalid insurance coverage and a breach of flag State and international obligations as a consequence.[218]

G. SETTLEMENT AGREEMENT AND RELEASE OF *DUZGIT INTEGRITY*

116. Between 22 October and 7 November 2013, Mr. Metin Düzgit of DS Tankers and the President of the Committee engaged in settlement discussions.[219] Prior to that, on 4 October 2013, São Tomé had entered into a settlement agreement with the owner of *Marida Melissa*. The terms of that agreement addressed the IMAP fine, the court ordered compensation, the return of the vessel and the waiver of all claims.[220] Malta submits that *Duzgit Integrity* was treated differently because it had valuable goods on board.[221]

117. On 23 November 2013, a settlement agreement was concluded between DS Tankers and São Tomé ("**Settlement Agreement**").[222]

118. The terms of the Settlement Agreement provided in relevant part:

> First Clause

[215] Hearing Transcript (23 Feb. 2016), 140:9-17; General Authorisation granted by the Coast Guard of São Tomé and Príncipe on 2 October 2013 for Monjasa DMCC and any vessel chartered by Monjasa group to conduct STS oil transfer in the waters of São Tomé and Príncipe (**AFE 28**).

[216] São Tomé's Post-Hearing Submissions, para. 16; Statement by Second Lieutenant of the Coast Guard Mr. Valter Baieca Alfonso Fernandes (**RWS 3**). *See* also Declaration issued by the Coast Guard explaining how the fuel on board the vessel *Duzgit Integrity* was transferred to the vessel *M. T. Energizer* (**AFE 40**).

[217] Memorial, para. 174.

[218] Memorial, para. 177.

[219] Counter-Memorial, paras 131-132 referring to Correspondence between Mr. Düzgit and Mr. Posser da Costa (**RFE 27**) and Proposal DS Tankers, 7 November 2013 (**RFE 28**).

[220] Counter-Memorial, para. 128.

[221] Memorial, para. 160.

[222] Counter-Memorial, para. 133; Settlement Agreement signed between the Government of São Tomé and Príncipe and DS Tankers, 23 November 2013 (attached to **AFE 26; AFE 41**).

> 1. The State releases, on this date, and as it is, the Vessel Duzgit Integrity with registration no. IMO9380415, to its Owner who had possession of since March 2013 in the Ana Chaves Bay, territorial sea of São Tomé and Príncipe.
>
> 2. The conditions and stipulated by the State to the aforementioned release is as follows:
>
> (i) the Owner shall pay forthwith a fine of EUR 28,875 to IMAP . . . which will receive these amounts on behalf of the State […]
>
> (ii) The Owner shall pay the cargo inside the Vessel that was used by the authorities for exclusive purpose of the maintenance of the integrity of the stay in the Ana Chaves Bay, in the lump sum of USD 625, 000; […]
>
> Second Clause
>
> 1. The Owner gives up and waives, as applicable, any judicial actions already filed or to be filed, in any tribunal, against the State, its administrative bodies, the representatives of the State, public entities or similar, in São Tomé and Príncipe or in another country, as well as any additional complaints filed with private or international entities.
>
> 2. The above mentioned waiver of rights by the Owner encompasses any request for indemnification, compensation and/or similar, in whichever manner, deriving from any fact related to the Vessel Duzgit Integrity whilst she was kept in the territorial sea of São Tomé and Príncipe, in relation to which there is nothing else to be claimed in whichever manner.
>
> [. . .]
>
> Third Clause
>
> 1. [The Owner] has not transferred, in any manner, including but not limited, to the State of Malta, any claim and/or rights the State deriving from the facts or consequences related to the stay of the Vessel in the national waters of São Tomé and Príncipe.[223]

119. *Duzgit Integrity* was released on 25 November 2013.[224] Malta considers that the Settlement Agreement was concluded under duress for the following reasons. First, São Tomé ordered DS Tankers not to inform Malta of the ongoing discussions "on pain of severance of all talks and possibilities for release".[225] Second, Mr. Metin Düzgit was in São Tomé for a month in an attempt to find a solution.[226] Third, the vessel had incurred exceptionally high losses by the time the settlement was reached.[227] Fourth, the entire cargo had been confiscated and the crew had been suffering the psychological effects of the events on 11 October 2013. Finally, *Duzgit Integrity* had been treated differently than *Marida Melissa*.[228]

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[223] *See* Settlement Agreement signed between the Government of São Tomé and Príncipe and DS Tankers, 23 November 2013 (attached to **AFE 26**; **AFE 41**).

[224] Memorial, para. 190.

[225] Memorial, para. 193.

[226] Memorial, para. 193.

[227] Memorial, para. 193.

[228] Memorial, para. 193.

120. Malta further submits that the Settlement Agreement had not been validated by the court[229] and that *Duzgit Integrity* remained fully registered and maintained under the Maltese flag.[230] Even after the commencement of the arbitral proceedings, Malta contends that it has attempted, without success, to negotiate with São Tomé.[231]

IV. PARTIES' REQUESTS FOR RELIEF

121. At the end of the hearing, Malta formulated its final submissions to the Tribunal as follows:

> 1. Pursuant to the Arbitral Tribunal's Procedural Order No. 5 not to deal with the quantification of damages compensation at the present hearing, Malta reserves the right to present further submissions concerning compensation at a later stage, in addition to those already filed.
>
> 2. [To render] a declaratory judgement confirming the wrongfulness of [São Tomé and Príncipe's] conduct, a formal apology, and compensation for moral and financial losses incurred as a result of [São Tomé and Príncipe's] action against all interest of the *Duzgit Integrity*, including shipowner, charterers and crew.
>
> 3. To reject and dismiss in their entirety São Tomé and Príncipe's preliminary objections to the jurisdiction of the Arbitral Tribunal and the admissibility of Malta's claims in this dispute.
>
> 4. To declare, adjudge and hold that the Arbitral Tribunal has jurisdiction to hear and determine these disputes, and that Malta's claims are well founded and fully admissible.
>
> 5. To declare and adjudge and order that the São Tomé and Príncipe authorities did give authorisation for the operation declared by the *Duzgit Integrity* during the first visit by the Coast Guard, and that therefore the entirety of the measures taken by São Tomé on and after 15th March 2013 were unjustified.
>
> 6. [To declare] [t]hat São Tomé and Príncipe failed to properly inform that without written authorisation by the competent authorities of São Tomé and Príncipe, [the *Duzgit Integrity*] had to leave the territorial waters or archipelagic waters to carry out any STS operation or any other transfer of equipment with the Marshall Islands ship M/T *Marida Melissa*.
>
> 7. [To declare] [t]hat São Tomé and Príncipe, in applying national legislation related to criminal and customs law and other administrative law -- in particular Decreto No. 4/2010 -- to the *Duzgit Integrity*, flying the flag of the Republic of Malta, breached its obligations to the Republic of Malta first on its own right to protect the ship as provided by Articles 91 and 94, and under customary international law.
>
> 8. Without prejudice to the above, to declare, adjudge and order, whether in whole or in part, that São Tomé and Príncipe violated its obligations pertaining to the exercise of its maritime sovereignty in terms of any or all of Articles 2(3), 49(3), and 25(1), and did so abusively and in bad faith, and in connected violation of Article 300 of the Convention and in violation of general international law in

[229] Memorial, para. 197.

[230] Memorial, para. 198.

[231] Reply, para. 421; *Note Verbale* from Malta to São Tomé and Príncipe, 28 April 2014 (**AFE 2.11**).

respect of Malta, the Maltese vessel *Duzgit Integrity*, her master, her crew, and all interests associated thereto.

9. Without prejudice to the above, to declare, adjudge and order that São Tomé and Príncipe violated, and did so abusively and in bad faith, and in connected violation of Article 300 of the Convention, generally applicable rules of international law related to fundamental human rights and humanitarian concerns of the master and crew of the *Duzgit Integrity* and her owners and charterers, particularly, without limitation, for not affording the rights to due process and for not respecting the principles of reasonableness, proportionality, non-differentiation and non-arbitrariness.

10. Without prejudice to the above, to declare, adjudge and order that São Tomé and Príncipe violated Articles 192, 194 and 225 of the Convention, and other generally applicable rules and principles of the international law directly related to the Law of the Sea, and did so abusively and in bad faith, and therefore also in breach of Article 300 of the Convention.

11. With respect to reparation [] the Republic of Malta respectfully requests the Arbitral Tribunal to award:

    a. [F]irst, in full satisfaction, a declaratory judgment on the wrongfulness of the conduct of São Tomé and Príncipe in respect to the internationally wrongful acts indicated in Malta's Memorial and Reply;

    b. [S]econd, a formal apology from São Tomé and Príncipe for those wrongful misconduct acts;

    c. [T]hird, a compensation for material and non-material damages suffered by the Republic of Malta as a result of the law enforcement acts against all the interests of the *Duzgit Integrity*, including the shipowner, charterer and crews, as requested in this or in final submissions that the parties may yet be required to make if the quantification takes place.

12. With respect to the quantification of those damages, the Republic of Malta reserves the right to present further submissions at a later stage, pursuant [] to the Arbitral Tribunal's procedural order.

13. Finally, [to order] São Tomé and Príncipe [] to bear all costs and expenses incurred by the Applicant in this case, including, without limitation, the cost incurred in this case before the Arbitral Tribunal, legal costs, et cetera, with interest thereon.[232]

122. In its final submissions made at the end of the hearing, São Tomé requested the Tribunal:

(i) First, to adjudge and declare that it is without jurisdiction to hear the present case.

(ii) Second, in the alternative, to adjudge and declare that the Republic of Malta's claims are inadmissible;

(iii) Third, in the alternative, to reject all claims made by the Republic of Malta, including those introduced during the oral hearings.

(iv) Fourth, to determine that the costs, disbursements and legal fees incurred by the Democratic Republic of São Tomé and Príncipe in these proceedings shall be fully

[232] Hearing Transcript (24 Feb. 2016), 65:5-68:25. The numbering here of Malta's final submissions has been added by the Tribunal, as has the text in square brackets.

> borne by the Republic of Malta and that the Republic of Malta shall reimburse the Democratic Republic of São Tomé and Príncipe for its share of the expenses of the Tribunal, including the remuneration of its members.[233]

V. JURISDICTION AND ADMISSIBILITY

A. JURISDICTION *RATIONE MATERIAE*

123. The relevant provisions of the Convention as concerns the Tribunal's jurisdiction are Articles 286, 287(3), and 288:[234]

> **ARTICLE 286**
> *Application of procedures under this section*
>
> Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.
>
> **ARTICLE 287**
> *Choice of Procedure*
>
> 3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.
>
> **ARTICLE 288**
> *Jurisdiction*
>
> 1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.
>
> 2. A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.
>
> 3. The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea established in accordance with Annex VI, and any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith.
>
> 4. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

124. São Tomé objects to the Tribunal's jurisdiction on the grounds that this dispute does not concern the interpretation or application of the Convention.[235]

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[233] Rejoinder, Submissions; Hearing Transcript (24 Feb. 2016), 104:23-105:12.

[234] Counter-Memorial, paras 144-147; Reply, para. 261.

[235] Counter-Memorial, paras 141, 144 *et seq.*; Rejoinder, paras 1, 10; Hearing Transcript (23 Feb. 2016), 149:24-25, 151:1-2.

i. Respondent's position

125. São Tomé submits that Articles 288(1) and 287 stipulate that the dispute settlement procedures provided for in the Convention only apply to "disputes concerning the interpretation or application" of the Convention, and not to any claims in some way related to maritime issues.[236] It argues that the fundamental nature of the compromissory clause in Article 286 is to limit jurisdiction to claims brought under the Convention.[237]

126. São Tomé adds that it is for the Tribunal to characterise the dispute before it, "by examining the position of both parties" as held by the International Court of Justice ("**ICJ**") in the *Nuclear Tests Case*.[238]

127. Citing the *M/V Louisa Case*, São Tomé insists that in order to establish that the dispute concerns a provision of the Convention, a claimant state must demonstrate a real and substantial connection between the facts and the relevant provision of the Convention.[239] Therefore, "mere invocation of a provision of the Convention cannot itself mean that there is a dispute concerning the Convention".[240]

128. São Tomé submits that "the nature of the dispute is not of a kind that falls under the Convention".[241] It claims that Malta relies on rules and norms of international law, fundamental human rights and general principles of law as the basis for its claims, and only mentions the Convention as an aside.[242] Moreover, São Tomé submits that Malta relies on generic provisions of the Convention that do not contain specific rights or obligations and attempts to use them to introduce the principles and norms of international law upon which it relies.[243]

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[236] Counter-Memorial, para. 148.

[237] Rejoinder, paras 25-26 (in response to Reply, paras 264-266).

[238] Counter-Memorial, para. 166; Rejoinder, para. 24; *Nuclear Tests* (New Zealand v. France), Judgment of 20 December 1974, ICJ Reports 1974, p. 457 at p. 467, para. 31 (**ALE 10; RLE 5**); *Fisheries Jurisdiction* (Spain v. Canada), Jurisdiction of the Court, Judgment of 4 December 1998, ICJ Reports 1998, p. 432 at p. 466, para. 30.

[239] Hearing Transcript (23 Feb. 2016), 148:14-19, 149:5-8.

[240] Hearing Transcript (23 Feb. 2016), 148:19-21.

[241] Counter-Memorial, paras 165, 180; Rejoinder, para. 27.

[242] Counter-Memorial, paras 168-172, 174 referring to Memorial, paras 285-321. *See supra* Section VI.

[243] Counter-Memorial, para. 172-173, 177; Rejoinder, paras 31-32 referring to Memorial, para. 394, where Malta claims that São Tomé "violated Article 2(3) of the Convention through a bad faith and abusive violation of other rules of international law".

129. São Tomé submits that other Annex VII tribunals that applied other norms of international law did so in the context of disputes that concerned a specific provision of the Convention.[244] São Tomé submits that, in this case, Malta is requesting the Tribunal to extend its jurisdiction by looking exclusively to norms outside the Convention.[245] In this regard, São Tomé cites the conclusion in the *Chagos Islands Case* that "an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1)".[246]

130. São Tomé further notes that Malta is asking the Tribunal to rule on the enforcement of São Tomé laws.[247] It refers again to the *M/V Louisa Case* to claim that it is not incumbent on the Tribunal to determine whether São Tomé has violated its internal legislation, or to act as a human rights tribunal, or an appellate forum for procedures conducted in São Tomé.[248]

131. São Tomé argues that the scope of jurisdiction is not altered by Article 293 of the Convention (Applicable Law).[249] While this article permits a tribunal to apply other rules and principles of international law which are "necessary to settle claims over which it has jurisdiction", it does not extend the jurisdiction of the Tribunal to claims based on instruments other than the Convention.[250] It finds support for this contention in the *MOX Plant Case*, the *Arctic Sunrise Arbitration* and the *M/V Louisa Case*.[251]

ii. Applicant's position

132. Malta rejects São Tomé's contention that the Tribunal does not have jurisdiction because the dispute does not fall under the Convention.[252] Malta considers that São Tomé's interpretation of

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[244] Counter-Memorial, paras 176.

[245] Counter-Memorial, para. 178.

[246] Counter-Memorial, para. 179 referring to *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom), Award of 18 March 2015, PCA, para. 220 (**RLE 3**)..

[247] Counter-Memorial, paras 139-141, 175; Rejoinder, para. 27 referring to *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom), Award of 18 March 2015, PCA, para. 203 (**RLE 3**).

[248] Counter-Memorial, para. 176 referring to *M/V Louisa* (Saint Vincent and the Grenadines v. Spain), Judgment of 28 May 2013, ITLOS Reports 2013, p. 4 at para. 125 (**RLE 4**).

[249] Rejoinder, para. 35.

[250] Rejoinder, paras 36-37.

[251] Rejoinder, paras 38-40 referring to *MOX Plant Case* (Ireland v. United Kingdom), Order No. 3 of 24 June 2003, PCA, para. 19 (**RLE 46**); *Arctic Sunrise Arbitration* (Netherlands v. Russia), Award on the Merits of 14 August 2015, PCA, paras 190-192 (**RLE 47**); *M/V Louisa* (Saint Vincent and the Grenadines v. Spain), Judgment of 28 May 2013, ITLOS Reports 2013, p. 1 at para. 155 (**ALE 42; RLE 4**).

[252] Reply, paras 270-272.

the dispute settlement clauses is unduly restrictive.[253] It submits that "[t]he Convention does not use the word "only" but the word "any" so that a tribunal "shall have jurisdiction over any dispute concerning the interpretation and application of [the] Convention".[254] Malta finds support in the joint dissenting opinion of six judges in the *Virginia G* case:

> There is no provision of the Convention which is immune from interpretation by the competent judicial body. Therefore, when the occasion arises, the Tribunal is competent to interpret every word and expression in the Convention. Any other view will be contrary to the rule of law.[255]

133. Malta claims that the dispute relates to São Tomé's exercise of its maritime sovereignty (as granted under the Convention in Articles 2(1) and 49(1)) against the rights of another State, its flag and vessel (enjoyed in the terms of the Convention in Articles 91 and 94).[256] It adds that the relevant events took place over a protracted time, starting within the territorial sea of São Tomé and continuing within its archipelagic waters.[257] Malta submits that the events that took place between March and December 2013 "clearly characterise this case as a claim for damages between the flag State of the *Duzgit Integrity* and São Tomé and Príncipe, under the international law of the sea".[258] It follows that "the nature of this dispute is intimately linked with the Convention".[259]

134. Malta submits that the dispute includes claims that São Tomé violated its obligations and duties when exercising maritime sovereignty under Articles 2(1), 2(3), 49(1) and 49(3)[260] and that the principles and rights relied upon also apply as a matter of general international law.[261] Malta also alleges breaches of Article 192, 194 and 225 with respect to São Tomé's obligation towards the marine environment.

135. Malta invokes Article 300 of the Convention as "a common thread linking all the claimed violations of the rights and obligations".[262] Article 300 imposes an obligation of good faith upon the exercise of any right endowed by any provision of the Convention. Malta submits that São

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[253] Reply, para. 265 referring to Counter-Memorials, para. 148.

[254] Reply, paras 265-266 referring to Counter-Memorial, para. 148; Articles 286 and 288(1) of the Convention.

[255] Hearing Transcript (24 Feb. 2016), 36:2-9.

[256] Reply, paras 274-275.

[257] Reply, para. 276.

[258] Reply, para. 300.

[259] Hearing Transcript (24 Feb. 2016), 38:6-7.

[260] Hearing Transcript (24 Feb. 2016), 42:7-10.

[261] Reply, paras 277-279.

[262] Hearing Transcript (24 Feb. 2016), 42:17-25.

Tomé has abused its right to exercise sovereignty in its treatment *vis-a-vis* the *Duzgit Integrity* and thus, breached Article 300.[263]

136. Malta objects to São Tomé's assertion that Malta is merely using the Convention as a "pretext".[264] Malta explains that the Convention operates within the larger context of international law and links to other international law regimes and that, therefore, a violation of the Convention is also a violation of international law.[265]

137. Malta explains that it is not contesting the validity or legitimacy of São Tomé's internal legislation, but rather the *extent* and *manner* of enforcement.[266] Malta submits that, in the terms of Article 2(3), Article 49(3) and similar provisions in the Convention, "São Tomé has an obligation not to exercise its sovereignty in breach of the Convention or other rules of international law".[267]

iii. Decision of the Tribunal

138. Article 288(1) limits the jurisdiction of the Tribunal to disputes concerning the interpretation or application of the provisions of the Convention. This dispute concerns Malta's claims that (i) the arrest of *Duzgit Integrity*, the detention of the Master, the fines imposed and the confiscation of the vessel and its cargo constitute breaches of Arts. 2(3), 25(1), 49(3) and 300 of the Convention; and (ii) the transhipment of oil from *Duzgit Integrity* to *Energizer* carried out by São Tomé on 19 October 2013 breached Arts. 192, 194, 225 and 300 of the Convention. São Tomé disputes all of Malta's claims. The dispute concerns the Parties' divergent views as to whether São Tomé acted within the lawful confines of its enforcement jurisdiction as prescribed by the Convention. In order to determine Malta's claims, the Tribunal will have to determine which provisions of the Convention apply to the present circumstances and whether São Tomé's conduct complied with those provisions. The Tribunal finds that this dispute clearly concerns the interpretation and application of certain provisions of the Convention. Consequently the requirement for finding jurisdiction is satisfied.

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[263] Hearing Transcript (24 Feb. 2016), 42:7-10, 42:17-25, 66:20-25, 67:1.

[264] Reply, para. 287.

[265] Reply, paras 264, 280-282, 286.

[266] Reply, paras 263, 288-289 referring to Counter-Memorial, para. 176.

[267] Reply, paras 290-291 (emphasis in Reply).

B. ADMISSIBILITY OF CLAIMS

139. São Tomé argues that Malta's claims are inadmissible on the following grounds: (i) the requirement of Article 295 of exhaustion of local remedies has not been met; (ii) Malta has not sufficiently specified the grounds on which several of its claims are based; (iii) the damages suffered by the owners of *Duzgit Integrity* have been settled; and (iv) the requirement of Article 283 of an exchange of views has not been observed.[268]

140. Malta contests all of São Tomé submissions regarding inadmissibility.[269]

1. Exhaustion of local remedies under Article 295 of the Convention

141. Article 295 of the Convention provides:

> **ARTICLE 295**
> *Exhaustion of local remedies*
>
> Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law.

i. Respondent's position

142. São Tomé notes that customary international law requires that "before international proceedings may be instituted in the context of diplomatic protection, local remedies must be exhausted".[270] It highlights that Malta itself states that this is a case of diplomatic protection.[271] São Tomé argues that "[c]ases of diplomatic protection are examples par excellence of instances where the rule that local remedies must be exhausted applies".[272]

143. In any event, São Tomé pleads that, even if this is not strictly speaking a case of diplomatic protection, "the Tribunal has to decide whether the preponderant element of Malta's claims concerns direct injury to the state, or whether Malta is bringing the claims on behalf of the vessel and its crew".[273] It submits that Malta's claims do not regard a violation of the State's own

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[268] Counter-Memorial, paras 142-143, 203-204; Rejoinder, paras 75-76.

[269] Reply, paras 259-260, 363 *et seq.*

[270] Hearing Transcript (23 Feb. 2016), 97:16-19.

[271] Counter-Memorial, para. 212; Rejoinder, paras 80-81 referring to Reply, para. 274.

[272] Rejoinder, para. 81 referring to ILC Draft Articles on Diplomatic Protection with Commentaries, 2006, Commentary to Draft Article 18 under (1), p. 91 (**RLE 50**).

[273] Hearing Transcript (23 Feb. 2016), 97:21-25, 98:1-2.

rights.[274] São Tomé submits that even if the claim by Malta could be regarded as containing both elements of direct and indirect injury, Malta is "principally bringing claims on behalf of DS Tankers, Stena Oil and the Master and crew of *Duzgit Integrity*".[275] Therefore, São Tomé insists that the requirement of exhaustion of local remedies applies.[276]

144. São Tomé refutes Malta's assertion that no effective remedies were available.[277] São Tomé submits that Stena Oil could have requested nullification of the decision of the Singular Court of 29 March 2013, on the basis that it had been sentenced without being personally notified of the legal proceedings (Articles 75(2), 87(e) and 88 of the Code of Criminal Procedure).[278] São Tomé adds that other remedies were available; namely an administrative procedure to demand the release of the vessel[279] and the possibility to request an indemnification for the value of the forfeited goods under the Criminal Code.[280] São Tomé disagrees with Malta's submission that there was no confidence in the guarantees of due process in São Toméan system.[281]

ii. Applicant's position

145. Malta submits that its claims as a whole are brought on the basis of an injury to itself by the wrongful acts of São Tomé and, therefore, the requirement of exhaustion of local remedies does not apply.[282] Malta submits that these rights belong to it under Articles 91 and 94 the Convention, "principally by virtue of the vessel *Duzgit Integrity* having Maltese nationality and being under Maltese jurisdiction" throughout the relevant period of the dispute and remaining so today.[283] Malta claims, therefore, that it "is asserting <u>its own</u> rights to ensure, in the person of its subjects, respect for the rules of international law"—in particular, for the obligations on

[274] Rejoinder, paras 77-79; Counter-Memorial, paras 205-207, 211 referring to *M/V Saiga* (Saint Vincent and the Grenadines v. Guinea), Case No. 2, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10 (**ALE 28; RLE 15**); *M/V Virginia G* (Panama v. Guinea-Bissau), Judgment of 14 April 2014, Joint dissenting opinion of vice-president Hoffmann and judges Marotta Rangel, Chandrasekhara Rao Kateka, Gao and Bouguetaia, ITLOS Reports 2014, p. 214 at para. 6 (**RLE 14**). São Tomé submits that none of the claims submitted by Malta concerns a direct violation of its rights.

[275] Counter-Memorial, para. 212; Hearing Transcript (23 Feb. 2016), 98:6-11.

[276] Hearing Transcript (23 Feb. 2016), 98:20-21.

[277] Counter-Memorial, para. 214; Rejoinder, para. 82.

[278] Counter-Memorial, paras 213-214.

[279] Hearing Transcript (23 Feb. 2016), 99:5-7.

[280] Rejoinder, para. 86; Hearing Transcript (23 Feb. 2016), 99:7-12.

[281] Rejoinder, para. 82.

[282] Reply, paras 363-364, 372.

[283] Reply, para. 366 referring to Article 91 (nationality of ships), Article 94 (duties of the flag state); Hearing Transcript (23 Feb. 2016), 9:6-13.

coastal States.[284] Malta further notes that under international law the vessel and all of its associated interests are considered as one and the same unit, benefiting from the nationality of the flag State.[285]

146. In its Reply, Malta characterised this claim as one of diplomatic protection.[286]

iii. Decision of the Tribunal

147. The exhaustion of local remedies is a requirement under international law when a State is exercising diplomatic protection. While Malta has characterised its claim as one of diplomatic protection, it has also invoked its rights as a flag State under the Convention.

148. The Convention is a multilateral treaty which establishes a framework of rules that apply to all State parties. In certain circumstances, the provisions of the Convention apply in such a way that a relationship of a bilateral character between two parties is created.[287] Part IV of the Convention sets out the rights and duties of coastal States and other States, including flag States, within the coastal State's archipelagic waters. Part XII of the Convention sets out obligations of States with respect to the protection and preservation of the marine environment. Article 300 of the Convention provides that States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognised in this Convention in a manner which would not constitute an abuse of right.

149. To be satisfied that Malta has standing to bring claims against São Tomé, the Tribunal need only be satisfied that obligations were owed by São Tomé to Malta under the Convention. São Tomé owed certain obligations to Malta under the Convention. Pursuant to Arts. 49(3) and 300 of the Convention, São Tomé had to ensure that any law enforcement measures taken by it against a vessel under Malta's flag in São Tomé's archipelagic waters complied with the Convention. The Tribunal concludes that under the Convention Malta has standing to invoke the international

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[284] Reply, para. 367-368 (emphasis in Reply) referring to *Mavrommatis Palestine Concessions* (Greece v. UK), Objection to the jurisdiction of the Court, 1924 PCIJ Series A No.2.

[285] Reply, paras 370-371 referring to *M/V Saiga* (Saint Vincent and the Grenadines v. Guinea), Case No. 2, Judgment of 1 July 1999, 1999 ITLOS Reports, p. 10 (**ALE 28; RLE 15**).

[286] Reply, para. 274: "This is a State-to-State dispute – a claim for damages – brought in the context of diplomatic protection by the flag State of the *DUZGIT INTEGRITY* against the coastal State of São Tomé and Príncipe in respect to unjustified, excessive and abusive conduct by the latter in violation of the rights of the former".

[287] J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 258, para. 8.

responsibility of São Tomé for breaches of obligations owed by São Tomé as coastal State to Malta as flag State.

150. The Tribunal accepts that *Duzgit Integrity* and all persons on board the ship at the relevant times should be considered as part of the unit of the ship. In the *Arctic Sunrise Arbitration*, *M/V "SAIGA" (No. 2)* and *M/V "Virginia G"*, it was held that "every person involved or interested" in a vessel's operations should be considered as part of the unit of the ship and thus treated as an entity linked to the flag State.[288] The Tribunal considers *Duzgit Integrity* to be a unit such that its crew, all persons and objects on board, as well as its owner and every person involved or interested in it are included. Malta is entitled to bring claims in respect of alleged violations of its rights under the Convention which resulted in damage to the ship, its master, and owner and charterer. This conclusion applies regardless of the nationality of the person or entity in question.

151. Once determined that Malta has standing to bring the current claims under the Convention, in order to decide whether the requirement of exhaustion of local remedies is still to be met, it must be clarified whether Malta's claims are preponderantly for injury to its direct or indirect rights, namely, for injury to its rights as the flag State of the vessel in relation to damages incurred by it. The test of preponderance is set out in Article 14(3) of the International Law Commission's ("**ILC**") Draft articles on Diplomatic Protection which states:

> Local remedies shall be exhausted where an international claim, or request for a declaratory judgment related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.[289]

152. In the *Virginia G Case*, ITLOS has accepted this test stating that:

> When the claim contains elements of both injury to a State and injury to an individual, for the purpose of deciding the applicability of the exhaustion of local remedies rule, the Tribunal has to determine which element is preponderant[290]

153. As noted by the ILC in its commentary to the above quoted provision:

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[288] *Arctic Sunrise Arbitration* (Netherlands v. Russia), Award on the Merits dated 14 August 2015, PCA, para. 172 (**RLE 47**); *M/V Saiga* (Saint Vincent and the Grenadines v. Guinea), Case No. 2, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10 at para. 106 (**ALE 28; RLE 15**); *M/V "Virginia G"* (Panama v. Guinea-Bissau), Judgment of 14 April 2014, ITLOS Reports 2014, p.4 at para. 127 (**RLE 42**).

[289] ILC Draft Articles on Diplomatic Protection with Commentaries, 2006, p. 71 (**RLE 50)**.

[290] The M/V Virginia G case (Panama v. Guinea Bissau) ITLOS Judgment of 14 April 2014, para 157

> In practice it is difficult to decide whether the claim is "direct" or "indirect" where it is "mixed", in the sense that it contains elements of both injury to the State and injury to the nationals of the State.[291]

154. The difficulty signaled by the ILC would present itself in the present case, were it not for the fact that DS Tankers concluded a Settlement Agreement with São Tomé and that in such Agreement, DS Tankers:

> . . . gives up and waives, as applicable, any judicial actions already filed or to be filed, in any tribunal, against the State, its administrative bodies, the representatives of the State, public entities or similar, in Sao Tomé and Principe or in another country, as well as any additional complaints filed with private or international entities.[292]

155. Consequently, the main private entity which has suffered injury that can be seen as giving rise to an "indirect" claim of Malta cannot avail itself of any remedy in São Tomé.

156. In light of this, the direct claims of Malta for injury suffered as a State may be considered as preponderant. Consequently, there is no need that the private entities involved different from DS Tankers exhaust local remedies.

157. As the flag State under the Convention, Malta has standing to bring the current claims under the Convention. There is no requirement for the exhaustion of local remedies in the circumstances of the present case under the Convention. On this basis, this objection to admissibility is rejected.

2. Specificity of legal bases

i. Respondent's position

158. São Tomé submits that under general principles of international law and Article 1 of Annex VII of the Convention, a party initiating arbitration must make clear the legal bases of its claims.[293] São Tomé considers that Malta has not fulfilled this obligation in relation to some of its claims, which should therefore be considered inadmissible.[294]

159. São Tomé explains that Malta refers to the International Convention for the Prevention of Pollution from Ship ("**MARPOL**"), International Convention for the Safety of Life at Sea

[291] ILC Draft Articles on Diplomatic Protection with Commentaries, 2006, p. 74, para. 10 (**RLE 50)**.

[292] Settlement Agreement signed between the Government of São Tomé and Príncipe and DS Tankers, 23 November 2013 (attached to **AFE 26; AFE 41**).

[293] Counter-Memorial, paras 216-217.

[294] Counter-Memorial, paras 217 *et seq*.

("**SOLAS**") and STCW, but it is not clear which precise rules of these instruments have allegedly been breached.[295]

160. São Tomé further submits that Malta has failed to specify the legal basis for its claims that São Tomé has "violated fundamental human rights of the Master and crew".[296] São Tomé asserts that Malta relies on various human rights treaties and on case law of the European Court of Human Rights ("**ECHR**"), none of which, São Tomé states, is binding upon both Parties.[297] As a result, São Tomé concludes that these treaties cannot themselves constitute the source of obligations between the Parties or establish the legal basis for a claim by Malta.[298]

ii. Applicant's position

161. Malta submits that it has specified the legal bases of its claims,[299] as contemplated by provisions of the Convention and other rules of international law recognised by the Convention or of rules of law that are peremptory in nature or of general application.[300]

162. Malta explains that the obligations that arise under Article 225 of the Convention, together with Articles 192 and 194 operate in tandem with São Tomé's other international responsibilities, including those arising as a result of its IMO membership and under MARPOL and SOLAS.[301]

163. Malta submits that its claims based on human rights and humanitarian considerations are admissible.[302] Malta argues that the Convention contains numerous references to "other rules of international law" (or similar phrasing).[303] Malta refers to several law of the sea cases where the

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[295] Counter-Memorial, paras 218-220 referring to Memorial, paras 355-357.

[296] Counter-Memorial, para. 221 referring to Memorial, para. 394.

[297] Counter-Memorial, paras 222-224 referring to Memorial, paras 289 (reference to the International Covenant on Civil and Political Rights (1966) and to the African Charter on Human and Peoples' Rights (1981)), 291 (reference to the 1992 Resolution on the Right to Recourse and Fair Trial of the African Commission on Human and People's Rights), 299, 300, 301, 307 (reference to the 2003 Principles and Guidelines on the Right to a Fair Trail and Legal Assistance in Africa and jurisprudence of the African Commission of Human rights), 338-339 (reference to case law of the ECHR).

[298] Counter-Memorial, para. 224.

[299] Reply, paras 380, 412.

[300] Reply, paras 380-383.

[301] Reply, paras 384-391.

[302] Reply, para. 402.

[303] Reply, para. 401 referring to Preamble, articles 2(3), 19(1), 19(2)(a). 21(1), 31, 34(2), 39(l)(b), 58(2), 58(3), 74(1), 83(1), 87(1), 87(l)(d), 138, 139(2), 146, 221(1), 223, 235(1), 235(3), 293(1), 295, 297(1)(b), 301, 303(4), 304, 317(3) of the Convention.

phrases "human rights", "humanitarian concerns", "due process of law" and "civil rights" appear.[304]

iii. Decision of the Tribunal

164. The Tribunal is satisfied that Malta has amply and sufficiently specified the legal bases in the Convention for its claims in its Memorial dated 12 December 2014, Reply dated 23 October 2015, and its oral submissions at the Hearing held on 23-24 February 2016. The Tribunal does not find that the fact that Malta has referred to several instruments apart from the Convention renders its claims insufficiently specified.

3. Effect of the Settlement Agreement

165. São Tomé submits that the claims for damages suffered by the owner of *Duzgit Integrity*, DS Tankers, are inadmissible given that they were the object of the Settlement Agreement.[305] Malta objects to this on the grounds that (i) Malta was not a party to the Settlement Agreement; and (ii) the Settlement Agreement is in any event invalid *ab initio*.[306]

i. Respondent's position

166. São Tomé notes that a number of Malta's claims for monetary compensation relate to damages allegedly suffered by DS Tankers.[307]

167. São Tomé recalls that it concluded the Settlement Agreement with DS Tankers on 23 November 2013, according to which São Tomé released *Duzgit Integrity* on 25 November 2013 upon payment of the IMAP fine plus an additional sum.[308] São Tomé states that, as part of the

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[304] Reply, paras 397-398 referring to *M/V Saiga* (Saint Vincent and the Grenadines v. Guinea), Case No. 2, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10 at para. 159 (**ALE 28; RLE 15; ALE 39**); *Juno Trader* (Saint Vincent and the Grenadines v. Guinea-Bissau), Prompt Release, Judgment of 18 December 2004, ITLOS Reports 2004, p. 17 at para. 77 (**ALE 40**); *Tomimaru* (Japan v. Russian Federation), Prompt Release, Judgment of 6 August 2007, ITLOS Reports 2005-2007, p.74 at para. 63 (**ALE 41**); *M/V Louisa* (Saint Vincent and the Grenadines v. Spain), Judgment of 28 May 2013, ITLOS Reports 2013, p. 4 at paras 154-155 (**ALE 42; RLE 4**); *M/V Virginia G* (Panama v. Guinea-Bissau), Judgment of 14 April 2014, ITLOS Reports 2014, p. 4 at paras 359, 362 and operative provision 13 (**ALE 43; RLE 42**); *The Enrica Lexie Incident* (Italy v. India), Provisional Measures, Order 2015/5of 24 July 2015, ITLOS Reports 2015, to be published, paras 94, 99, 104, 133, and several accompanying separate opinions and declarations (**ALE 44**).

[305] Counter-Memorial, paras 226-229.

[306] Reply, paras 403-404, 408, 410.

[307] Counter-Memorial, para. 225 referring to Memorial, para. 391.

[308] Counter-Memorial, paras 226-227; Settlement Agreement signed between the Government of São Tomé and Príncipe and DS Tankers, 23 November 2013 (attached to **AFE 26; AFE 41**); *See supra* Section III.G.

Settlement Agreement, DS Tankers explicitly (i) agreed to waive its rights to bring claims against São Tomé, including any request for damages or compensation; and (ii) confirmed that it had not transferred its alleged claims to third parties, including Malta.[309] In turn, São Tomé also agreed to waive its rights, claim or sum against the vessel and any associated persons, property, interest.[310] Through such waiver, São Tomé demonstrates that the agreement was fair and reciprocal between the Parties.

168. São Tomé notes that Malta claims to be asserting its own right in exercising diplomatic protection over one of its nationals and, therefore, that it is was not for DS Tankers to waive any claims (the "Mavrommatis fiction").[311] São Tomé submits that this fiction is subject to qualification. São Tomé argues that it has been recognised that in such situations a State is not asserting its own right only, but also the right of the injured national.[312] São Tomé considers that the law has evolved in this regard,[313] and it invites the Tribunal to:

> adopt the view that if the rights of the national have been adequately safeguarded because it voluntarily settled the dispute and – in this case – was returned its vessel, there is no longer place for the national's State to pursue a claim for damages allegedly resulting from that same dispute . . . .[314]

169. São Tomé submits that it justifiably expected that Malta would be informed of the Settlement Agreement given that Mr. Gallardo was both acting as agent for Malta and representing Stena Oil and DS Tankers in the settlement discussions and given that Mr. Düzgit confirmed that he would inform Mr. Gallardo of the settlement reached.[315] São Tomé states that it "genuinely

[309] Counter-Memorial, para. 228 and reference to paras 134-135.

[310] Hearing Transcript (23 Feb. 2016), 100: 14-24.

[311] Reply, para. 404(i); Rejoinder, paras 88-89 referring to *Mavrommatis Palestine Concessions* (Greece v. UK), Objection to the jurisdiction of the Court, 1924 PCIJ Series A No.2, quoted in ILC Draft Articles on Diplomatic Protection with Commentaries, 2006, pp. 25-26, and Article 19, pp. 96-97, 100 (**RLE 50**).

[312] Rejoinder, paras 90-95 referring to ILC Draft Articles on Diplomatic Protection with Commentaries, 2006, p. 25 (**RLE 50**).

[313] Rejoinder, paras 91-95 referring to Article 19(c) of the ILC Draft Articles on Diplomatic Protection which recognises that a State entitled to exercise diplomatic protection should transfer to the injured person any compensation obtained from the responsible State; *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment of 19 June 2012, ICJ Reports 2012, p. 324 at para. 57 (**RLE 53**); *Cyprus v Turkey*, Application No. 25781/94, Judgment of 12 May 2014, European Court of Human Rights, Grand Chamber, operative para. 4(c) (**RLE 54**).

[314] Rejoinder, para. 91.

[315] Rejoinder, paras 96-97.

assumed that the matter was fully and finally settled" as evidenced by the letter from São Tomé's Foreign Minister to Malta's Foreign Minister on 12 December 2013.[316]

170. São Tomé maintains that Malta's allegations that the negotiations were conducted to "apply maximum pressure on the owners and the charterers" and that the Settlement Agreement was concluded under duress are false and not substantiated.[317] São Tomé submits that the text in the remittance note referred to by Malta does not constitute adequate and conclusive evidence of coercion, suggesting that there may have been a number of reasons for the inclusion of that text (including possible insurance claims).[318] São Tomé also recalls in this context that it was "DS Tankers itself [that] had initiated the settlement negotiations" after 22 October 2013 and first proposed to pay a lump sum compensation.[319] Following the conclusion of the agreement, Mr. Düzgit "explicitly confirmed" that he would ask Malta to withdraw the arbitration. São Tomé observes that "clearly, the agreement was breached and the arbitration was not withdrawn".[320]

171. São Tomé further notes that the Settlement Agreement contains an exclusive choice of forum clause conferring jurisdiction on the courts of Portugal for any disputes arising from it.[321]

172. In light of the above, São Tomé emphasises that if a matter has been settled amicably, "there is no longer place for the national state to pursue a claim for damages".[322] It concludes that all claims brought by Malta that relate to damages suffered by DS Tankers are inadmissible.[323]

ii. Applicant's position

173. Malta submits that the Settlement Agreement cannot render its claims inadmissible given that Malta is not a party to the Settlement Agreement—and did not participate in the negotiations.[324]

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[316] Rejoinder, para. 98 referring to Letter from the Minister of Foreign Affairs of São Tomé and Príncipe to Malta, 12 December 2013, para. 22 (**AFE 2.10**).

[317] Counter-Memorial, para. 226 referring to; Memorial, para. 193; Rejoinder, paras 99-102; Hearing Transcript (23 Feb. 2016), 101:5-11.

[318] Rejoinder, paras 101-102 referring to Remittance note stating payment as a result of the settlement agreement between the Government of São Tomé and Príncipe and DS Tankers, 8 November 2013 (**AFE 43**).

[319] Rejoinder, para. 102 referring to Proposal DS Tankers, 7 November 2013 (**RFE 28**).

[320] Hearing Transcript (23 Feb. 2016), 102:17-24.

[321] Rejoinder, para. 103.

[322] Hearing Transcript (23 Feb. 2016), 102:25, 103:1-4.

[323] Counter-Memorial, para. 229.

[324] Reply, para. 403 referring to Settlement Agreement signed between the Government of São Tomé and Príncipe and DS Tankers, 23 November 2013 (attached to **AFE 26; AFE 41**).

Malta further highlights that the Settlement Agreement was concluded after arbitration proceedings had already been instituted.[325]

174. Malta challenges São Tomé's objection to admissibility on three further grounds: (i) DS Tankers could not waive Malta's rights to claim reparation under international law; (ii) the second clause paragraph 1 (regarding waiver of the right to claim) and the third clause paragraph 1 (regarding transference of rights) are "ambiguous and anomalous" and do not mention the present dispute; and (iii) there is no need for DS Tankers to transfer any rights to Malta given that this action is being brought by Malta itself under diplomatic protection (the rights invoked therefore belong principally to Malta).[326]

175. Malta adds that it is "not convinced that [São Tomé] intended [the] document to be a settlement in good faith or, indeed, a settlement with Malta".[327] Malta argues that the timing, manner, and circumstances in which negotiations were conducted evidence that São Tomé was only interested in dealing with DS Tankers. It did not invite Malta to partake in the discussions, negotiations, and/or conclusion of the Settlement Agreement.[328]

176. Malta further submits that the Settlement Agreement was concluded in coercive circumstances, "under duress", and by applying maximum pressure on the owners and charterers of *Duzgit Integrity* to give in to São Tomé's demands, without the diplomatic involvement of Malta, the flag State which had already initiated arbitration proceedings.[329]

177. Malta asks the Tribunal to consider circumstances that it submits illustrate the pressure felt by DS Tankers to reach an agreement in order to have *Duzgit Integrity* released. These circumstances constitute duress factors: (i) the 8 months of detention of *Duzgit Integrity* and the liability, costs, and losses incurred during this period; (ii) the worsening state of the ship and the loss in its value;[330] (iii) state of the crew on board, particularly following the events of 11 and 19-22 October 2013; (iv) the confiscation and private sale of cargo (at a price that was likely 60% less than market value); (v) the release of *Marida Melissa* in unclear circumstances

[325] Reply, paras 403-404 referring to Settlement Agreement signed between the Government of São Tomé and Príncipe and DS Tankers, 23 November 2013 (attached to **AFE 26; AFE 41**).

[326] Reply, para. 404.

[327] Reply, para. 405.

[328] Reply, paras 406-407.

[329] Reply, paras 406, 408.

[330] Hearing Transcript (24 Feb. 2016), 59:1-2.

(differentiating the treatment of both vessels);[331] and (vi) the "excessive" payment of USD 625,000 representing the cargo inside the vessel that was used for maintenance purposes during detention.[332]

178. Malta notes that the remittance note detailing DS Tankers' payment of the USD 625,000 states that payment was made under duress. It reads: "WITHOUT ACCEPTING ANY LIABILITY PAYMENT UNDER DURESS OF INVOICE FA0075/13 DATE 16.03.2013".[333]

179. Malta concludes therefore that the Settlement Agreement is invalid *ab initio*, and, in any event, does not render any part of Malta's claim inadmissible.[334]

iii. Decision of the Tribunal

180. As stated above, the Tribunal finds that Malta has standing under the Convention to bring claims against São Tomé (*supra* paragraphs 147-157). This standing extends to claims for damages suffered by all entities that are considered as part of the unit of the ship, including the owner DS Tankers. On 23 November 2013, DS Tankers entered into a Settlement Agreement with São Tomé by which, *inter alia*, it gave up and waived any judicial actions against the State.[335]

181. The Tribunal finds that the Settlement Agreement reached between DS Tankers and São Tomé has no bearing on Malta's entitlement to bring claims against São Tomé under the Convention. The claims settled by DS Tankers under the Settlement Agreement are distinct from those brought by Malta at international law under the Convention.

182. The Tribunal further notes that Malta is not a party to the Settlement Agreement and therefore is not bound by it. The Tribunal determines that the Settlement Agreement is thus not relevant to the question of the admissibility of Malta's claims as they pertain to DS Tankers.

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[331] Fine of EUR 28,875 issued against the *Marida Melissa*, 16 October 2013, and receipt of payment, 7 October 2013 (**AFE 42**); *See supra* Section III, para. 116.

[332] Reply, para. 408.

[333] Reply, para. 409 referring to Remittance note stating payment as a result of the settlement agreement between the Government of São Tomé and Príncipe and DS Tankers, 8 November 2013 (**AFE 43**). The Tribunal notes that the Remittance Note submitted at **AFE 43** appears only to confirm the payment of the IMAP fine of EUR 28,875. There is no evidence on record showing that the USD 625,000 amount was in fact paid by Malta.

[334] Reply, para. 410.

[335] The Tribunal notes that there is no prior instance of a case brought under the Convention in which one of the entities within the unit of a ship concluded a settlement agreement with a State against which proceedings were brought under the Convention.

183. The Settlement Agreement *may* be relevant to a later phase of these proceedings as concerns the quantification of any damages suffered by DS Tankers, but the Tribunal makes no finding at this stage in that regard.

4. Exchange of views under Article 283 of the Convention

184. Article 283 contains a requirement for an "exchange of views" between parties to a dispute. It reads as follows:

> **ARTICLE 283**
> *Obligation to exchange views*
>
> 1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
>
> 2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

i. Respondent's position

185. São Tomé submits that Malta did not satisfy the requirement for an exchange of views before initiating the present arbitration.[336] São Tomé says that Article 283 requires that a party wishing to bring a dispute to arbitration under the Convention must have mentioned the prospect of arbitration and specified on which provisions it relies.[337] São Tomé asserts that in this case, Malta did not specify the basis of its claims prior to initiating arbitration.[338] São Tomé submits that it was put on notice that Malta would refer the dispute to arbitration by a letter of 18 September 2013, wherein reference was made to the Convention, but not to any of its provisions.[339]

186. São Tomé submits that, at that stage, Article 283(2) required the parties to exchange views again. São Tomé accepts that the Parties had agreed to conduct negotiations, but notes that negotiations were terminated by Malta. São Tomé argues that it was incumbent upon Malta to initiate an

[336] Counter-Memorial, para. 230.

[337] Counter-Memorial, para. 231 referring to São Tomé refers to *Southern Bluefin Tuna Cases* (New Zealand v Japan) (Australia v. Japan), Award on Jurisdiction and Admissibility of 4 August 2000, RIAA Vol. XXIII, p. 1 at para. 55 (**RLE 8**).

[338] Counter-Memorial, para. 231.

[339] Counter-Memorial, para. 238.

exchange of views to discuss the possible settlement of the dispute by other means prior to initiating arbitration.[340]

187. São Tomé argues that it had been in the process of settlement discussions with Malta.[341] São Tomé states that it granted pardon to the Masters as part of these negotiations and adds that the Parties were trying to agree on a place for a meeting when Malta suggested by two *Notes Verbales* that São Tomé never responded to any of its communication and on 22 October 2013 initiated arbitration.[342]

188. São Tomé emphasises that at no point in time during the negotiations did Malta make clear on which specific provisions of the Convention it was relying for its claims.[343] Additionally, Malta did not exchange views on what method of dispute settlement to use after it considered negotiations terminated.[344]

ii. Applicant's position

189. Malta submits that it fulfilled the requirements of Article 283.[345] Malta states that it attempted to open diplomatic discussions but its efforts were barred by São Tomé's unwillingness to reach an amicable settlement.[346] Malta asserts that São Tomé's actions led to an impasse and it was São Tomé that officially terminated all negotiations stating that "there are no longer any conditions to maintain the discussion . . . with Stena Oil Ab and the owner of the vessel *Duzgit Integrity*".[347]

190. Malta states that São Tomé omits any mention to the relevance of the escalation of events on 11 October 2013,[348] to which Stena Oil's letters were a direct reaction.[349] Malta explains that São Tomé took offence to Stena Oil's reaction, decided to terminate negotiations and pursue a

[340] Counter-Memorial, para. 239.

[341] Counter-Memorial, para. 240 referring to *Note Verbale* from São Tomé and Príncipe to Malta, 27 September 2013 (**AFE 2.6**); Letter from Malta's Agents to São Tomé and Príncipe, 4 October 2013 (**AFE 2.7**).

[342] Counter-Memorial, paras 240-241 referring to *Note Verbale* from Malta to São Tomé and Príncipe, 14 October 2013 (**AFE 2.8**); Letter from Malta's Agents to São Tomé and Príncipe, 18 October 2013 (**AFE 2.9**).

[343] Counter-Memorial, para. 242.

[344] Counter-Memorial, paras 243-244.

[345] Reply, para. 425.

[346] Reply, para. 423.

[347] Reply, paras 411-415 referring to Letter of the President of the Committee, 16 October 2013 (**RFE 26**) (emphasis in Reply).

[348] *See supra* Section III, para. 109 *et seq*.

[349] Reply, paras 416-417; *see supra* Section III, para. 109.

second attempt to remove the cargo from *Duzgit Integrity*, disregarding also Malta's clear request (as the flag State) for São Tomé to not proceed with the removal.[350]

191. Malta submits that it initiated arbitral proceedings after these events, when "it was manifest that there was no scope for talks or settlement" given that São Tomé had "not once replied substantively […] in a manner that might begin to be considered as a reciprocal exchange of views".[351] Malta considers that the first time that São Tomé corresponded substantially was by a letter dated 12 December 2013, after arbitration had been initiated and the default mechanism to appoint an arbitrator had been triggered.[352]

192. Malta submits that an analysis of the time-line of communications and key events between the Parties[353] demonstrates that (i) Malta attempted several times to pursue talks, until immediately before instituting arbitral proceedings; (ii) Malta offered alternative mechanisms for dispute resolution (namely, submission to ITLOS); (iii) São Tomé was not genuinely open to talks with Malta; and (iv) it was São Tomé that escalated events, and definitively terminated negotiations on 16 October 2013.[354]

193. For instance, Malta submits that its letter of 18 September 2013 was a pre-notification of arbitration, clearly indicating the existence of a dispute. Malta further submits that it made reference to the grounds on which the dispute was based and included an indication of a possible alternative method of resolving disputes—submission to ITLOS.[355] Malta notes that São Tomé's reply did not address its arguments nor provide a position on possible settlement mechanisms, stating only its availability for a meeting (later not agreeing on the location).[356]

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[350] Reply, paras 417-418.

[351] Reply, para. 419.

[352] Reply, para. 420 referring to Letter from the Minister of Foreign Affairs of São Tomé and Príncipe to Malta, 12 December 2013 (**AFE 2.10**).

[353] Diplomatic correspondence between Malta and São Tomé and Príncipe (**AFE 2**).

[354] Reply, para. 421 referring to Diplomatic correspondence between Malta and São Tomé and Príncipe (**AFE 2**); *see supra* Section III, paras 97 *et seq*.

[355] Reply, para. 421 referring to Letter from Malta's Agents to São Tomé and Príncipe, 18 September 2013, para. 28 (**AFE 2.4**).

[356] Reply, para. 421 referring to *Note Verbale* from São Tomé and Príncipe to Malta, 27 September 2013 (**AFE 2.6**); Letter from Malta's Agents to São Tomé and Príncipe, 4 October 2013 (**AFE 2.7**); *see supra* Section III, para. 103.

194. Malta sent further communications to São Tomé after the event on 11 October 2013, stating its concern with the ongoing events, reiterating alternative dispute-resolution methods, and specifying a date for a possible meeting as a final attempt.[357]

195. Malta states that it made still another attempt at negotiations after the arbitration proceedings had been initiated and did not receive a reply from São Tomé.[358] According to Malta, even after the release of the vessel, Malta continued trying to resolve the dispute peacefully until today. Such effort includes the meeting between the Prime Minister of Malta and the President of São Tomé at the occasion of the EU-Africa Summit in Brussels.[359]

196. Malta reiterates that a proper exchange of views implies a reciprocal effort. It submits that it made several attempts and that São Tomé showed unwillingness to reach an amicable settlement throughout this process.[360] Malta concludes therefore that it "was not obliged to continue with an exchange of views, it being manifest that the possibilities of reaching agreement were exhausted", and accordingly the requirements of Article 283 were satisfied.[361]

iii. Decision of the Tribunal

197. Article 283 requires the Parties to exchange views regarding the means for resolving their dispute. As stated by the tribunal in the *Chagos Islands Case*:

> Article 283 . . . was intended to ensure that a State would not be taken entirely by surprise by the initiation of compulsory proceedings. It should be applied . . . without an undue formalism as to the manner and precision with which views were exchanged and understood. In the Tribunal's view, Article 283 requires that a dispute have arisen with sufficient clarity that the Parties were aware of the issues in respect of which they disagreed.[362]

198. In the *Arctic Sunrise Arbitration*, the tribunal held that:

> The Tribunal understands this provision to require that the Parties exchange views regarding the means by which a dispute that has arisen between them may be settled. . . .

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[357] Reply, para. 421 referring to Letter from Malta's Agents to São Tomé and Príncipe, 18 October 2013 (**AFE 2.9**).

[358] Reply, para. 421 referring to *Note Verbale* from Malta to São Tomé and Príncipe, 28 April 2014 (**AFE 2.11**).

[359] Hearing Transcript (24 Feb. 2016), 60:24-25, 61:1-4.

[360] Reply, paras 422-423.

[361] Reply, paras 424-425.

[362] *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom), Award of 18 March 2015, PCA, para. 382 (**RLE 3**).

> Article 283(1) does not require the Parties to engage in negotiations regarding the subject matter of the dispute.[363]

199. The Tribunal finds that the requirement for an exchange of views has been satisfied in this case. By *Note Verbale* of 23 April 2013, the Maltese Ministry of Foreign Affairs wrote to the São Tomé Ministry of Foreign Affairs to raise its concerns around the incident involving the vessel and the severity of the sentence passed by the São Tomé court of first instance. Malta exhorted the São Tomé authorities to review the case and come to an equitable resolution.[364] São Tomé acknowledged receipt of Malta's *Note Verbale* on 29 April 2013 by *Note Verbale* dated 29 April 2013, noting that the matter was before the Supreme Court.[365] On 22 April 2013, the Maltese Transport Centre wrote to the Permanent Secretary for the Ministry of Foreign Affairs of São Tomé with respect to the arrest of the vessel and the master, seeking a review of the court's decision to bring it "in accordance with international norms, primarily the [Convention]."[366] On 15 May 2013, the Ministry of Foreign Affairs of Malta again wrote to its São Tomé counterpart with concerns as to the severity of the decision of the court of first instance, seeking that it be reviewed to comply with international norms as reflected in the Convention.[367] By letter dated 18 September 2013, the Agents of Malta wrote to São Tomé to provide pre-notification of the imminent submission of the dispute surrounding the vessel to arbitration under the Convention.[368] This was a 5-page letter providing a detailed overview of the dispute, sent in both English and in Portuguese. It stated:

> The government of São Tomé is hereby put on notice that Malta shall imminently proceed to refer the dispute to arbitration pursuant to Article 286 UNCLOS under the applicable procedure set out in Annex VII UNCLOS. Both States are parties to UNCLOS and neither State has made any choice of procedure pursuant to Article 287 UNCLOS.[369]

200. This correspondence was acknowledged by São Tomé in a *Note Verbale* dated 27 September 2013,[370] in which São Tomé proposed a meeting to discuss settlement talks. It was shortly thereafter that São Tomé boarded *Duzgit Integrity* and performed a transhipment of the cargo to the *Energizer*. Upon learning of these events, on 14 October 2013, Malta requested São Tomé not to take any action that would further aggravate the situation, and reserved its right as the

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[363] *Arctic Sunrise Arbitration* (Netherlands v. Russian Federation), Award on the Merits of 14 August 2015, PCA, para. 151 (**RLE 47**).

[364] *Note Verbale* from Malta to São Tomé and Príncipe, 23 April 2013 (**AFE 2.1**).

[365] *Note Verbale* from São Tomé and Príncipe to Malta, 29 April 2013 (**AFE 2.2**).

[366] Letter from Transport Malta to São Tomé and Príncipe dated 22 April 2013 (**AFE 2.1**).

[367] *Note Verbale* from Malta to São Tomé and Príncipe, 15 May 2013 (**AFE 2.3**).

[368] Letter from Malta's Agents to São Tomé and Príncipe, 18 September 2013 (**AFE 2.4**).

[369] Letter from Malta's Agents to São Tomé and Príncipe, 18 September 2013 (**AFE 2.4**).

[370] *Note Verbale* from São Tomé and Príncipe to Malta, 27 September 2013 (**AFE 2.6**).

flag State "to take all other possible actions at law, including to refer the matter before an international arbitration panel set up in terms of the United Nations Convention on the Law of the Sea".[371] This had been stated in a letter from Malta to the Chief of Cabinet of São Tomé on 18 September 2013.[372]

201. In light of the above, the Tribunal considers that São Tomé was sufficiently notified of the possibility that Malta would initiate the present proceedings and that the nature of the dispute was made sufficiently clear. The Tribunal does not consider that it was necessary for Malta to specify the provisions of the Convention that it relied upon. The Tribunal concludes that for the purposes of Article 283 there had been a sufficient exchange of views.

VI. APPLICABLE LAW

202. Article 293(1) of the Convention provides:

> **ARTICLE 293**
> *Applicable law*
>
> 1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

i. Applicant's Position

203. Malta's position is that this case concerns not only the application and interpretation of the Convention, but also other rules of international law that are applicable to this case, in line with Article 293 of the Convention.[373] Malta submits that "fundamental human rights . . . fall within the scope of 'other rules of international law'".[374] Malta claims that São Tomé did not respect fundamental human rights enshrined in various domestic and international instruments—such as the Universal Declaration of Human Rights—in the exercise of its sovereignty.[375] Malta "invokes the articles or principles of law which are of paramount importance, namely human rights considerations and the protection of the environment."[376]

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[371] *Note Verbale* from Malta to São Tomé and Príncipe, 14 October 2013 (**AFE 2.8**).

[372] Letter from Malta's Agents to São Tomé and Príncipe, 18 September 2013 (**AFE 2.4**).

[373] Hearing Transcript (23 Feb. 2016), 15:14-23.

[374] Reply, para. 170.

[375] Memorial, paras 284-321.

[376] Hearing Transcript (24 Feb. 2016), 51:21-24.

ii. Respondent's Position

204. São Tomé does not dispute that it is under an obligation to observe rules of customary international law and general principles of law. It argues that the scope of the dispute resolution framework under the Convention is limited to deciding disputes relating to the interpretation and application of the Convention and thus, in so far as Malta's claims are based on other rules of international law that are separate and distinct from the Convention, the Tribunal should find it has no jurisdiction.[377]

205. São Tomé emphasises the difference between applicable law under Article 293 and jurisdiction under Article 288(1).[378] The former provision enables a tribunal to "apply rules and principles that may be necessary to settle a claim under the Convention" but does not extend the jurisdiction of a tribunal, which is a matter governed exclusively by the latter provision, to determine claims based upon instruments other than the Convention.[379]

206. São Tomé recognises the relevance of human rights and due process in the law of the sea but rejects that they can, by virtue of Article 293, form the basis of a tribunal's jurisdiction. São Tomé challenges Malta's reliance on *M/V Louisa* on the basis that the tribunal in that case found that it did not have jurisdiction despite acknowledging the importance of human rights law and considerations of due process.[380] São Tomé finds further support in the *Arctic Sunrise Arbitration*:

> Article 293 is not, however, a means to obtain a determination that some treaty other than the Convention has been violated, unless that treaty is otherwise a source of jurisdiction, or unless that treaty directly applies pursuant to the Convention.[381]

iii. Decision of the Tribunal

207. Article 288(1) limits the jurisdiction of this Tribunal to disputes concerning the interpretation or application of the provisions of the Convention. Article 293(1) provides that the Tribunal shall apply the Convention and other rules of international law not incompatible with the Convention. The combined effect of these two provisions is that the Tribunal does not have jurisdiction to determine breaches of obligations not having their source in the Convention

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[377] Rejoinder, para. 23.

[378] Rejoinder, para. 35.

[379] Rejoinder, para. 36-37.

[380] Rejoinder, para. 40.

[381] Rejoinder, para. 39 referring to *Arctic Sunrise Arbitration* (Netherlands v. Russia), Award on the Merits of 14 August 2015, PCA, paras 190-192 (**RLE 47**).

(including human rights obligations) as such, but that the Tribunal "may have regard to the extent necessary to rules of customary international law (including human rights standards) not incompatible with the Convention, in order to assist in the interpretation and application of the Convention's provisions that authorise the arrest or detention of a vessel and persons".[382]

208. While Article 293(1) does not extend a tribunal's jurisdiction, it ensures that a tribunal can give full effect to the provisions of the Convention. For this purpose, some provisions of the Convention directly incorporate other rules of international law.[383] As stated by the tribunal in the *Arctic Sunrise Arbitration*, in order properly to interpret and apply particular provisions of the Convention, it may be necessary for a tribunal to resort to foundational or secondary rules of general international law such as the law of treaties or the rules of State responsibility. In the case of some broadly worded or general provisions, it may also be necessary to rely on primary rules of international law other than the Convention in order to interpret and apply particular provisions of the Convention. Both arbitral tribunals and ITLOS have interpreted the Convention as allowing for the application of relevant rules of international law.[384] Article 293 of the Convention makes this possible.

209. The exercise of enforcement powers by a (coastal) State in situations where the State derives these powers from provisions of the Convention is also governed by certain rules and principles of general international law, in particular the principle of reasonableness. This principle encompasses the principles of necessity and proportionality.[385] These principles do not only apply in cases where States resort to force, but to all measures of law enforcement. Article 293(1) requires the application of these principles. They are not incompatible with the Convention.

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[382] *Arctic Sunrise Arbitration* (Netherlands v. Russia), Award on the Merits of 14 August 2015, PCA, para. 198 (**RLE 47**).

[383] *Arctic Sunrise Arbitration* (Netherlands v. Russia), Award on the Merits of 14 August 2015, PCA, para. 188 (**RLE 47**). For example, Article 74 provides that "[t]he delimitation of the exclusive economic zone between states with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 in the Statute of the International Court of Justice, in order to reach an equitable solution". Article 311(2) provides that: "[t]his 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".

[384] In the *M/V "SAIGA" (No. 2)* case, ITLOS account of general international law rules on the use of force in considering the use of force for the arrest of a vessel. *See* Judgment of 1 July 1999, ITLOS Reports 1999, p. 10 at para. 155.

[385] *Arctic Sunrise Arbitration* (Netherlands v. Russia), Award on the Merits of 14 August 2015, PCA, paras 222, 326 (**RLE 47**). *M/V Saiga* (Saint Vincent and the Grenadines v. Guinea), Case No. 2, Judgment of 1 July 1999, 1999 ITLOS Reports p. 10 at para. 155 (**ALE 28**; **RLE 15**).

210. The Tribunal is not competent to determine if fundamental human rights obligations were violated by São Tomé, or if São Tomé applied its own laws correctly; the Tribunal cannot act as an appeals court. The Tribunal can only determine if the measures actually taken by São Tomé on and subsequent to 15 March 2013 breached its international law obligations resulting from the principle of reasonableness as applied to law enforcement measures by a coastal State. The criterion of proportionality is relevant to a determination of whether the measures taken by São Tomé were reasonable.

VII. MERITS

A. ARTICLE 300

211. Malta has invoked Article 300 of the Convention in relation to all of its claims on the merits.

212. Article 300 provides:

> **ARTICLE 300**
> *Good faith and abuse of rights*
>
> States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

i. Applicant's Position

213. Malta relies on Article 300 to extend the obligation of good faith and non-abuse of rights contained therein to "each and every provision in the Convention that endows a state with a right or imposes an obligation".[386] Malta submits that human rights and humanitarian considerations are relevant to the abuse of right under Article 300.[387] It argues that such considerations have been accepted into the law of the sea. Just as with human rights, Malta argues that, by virtue of Article 293 of the Convention and Article 11 of the Rules of Procedure, other rules of international law beyond the Convention also impose limitations upon the sovereignty of a coastal state.[388] Malta claims that its reliance on human rights considerations and other rules of international law is, therefore, "perfectly justified"[389] and would not take the dispute outside the Convention.

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[386] Hearing Transcript (24 Feb. 2016), 42:20-25.

[387] Hearing Transcript (23 Feb. 2016), 63:24-64:2, 66:3-5.

[388] Hearing Transcript (24 Feb. 2016), 51:14-18.

[389] Hearing Transcript (24 Feb. 2016), 51:14-18.

ii. Respondent's Position

214. São Tomé opposes Malta's claim that Article 300 "incorporates human rights and humanitarian considerations into the concept of abuse of rights"[390] thereby subjecting São Tomé's exercise of sovereignty to the scrutiny of human rights law. São Tomé argues that if the Convention intended to impose such a limitation, it would do so expressly, as with Article 73(1) and (2) of the Convention. São Tomé argues that when there are no explicit limitations, "it is not for a court or tribunal to establish them by use of generic provisions".[391]

215. São Tomé submits that "an abuse of right" under Article 300 requires "a particular level of severity".[392] The question is whether a state exercised "its right in bad faith for a purpose that they were not intended and . . . caused significant damage to another state or its nationals"[393] in a "perverse, improper, corrupt, deceitful or fraudulent" manner[394] which can only be proved by "clear and compelling evidence".[395] São Tomé considers that Malta has failed to provide such evidence on the basis of its mere speculation as to the possible motivation for the actions of São Tomé.[396]

iii. Decision of the Tribunal

216. Article 300 is an overarching provision which applies to all provisions of the Convention. It is not a stand-alone provision. In *M/V Louisa*, the tribunal held that:

> . . . it is apparent from the language of article 300 of the Convention that article 300 cannot be invoked on its own. It becomes relevant only when "the rights, jurisdiction and freedoms recognised" in the Convention are exercised in an abusive manner.[397]

217. In *M/V Virginia G*, the tribunal also noted that:

> . . . it is not sufficient for an applicant to make a general statement that a respondent by undertaking certain actions did not act in good faith and acted in a manner which constitutes

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[390] Hearing Transcript (24 Feb. 2016), 97:3-7.

[391] Hearing Transcript (24 Feb. 2016), 100:15-21.

[392] Hearing Transcript (24 Feb. 2016), 102:6-8.

[393] Hearing Transcript (24 Feb. 2016), 102:9-14.

[394] Hearing Transcript (24 Feb. 2016), 102:14-16.

[395] Hearing Transcript (24 Feb. 2016), 103:11-16.

[396] Hearing Transcript (24 Feb. 2016), 103:5-8.

[397] *M/V Louisa* (Saint Vincent and the Grenadines v. Spain), Judgment of 28 May 2013, ITLOS Reports 2013, p.4 at para. 137 (**ALE 11**).

> an abuse of rights without invoking particular provisions of the Convention that were violated in this respect.[398]

218. Accordingly, Article 300 is an example of the application of rules of general international law, albeit by explicitly incorporating them into the Convention. It may be invoked when rights, jurisdiction and freedoms recognised in the Convention are exercised in an abusive manner.[399] In the following analysis, Article 300 will be examined in connection with alleged violations of specific provisions of the Convention.

B. ALLEGED VIOLATION OF ARTICLE 49(3) OF THE CONVENTION IN CONNECTION WITH A VIOLATION OF ARTICLE 300

219. Article 49 of the Convention provides, in relevant part:

> **ARTICLE 49**
> *Legal status of archipelagic waters, of the air space over archipelagic waters and of their bed and subsoil*
>
> 1. The sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines drawn in accordance with article 47, described as archipelagic waters, regardless of their depth or distance from the coast.
>
> […]
>
> 3. This sovereignty is exercised subject to this Part.
>
> […]

220. Malta alleges that the overall conduct and measures taken by São Toméan authorities in respect of *Duzgit Integrity*, the Master, crew, owner, charterer and all interests associated with the vessel were unjustified, manifestly disproportionate, and in violation of, *inter alia*, Articles 49(3) and 300 of the Convention.[400] Malta's specific allegations in relation to São Tomé's conduct towards the *Duzgit Integrity*'s Master, owner, and charterer, and Malta (as flag State) are set out in the sub-sections that follow.

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[398] *M/V Virginia G* (Panama v. Guinea-Bissau), Judgment of 14 April 2014, ITLOS Reports 2014, p.4 at para. 398 (**RLE 42**).

[399] *M/V Louisa* (Saint Vincent and the Grenadines v. Spain), Judgment of 28 May 2013, ITLOS Reports 2013, p.4 at para. 137 (**ALE 11**).

[400] Memorial, paras 241-242; Hearing Transcript (24 Feb. 2016), 42:7-25.

1. Whether explicit authorisation was given during the Coast Guard's first visit

i. Applicant's position

221. It is Malta's case that it was granted verbal authorisation to undertake the STS transfer by the São Tomé Coast Guard patrol boat during its first visit.[401]

222. Malta maintains that the Master of *Duzgit Integrity* "disclosed his intentions in full" on the first visit by the Coast Guard at 7:05:18 a.m. on 15 March 2013[402] by mentioning key words such as "equipment transfer", " STS", and "*Marida Melissa*".[403] The radio transcript of the first visit[404] shows that the Master disclosed "key information" regarding the upcoming arrival of *Marida Melissa* for the intended STS operation.[405] The Master stated that the vessel was in that area for safety reasons, but he would immediately leave if São Tomé were to object.[406] Malta also points out that no STS operation could have commenced at the time of the first visit because *Duzgit Integrity* was alone.[407]

223. Malta further submits that the Coast Guard patrol boat left the scene with the knowledge that the STS operation would take place, and failed to raise any objections or take any measures until *Marida Melissa* was alongside *Duzgit Integrity*.[408] The Coast Guard understood the Master and concluded their conversation "in a confirmatory and reassuring manner" without objections.[409] Malta submits that the level of English of both sides was "more than sufficient for the Coast Guard to have understood what the Master stated".[410] Malta points out that the Coast Guard

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[401] Reply, paras 78, 98.

[402] Memorial, para. 243 i; Malta's letter of 9 March 2016, clarification of audio recordings, a) i; Reply, paras 75, 78 referring to Conversation between *Duzgit Integrity* and Coast Guard around 07:04 a.m. during the Coast Guard's first visit (**AFE 11.2**).

[403] Hearing Transcript (23 Feb. 2016), 57:10-14.

[404] Conversation between *Duzgit Integrity* and Coast Guard around 07:04 a.m. during the Coast Guard's first visit (**AFE 11.2**).

[405] Memorial, para. 243 ii; Reply, para. 81 ii referring to Conversation between *Duzgit Integrity* and Coast Guard around 07:04 a.m. during the Coast Guard's first visit (**AFE 11.2**).

[406] Memorial, para. 243 ii; Reply, paras 71, 81 iv, v referring to Conversation between *Duzgit Integrity* and Coast Guard around 07:04 a.m. during the Coast Guard's first visit (**AFE 11.2**).

[407] Memorial, para. 243 ii referring to Conversation between *Duzgit Integrity* and Coast Guard around 07:04 a.m. during the Coast Guard's first visit (**AFE 11.2**); Reply, paras 76, 158.

[408] Memorial, paras 243 v, vi, vii; Reply, para. 129.

[409] Memorial, para. 243 iii, iv, v; Reply, paras 77 i, 78, 82, 94-95.

[410] Memorial, para. 243 iii; Reply, paras 89-91.

officer stated "there was no misunderstanding between himself and the accused over the radio" during court proceedings.[411]

224. Malta also submits that if the Coast Guard had not understood the conversation, it would be grossly negligent for it to have responded with the phrases "I congratulate your cooperation", "Good morning", and "Good job".[412] Malta also points out that the first exchange happened via public VHF channel 16[413] and the Coast Guard on shore were also within range but did not intervene via radio.[414]

225. Malta also submits that while the Master stated during the first encounter that *Duzgit Integrity* would leave if the Coast Guard gave no permission, the Coast Guard failed to clearly order the Master to stop.[415] Malta adds that during both the first and second visits the Master stated that he would move offshore if no permission was given, with no direct answer from São Tomé.[416]

226. Malta states that there was sufficient time for the Coast Guard to take action had it intended to prevent the STS operation from taking place or seek further information.[417] Malta submits that the responsibility was shifted to the Coast Guard, as they could have and should have taken action during the first visit or immediately after.[418]

ii. Respondent's position

227. São Tomé contends that *Duzgit Integrity* failed to obtain prior authorisation to make an STS transfer in accordance with its law. *Decreto-Lei* 04/2010 requires 24-hour notice of arrival before entering the ports of São Tomé and is interpreted to be applicable to anchorages in the

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[411] Malta's Post-Hearing Submissions, para. 7 referring to Transcript of court hearings, 25, 26 and 29 March 2013, p. 6 (Portuguese), p. 21 (English) (**RFE 32**).

[412] Reply, para. 96 iv.

[413] Memorial, para. 243 ii referring to Conversation between *Duzgit Integrity* and Coast Guard around 07:04 a.m. during the Coast Guard's first visit (**AFE 11.2**); Reply, para. 130.

[414] Reply, paras 84, 97, 130 referring to Conversation between *Duzgit Integrity* and Coast Guard around 07:04 a.m. during the Coast Guard's first visit (**AFE 11.2**).

[415] Hearing Transcript (23 Feb. 2016), 57: 15-58: 11.

[416] Malta's Post-Hearing Submissions, paras 26-27 referring to Conversation between *Duzgit Integrity* and Coast Guard around 07:04 a.m. during the Coast Guard's first visit (**AFE 11.2**); Conversation between *Duzgit Integrity* and Coast Guard around 09:16 a.m. during the Coast Guard's second visit (**AFE 11.4**).

[417] Memorial, para. 244, ii, iii. Malta submits that there were at least three instances where São Tomé could have taken action: when *Duzgit Integrity* first entered its territorial waters, upon the first visit, and during the 2 hours and 10 minutes after the first visit, *see* Reply, para. 128.

[418] Memorial, para. 244 ii; Reply, para. 77 ii.

archipelagic waters and territorial sea.[419] São Tomé submits that Stena Oil was fully aware of the procedures and requirements[420] for obtaining prior written authorisation to enter São Tomé territorial waters and carry out operations,[421] referring to *Duzgit Integrity*'s own manuals and several previous instances where the charterer had applied for authorisation.[422] According to São Tomé, vessels like *Duzgit Integrity* intending to perform an STS operation are required to provide prior notification to the coastal State under international law, a requirement of which the Master was aware.[423] São Tomé notes that *Duzgit Integrity* failed to comply with this requirement and entered São Tomé waters to transfer large quantities of oil without notifying the authorities.[424]

228. Referring to the radio transcript of the first visit, São Tomé contests Malta's contentions that authorisation was granted verbally during the Coast Guard's first visit, and argues that:

(i) The Master did not disclose his intentions in full; he merely stated his intention to carry out an equipment transfer of hoses and fenders;

(ii) The Master failed to declare key information about the intended transfer; the most important part of the operation–the transhipment of some 1,555 MT of oil–is not mentioned at all during the entire conversation;

(iii) The level of English of the Coast Guard officer was poor, and this was made clear at the beginning of the conversation.[425]

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[419] Counter-Memorial, para. 330 referring to Statement of Stena Oil agent Mr. Wilson Morais (**AWS 4**).

[420] São Tomé indicates that this is a common requirement in international shipping and refers to a similar article of Maltese regulations on Dangerous cargo ships, marine terminals and facilities and bunkering. São Tomé also points out that the requirement is even stricter for dangerous or polluting goods, s*ee* Counter-Memorial, paras 287-288 referring to Excerpts from the Maltese Subsidiary Legislation 499.12 (**RLE 28**).

[421] Counter-Memorial, para. 286.

[422] Hearing Transcript (23 Feb. 2016), 110:23-111:23 referring to Notification of and reasons for the arrival of the *Marida Melissa* on 22 December 2012 (including English translation)(**RFE 8**); Email correspondence of 20, 21 and 22 December 2012 in relation to the authorisation formalities for the bunkering operation between the *Marida Melissa* and the D Whale (**RFE 9**); Authorisation requests filed on 3 and 9 December 2012 for the vessel Stena President (including English translation)(**RFE 10**); Authorisation Request filed on 31 January 2013 for the Stena Perros (including English translation)(**RFE 11**).

[423] Rejoinder, paras 112-114 referring to Regulation 42 of Annex 1 to MARPOL; Resolution MEPC.186(59) adopted by the International Maritime Organization, 17 July 2009 (**RLE 55**); Conversation between *Duzgit Integrity* and Coast Guard at 09:57 a.m. (**AFE 11.6**); Transcript of court hearings, 25, 26 and 29 March 2013, p. 3 (Portuguese) p. 18 (English) (**RFE 32**).

[424] Counter-Memorial, paras 286, 289.

[425] Counter-Memorial, para. 292.

229. São Tomé states that the Coast Guard officer's "understanding of the first conversation was limited to the fact that the *Duzgit Integrity* did not seem to have authorisation or an agent in São Tomé."[426] No one present in the Coast Guard Operation Centre could speak English or could assist the Coast Guard officer in the conversation.[427] São Tomé concludes that *Duzgit Integrity* did not request and obtain written authorisation and the Coast Guard did not give explicit authorisation.[428]

230. São Tomé contends that there was no implicit authorisation given during the first visit,[429] and notes that "the Master himself was not convinced that he had obtained authorisation" since the Master tried to contact the Coast Guard again to request permission for the operation.[430]

231. São Tomé claims that it did not act in violation of the Master's legitimate expectations because no such expectations were created.[431] São Tomé contends that: (i) the radio conversation during the first visit does not objectively and reasonably give rise to such expectations as the requirements for authorisation are extensive and strict, and the Master's subjective expectations are not sufficient;[432] (ii) the Coast Guard's response was ambiguous, and the Master should have been put on alert as the Coast Guard made clear his English was poor; it is in fact evident that the Master was put on alert as he asked for permission again later;[433] and (iii) because "the Master did not disclose his intentions in full" nor did he mention details of the operation, he could not have obtained authorisation even if the Coast Guard's English was perfect.[434]

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[426] São Tomé's Reply to Post-Hearing Submissions, para. 28 referring to Statement by Adjunct Sergeant of the Coast Guard Mr. Francisco Mendes Ferreira, para. 9 (**RWS 1**).

[427] São Tomé's Reply to Post-Hearing Submissions, para. 41.

[428] Counter-Memorial, para. 294; Rejoinder, para. 132.

[429] Counter-Memorial, para. 294; Rejoinder, paras 132, 134. São Tomé points out that "good job" said by the Coast Guard during the first visit is just a common expression of courtesy.

[430] Counter-Memorial, para. 296 referring to Conversation between *Duzgit Integrity* and *Marida Melissa* at 07:09 a.m. and 08:25 a.m. (**AFE 11.3**); Rejoinder, para. 139 referring to Statement of the Master of *Duzgit Integrity* Mr. Cengiz Gulsen (**AWS 1**).

[431] Counter-Memorial, para. 307.

[432] Counter-Memorial, para. 305; Rejoinder, para. 135.

[433] Counter-Memorial, para. 306; Rejoinder, para. 135.

[434] Counter-Memorial, para. 306; Rejoinder, paras 136-138 where São Tomé cites the information disclosure requirements related to STS operations of Regulation 42 of Annex 1 to MARPOL. São Tomé also points out that Regulation 42 is included in *Duzgit Integrity*'s STS operation plan, therefore the Master had knowledge of the requirements.

232. São Tomé denies that the information disclosed by *Duzgit Integrity* shifted responsibility to the Coast Guard, and argues that the responsibility remained with *Duzgit Integrity* to disclose information and seek authorisation.[435]

233. As far as the second visit is concerned, São Tomé states that "the São Tomé authorities did not consider accepting the proposal to proceed offshore because it was suspecting the *Duzgit Integrity* of being engaged in illegal activity, which warranted further investigation".[436]

iii. Decision of the Tribunal

234. Article 49 of the Convention is applicable because *Duzgit Integrity* was located in the archipelagic waters of São Tomé at the time of arrest.[437] The Tribunal determines that Malta has failed to establish that the São Toméan authorities gave explicit authorisation to *Duzgit Integrity* to conduct the intended STS transfer, even though it appears that the Master may have held a *bona fide* but mistaken belief that he had been given permission by the São Tomé Coast Guard. Consequently, the Tribunal finds that the actions undertaken by the São Toméan authorities in relation to *Duzgit Integrity* on 15 March 2013, namely, the Coast Guard's instruction to the Masters to anchor the vessels in the anchorage area and proceed onshore,[438] were not unlawful.

235. The Tribunal considers that São Tomé acted lawfully and in accordance with its law enforcement jurisdiction resulting from its sovereignty over its archipelagic waters in relation to *Duzgit Integrity* on 15 March 2013. The Master knew that *Duzgit Integrity* had an obligation to obtain permission prior to entering São Tomé's waters for making any transhipment. There was no obligation on São Tomé to inform *Duzgit Integrity* of that obligation separately, or to advise *Duzgit Integrity* to leave São Tomé's waters rather than arrest the ship after it had started preparing STS operations with *Marida Melissa*; São Tomé was acting within its sovereign powers to arrest the ship in the circumstances.

236. The Tribunal does not accept Malta's shift-in-responsibility argument. A foreign ship may not commence STS operations in the waters under sovereignty of a coastal State without authorisation. *Duzgit Integrity* had ample time to notify its agent to seek authorisation from São Tomé. The *Duzgit Integrity* charterers were not new to the West African region; they had done

[435] Rejoinder, paras 140-141.

[436] São Tomé's Reply to Post-Hearing Submissions, para. 61.

[437] Counter-Memorial, paras 160-161.

[438] Conversation between *Duzgit Integrity*, *Marida Melissa* and Coast Guard at 10:17a.m. (**AFE 11.7**).

STS transfers in São Tomé waters before.[439] In the Tribunal's view, the measures taken by São Tomé were necessary to ensure compliance with its laws and regulations adopted in conformity with the Convention. *Duzgit Integrity* did not have a written authorisation, and the radio communications with the master of the Coast Guard patrol boat during its first visit did not constitute such authorisation. Non-compliance with a requirement for prior authorisation under domestic law to undertake an STS operation has been found to be a serious violation.[440]

2. Whether the penalties imposed by São Tomé were disproportionate

(a) The IMAP fines

i. Applicant's position

237. Malta contends that the bases for IMAP fines[441] imposed on *Duzgit Integrity* and *Marida Melissa* on 16 March 2013 (EUR 28,875 each)[442] were unclear and unjustified for the following reasons:[443] (i) the legal basis of the fine relates specifically to entry into port, however the Master made clear that he did not have such intention;[444] (ii) the maximum fine of EUR 5,000 was not justifiable, as it is only applicable to "very serious offences: those that result from practices capable of jeopardising the operation of the systems for the protection of vessels and port installations";[445] (iii) the additional 50 percent increase of the fines (EUR 2,500) for each vessel (on the ground that the act was committed by a legal entity) was not justifiable, as the legal entity was not made party to the judicial proceedings;[446](iv) the charge of EUR 20,000 to each

[439] Notification of and reasons for the arrival of the Marida Melissa on 22 December 2012 (including English translation) (**RFE 8**); Email correspondence of 20, 21 and 22 December 2012 in relation to the authorisation formalities for the bunkering operation between the Marida Melissa and the D Whale (**RFE 9**); Authorisation requests filed on 3 and 9 December 2012 for the vessel Stena President (including English translation) (**RFE 10**); Authorisation request filed on filed on 31 January 2013 for the Stena Perros (including English translation) (**RFE 11**).

[440] *M/V Virginia G* (Panama v. Guinea-Bissau), Judgment of 14 April 2014, ITLOS Reports 2014, p.4 at para. 267 (**RLE 42)**: "In the view of the Tribunal, breach of the obligation to obtain written authorization for bunkering and to pay the prescribed fee is a serious violation".

[441] Malta submits that the owner and charterer paid the fines without prejudice to challenge them and the administrative measures later; Memorial, para. 252.

[442] Memorial, paras 249-250 referring to IMAP fine of EUR 28,875 against *Duzgit Integrity* and the *Marida Melissa*, 16 March 2013 (**AFE 12**); Extracts of *Decreto-Lei* 04/2010 (on Ports and Maritime Transport) (**ALE 14**).

[443] Memorial, para. 251.

[444] Memorial, para. 251 i; Reply, para. 134.

[445] Memorial, para. 251 ii.

[446] Memorial, para. 251 iii.

vessel as costs for intervention by the national authorities was questionable;[447] and (v) a further "other costs" of EUR 1,375 charged to each vessel was unexplained.[448]

ii. Respondent's position

238. São Tomé submits that it should be granted a high degree of deference in respect of its exercise of sovereignty in its archipelagic waters and territorial sea,[449] and therefore "international courts and tribunals should exercise restraint when carrying out judicial review".[450] São Tomé contends that the facts in this case do not meet the high threshold for such review.[451] São Tomé submits that because *Duzgit Integrity* did not obtain prior written authorisation, its penalties are justified and not erroneous.[452]

239. São Tomé contends that *Decreto-Lei* 04/2010, the basis of the IMAP fine, requires 24-hour notice of arrival before entering the ports of São Tomé and is interpreted to be applicable to anchorages in the archipelagic waters and territorial sea.[453] São Tomé submits that "[t]he amount of the fine was based on Articles 21 and 22 of Decreto-Lei 04/2010 and was increased with an amount as compensation for costs incurred as a result of the intervention of the Coast Guard".[454] São Tomé also contends that an explanation of the fine was provided to Malta.[455]

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[447] Memorial, para. 251 iv.

[448] Memorial, para. 251 v.

[449] Counter-Memorial, para. 328.

[450] Counter-Memorial, para. 328 referring to *M/V Virginia G* (Panama v. Guinea-Bissau), Judgment of 14 April 2014, Joint dissenting opinion of vice-president Hoffmann and judges Marotta Rangel, Chandrasekhara Rao Kateka, Gao and Bouguetaia, ITLOS Reports 2014, p. 214 at para. 54 (**RLE 14**).

[451] São Tomé cites to a dissenting opinion in the *Virginia G Case* stating that a court may only exercise judicial review when there is manifest error or arbitrariness in exercising the power or if the power is exercised on the basis of facts do not exist or are patently erroneous, *see* Counter-Memorial, para. 328 referring to *M/V Virginia G* (Panama v. Guinea-Bissau), Judgment of 14 April 2014, Joint dissenting opinion of vice-president Hoffmann and judges Marotta Rangel, Chandrasekhara Rao Kateka, Gao and Bouguetaia, ITLOS Reports 2014, p. 214 at para. 54 (**RLE 14**).

[452] Counter-Memorial, para. 329.

[453] Counter-Memorial, para. 330 referring to Statement of Stena Oil agent Mr. Wilson Morais (**AWS 4**).

[454] Counter-Memorial, para. 330 referring to Statement of Stena Oil agent Mr. Wilson Morais (**AWS 4**).

[455] Counter-Memorial, para. 330 referring to Statement of Stena Oil agent Mr. Wilson Morais (**AWS 4**).

(b) The customs fine

i. Applicant's position

240. Malta submits that the calculation of the EUR 1,08 million customs fine issued by the Customs Directorate General, based on the entirety of the cargo on board *Duzgit Integrity*, was neither explained nor justified.[456]

241. Malta points out that "[t]he Customs Code [of Procedure] stipulates a fine of six times the customs duty applicable to the transfer of the cargo when the cargo is not declared".[457] Malta further contends that even if the approximate 1,555 MT of MGO could be considered as intended for importation, the approximate 8,200 MT of HFO "were clearly already pre-allocated and not intended for São Tomé and Príncipe".[458] Malta also points out that no transfer of cargo actually took place.[459] Alternatively, Malta submits that the planned operation "was not a commercial transfer" as Stena Oil was simply moving oil between its chartered vessels "for no commercial value".[460]

ii. Respondent's position

242. São Tomé submits that according to Article 38 of the Customs Code of Procedure of São Tomé, "the penalty for failure to declare goods that are transhipped is a fine of six to twelve times the amount of duties that would otherwise have been due".[461] São Tomé contends that "the customs duties had to be calculated over the entire cargo on board".[462] According to São Tomé, "[i]f it were to be accepted that following an illegal transfer evidence can be submitted showing that only a small fraction of the cargo or goods was intended to be transferred, this would be an incentive not to declare goods".[463] São Tomé further argues that the fact that no goods had been

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[456] Memorial, paras 253-256 referring to Extracts of Colonial Customs Litigation Law, 1944 (**ALE 15**); Decision taken by São Tomé and Príncipe Ports and Maritime Institute, 27 March 2013 (**AFE 13**); Customs Directorate General fine of EUR 1,080,000 million, 2 April 2013 (**AFE 14)**; Reply, para. 136.

[457] Memorial, para. 253.

[458] Memorial, para. 256; Malta submits that it can provide certified copy of the Supply instructions issued by Stena Oil, 14 March 2013 (**AFE 9**) as evidence, *see* Reply, para. 139.

[459] Memorial, para. 256; Reply, para. 136.

[460] Reply, para. 137 referring to Supply instructions issued by Stena Oil, 14 March 2013 (**AFE 9**).

[461] Counter-Memorial, para. 331.

[462] Counter-Memorial, para. 331.

[463] Counter-Memorial, p. 85, n.165.

transferred by *Duzgit Integrity* "does not mean there had not been a violation of the Customs Code [of Procedure]".[464]

(c) The detention of the Master and the outcome of the criminal proceedings

i. Applicant's position

243. Malta contends that the Master of *Duzgit Integrity* was "effectively detained between 15 and 19 March" because his passport was confiscated and he was ordered to remain in a hotel.[465] During this period, the Master was not notified of any charges or procedures against him.[466]

244. Malta submits that the first "official" contact with the Master took place on 19 March 2013, when an official detention order was issued,[467] and a judicial officer visited and asked the Master to sign a declaration stating, *inter alia*, that his residence was the hotel, that he committed to appear before the court, and that he would not change or leave the residence for more than five days without prior authorisation.[468] The Master was then taken before the Public Prosecutor and released against a bail of approximately EUR 5,000 on 20 March 2013.[469] He was notified (without translation) to appear in court on 22 March 2013.[470]

245. With regard to the criminal proceedings against the Master, Malta submits that they were based on manifestly incorrect evidence and lacked due process.[471]According to Malta, the official report by the Coast Guard used as key evidence in the criminal proceedings[472] was "manifestly defective"[473] because it did not mention the first visit of the Coast Guard; created the "wrong

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[464] Counter-Memorial, p. 85, n.165.

[465] Memorial, para. 294; Reply, paras 189, 196-199 referring to the Foreword and Preamble of the Guidelines on the conditions of arrest, police custody and pre-trial detention in Africa of the African Commission on Human and People's Rights.

[466] Reply, paras 195, 198.

[467] Memorial, para. 295; Reply, para. 195 referring to Order of detention of Master Cengiz Gulzen, 19 March 2013 (**AFE 16**); Accusation of the Masters issued by the Prosecutor as amended on 22 March 2013 (**AFE 36**).

[468] Memorial, para. 295; Reply, para. 19 referring to; Statement of Identity and Residence of the Master, 19 March 2013 (**AFE 27**).

[469] Memorial, para. 297.

[470] Memorial, para. 297.

[471] Memorial, para. 260.

[472] Memorial, para. 243 ix.

[473] Memorial, para. 243 ix.

impression that the vessels were 'caught in the act' of smuggling";[474] and relied on photographs of the second visit only.[475] Malta further submits that even though the English and sworn translation in Portuguese of the transcript of the first visit was submitted, it was disregarded by the court.[476]

246. The Masters were sentenced to three years of imprisonment for smuggling,[477] and along with the owners of the vessels and the charterers, were ordered to pay an indemnification of approximately EUR 5 million to São Tomé.[478] The Court indicated that the three-year prison sentence would be reduced to two years' probation provided that the Masters jointly pay the above-mentioned indemnification within 30 days (an impossible condition to fulfil).[479] The Singular Court further declared the vessels and cargo "lost in favour of São Tomé".[480]

247. Malta submits that "the outcome of the criminal trial was a punishment of a most serious and disproportionate nature"[481] and that the court proceedings were "inherently unfounded".[482] Malta submits that the imprisonment sentence imposed on the Master, the EUR 5 million fine against the Master (for which the owner and the charterer were held jointly liable), and the confiscation of *Duzgit Integrity* and the cargo on board it were manifestly disproportionate.[483]

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[474] Memorial, para. 243 viii; Reply, paras 131-133 referring to Official Statement of facts issued by São Tomé and Príncipe's Coast Guard, 18 March 2013 (**AFE 15**); *Relatório* of the Customs Directorate, 27 March 2013 (**AFE 33**).

[475] Memorial, para. 243 xi referring to Official Statement of facts issued by São Tomé and Príncipe's Coast Guard, 18 March 2013 (**AFE 15**); Photos presented by the Public Prosecutor taken at the second visit of the Coast Guard showing both vessels alongside each other (**APE 2**).

[476] Memorial, para. 243 x referring to Sworn translation into Portuguese of the conversation between *Duzgit Integrity* and the Coast Guard during its first visit at 7:04 a.m. as submitted to the São Tomé and Príncipe courts (**AFE 11.8**); Sworn translation into Portuguese of the conversation between *Duzgit Integrity* and the Coast Guard during its second visit at 9:16 a.m. as submitted to the São Tomé and Príncipe courts (**AFE 11.9**).

[477] Counter-Memorial, para. 82, referring to Article 274 of the Criminal Code; Judgement of the Court of First Instance, 29 March 2013 (**AFE 17**).

[478] Memorial, para. 105; Counter-Memorial, para. 83, referring to Article 126 of the Criminal Code and Articles 483, 497, 562 of the Civil Code *in* Overview of relevant provisions of São Tomé law (**RLE 2**).

[479] Memorial, paras 105, 320 b; Counter-Memorial, para. 83.

[480] Counter-Memorial, para. 83, referring to Article 104(1) of the Criminal Code.

[481] Memorial, para. 318.

[482] Memorial, para. 319.

[483] Memorial, para. 320.

ii. Respondent's Position

248. São Tomé denies that the Master was effectively detained between 15 and 19 March 2013.[484] São Tomé explains that in light of its "serious and legitimate" suspicion that the Master was intent on smuggling, "it was necessary and appropriate to ensure that, pending the investigation, the Master would not be able to leave the country".[485]

249. São Tomé explains that the outcome of the proceedings was in conformity with São Toméan law. The sentence against the Masters was based on Article 274 of its Criminal Code.[486] The indemnification that the Master, DS Tankers and Stena Oil jointly were ordered to pay (amounting to EUR 4,988,592) was ordered pursuant to Article 126 of the Criminal Code read in conjunction with Articles 483, 497 and 562 of the Civil Code. *Duzgit Integrity* was forfeited to São Tomé "as the object that served or intended to serve the commission of a crime" on the basis of Article 104(1) of the Criminal Code.[487]

250. As to Malta's criticism of the penalties themselves, São Tomé contends that the penalties were fully in conformity with São Tomé law.[488] São Tomé points out that Malta's Customs Ordinance "provides that if any goods liable to the payment of duties are unshipped from any ship in Malta and the duty is not being first paid or secured, such goods shall be forfeited", and that a fine "equivalent to three times the amount of duty payable on the goods or five times the amount of the endangered duty" as well as imprisonment is possible.[489]

251. São Tomé submits that "[w]hile the penalties were indeed serious, São Tomé denies they were disproportionate, particularly in view of the seriousness of the crime and also when compared to the penalties that can be imposed for similar offences in, for example, Malta under the Maltese Customs Ordinance", [490] which also provides for a joint liability of the Master and the vessel.[491]

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[484] Counter-Memorial, paras 360-361; Rejoinder, paras 156-158.

[485] Counter-Memorial, para. 362.

[486] Counter-Memorial, para. 319.

[487] Counter-Memorial, para. 319.

[488] Counter-Memorial, para. 377.

[489] Counter-Memorial, paras 320-321 referring to Malta Customs Ordinance, Articles 60, 62(i) (**RLE 37**). São Tomé contends that "Maltese customs regulations also punish attempted smuggling", for which forfeiture of the goods, a fine and detainment of the offender might be applicable, *see* Counter-Memorial, para. 323 referring to Malta's Subsidiary Legislation 37.05, Customs Regulations, Article 26 (**RLE 38**).

[490] Counter-Memorial, para. 377 referring to Malta Customs Ordinance (**RLE 37**).

[491] Counter-Memorial, para. 322 referring to Malta Customs Ordinance, Article 64 (**RLE 37**).

252. With regard to Malta's allegation that São Tomé's actions caused a grossly disproportionate outcome, São Tomé contends that the sentence imposed on the Master was not outrageous, since he received a suspended sentence of three-year's imprisonment, two years of which were on conditional probation, and he was pardoned by the president after three months in prison.[492]

253. São Tomé adds that it established a committee after the Supreme Court judgment became *res judicata* to find a solution for all parties involved[493] and that it "obtained court approval to privately sell the cargo to a third party".[494]

(d) Decision of the Tribunal

254. As the Tribunal has noted in paragraph 209, under international law, enforcement measures taken by a coastal State in response to activity within its archipelagic waters are subject to the requirement of reasonableness, which encompasses the general principles of necessity and proportionality.[495]

255. The Tribunal finds that São Tomé had the right to ensure respect for its sovereignty by initially detaining the vessel, requesting the Master to come onshore to explain the circumstances, and to require the payment of charges and fines. The Tribunal does not consider the IMAP fine as unreasonable or disproportionate; it was the normal legal penalty for the type of infringement committed by *Duzgit Integrity*. The authorities provided reasoning for the components of the fine to the agent of the vessels (the fine was increased due to operational and administrative expenses).[496] The Tribunal finds that this measure fell well within the exercise by São Tomé of its law enforcement jurisdiction and must be given deference. The Tribunal notes that the fine was paid by the charterer on a without prejudice basis.[497]

256. The Tribunal does find, however, that the other penalties imposed by São Tomé, when taken together, were unreasonable and disproportionate when considering the original wrong committed by the vessel—an attempt to make an unauthorised STS transfer between two vessels of the same charterer. Moreover, while the Master of the *Duzgit Integrity* did not have

[492] Counter-Memorial, para. 388 (iii).

[493] Counter-Memorial, para. 388 (v).

[494] Counter-Memorial, para. 388 (vii).

[495] *Arctic Sunrise Arbitration* (Netherlands v. Russia), Award on the Merits of 14 August 2015, PCA, para. 222 (**RLE 47**).

[496] Letter from the Maritime and Port Institute of São Tomé to Agência Equador, 18 March 2013 (**RFE 12**).

[497] Statement of Stena Oil agent Mr. Wilson Morais (**AWS 4**), p.5; Memorial, para. 252.

authorisation, he had indicated repeatedly his willingness to move to outside the São Tomé territorial sea.

257. Customs fines apply to goods that are intended for import. Here there was no question of importation or even of an economic transaction. The transshipment operation *Duzgit Integrity* was intending to perform was a transfer between two vessels chartered by the same company (Stena Oil) of cargo belonging to that company. The reason for the operation was to facilitate the trip of *Duzgit Integrity* to Las Palmas to dry dock in order to maintain the best condition for navigation. [498] In the circumstances, the heavy Custom Directorates fine of more than EUR 1,000,000 imposed by São Tomé appears to be misplaced and disproportionate.

258. Further, there is no evidence to suggest that *Duzgit Integrity* was a repeat offender. Also, prior to the Master's conviction in São Tomé, he had never been found guilty of any criminal wrongdoing.[499] In spite of this, the Master was convicted of serious offences that had never taken place, and sentenced to three years in prison. In addition, he was held personally liable jointly and severally with the other Master, the owners, and the charterer to indemnify São Tomé in the amount of EUR 5 million.[500] The Master was pardoned and released six months after conviction (having spent approximately three months released on bail and three months in prison).[501] The EUR 5 million liability imposed on the Master was additional to the Custom Directorates fine of more than EUR 1 million and the IMAP fine of EUR 28,875, and was not included in the pardon.[502]

259. The Tribunal further recalls that for eight months, until its release under the terms of the Settlement Agreement, the vessel was under the full control of São Tomé while all expenses and responsibility were borne by the Maltese owner.[503]

260. In the Tribunal's view, when considered together, the prolonged detention of the Master and the vessel, the monetary sanctions, and the confiscation of the entire cargo, cannot be regarded as proportional to the original offence or the interest of ensuring respect for São Tomé's

[498] Memorial, para. 36.

[499] Statement of the Master of *Duzgit Integrity* Mr. Cengiz Gulsen (**AWS 1**).

[500] Memorial, para. 104; Statement of the Master of *Duzgit Integrity* Mr. Cengiz Gulsen (**AWS 1**); Judgement of the Supreme Court, 20 June 2013 (**AFE 18**).

[501] Memorial, paras 84, 144, 148.

[502] Memorial, para. 146; Counter-Memorial, para. 113.

[503] Memorial, para. 147.

sovereignty (including São Tomé's interest in demonstrating that such conduct will not be tolerated in future cases).

261. The disproportionality is such that it renders the cumulative effect of these sanctions incompatible with the responsibilities of a State exercising sovereignty on the basis of Article 49 of the Convention.

262. As already noted, the Applicant has invoked Article 300 of the Convention. The Tribunal is not aware of any prior instance in which another tribunal or court has found a breach of Article 300 of the Convention. There is, therefore, little guidance as to the legal test to be satisfied to establish such a breach. In the present case, the Tribunal sees no need to determine a violation of Article 300 given that it has already determined that Article 49(3) has been violated.

3. Whether other conduct by São Tomé was unlawful

(a) Whether the settlement negotiations with regard to the release of *Duzgit Integrity* exhibited coercion on the part of São Tomé

i. Applicant's position

263. Malta submits that the owner of *Duzgit Integrity* was coerced into an extortionate and discriminatory settlement.[504] Malta notes that the ownership of *Duzgit Integrity* never changed and São Tomé never re-registered the vessel under its flag,[505] which consequently meant that the owner of *Duzgit Integrity* remained "fully responsible" for the costs and fees related to *Duzgit Integrity* for the eight months it was detained in São Tomé.[506] Malta also notes that the charter party agreement between the owner and the charterer could not be performed, meaning that the owner lost eight months of hire while the charterer lost the use of the vessel for eight months (as well as access to the cargo on board).[507]

ii. Respondent's position

264. São Tomé submits that the settlement was freely agreed and not concluded under duress.[508] In this context, São Tomé points out that the resumption of negotiations was initiated by

[504] Memorial, para. 274.

[505] Memorial, para. 261.

[506] Memorial, para. 261.

[507] Memorial, para. 262.

[508] Counter-Memorial, paras 340-341.

Mr. Düzgit, who was under no obligation to take such action and could have terminated the discussion at any time.[509]

iii. Decision of the Tribunal

265. The Tribunal concludes that Malta has failed to establish that there was coercion in the negotiation process. The Tribunal notes that the circumstances were complex and while there was pressure on the owner as a result of the prolonged detention, that did not rise to the level of coercion.

(b) São Tomé's conduct in respect of Malta as the flag State-whether the alleged lack of notification constituted a breach

i. Applicant's position

266. Malta also submits that São Tomé violated its obligations to Malta under Article 94 of the Convention by failing to notify it of the allegations of smuggling and of measures taken against the Maltese vessel, preventing Malta from taking early remedial measures.[510]

ii. Respondent's position

267. São Tomé denies that it breached any obligations owed to Malta under Article 94. São Tomé notes that when *Duzgit Integrity* was arrested, it immediately informed the embassy of Portugal, the only European embassy in São Tomé that represents the interests of all EU members, to relay a message to the Maltese officials.[511] São Tomé submits that "[t]here is no general right under the Convention for a flag State to be notified".[512]

iii. Decision of the Tribunal

268. The Tribunal determines that São Tomé notified Portugal of the arrest of the vessel and that given that Malta is also a member of the EU, São Tomé's notice to Portugal was sufficient. Further, there is no relevant explicit provision in the Convention requiring that the flag State be notified.

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[509] Counter-Memorial, paras 339, 341.

[510] Memorial, paras 275-276; Reply, para. 124 i.

[511] Hearing Transcript (23 Feb. 2016), 136:12-20.

[512] Counter-Memorial, para. 324.

(c) Alleged differing treatment of other vessels

i. Applicant's position

269. Malta contends that it is a principle of national and international law that any unequal treatment must have an objective and reasonable justification assessed in relation to the aim and effects of the measure taken.[513] Malta submits that São Tomé violated this principle and treated *Duzgit Integrity* in a discriminatory and arbitrary manner.[514]

270. Malta submits that *Lefkoniko* is a relevant example to show that São Tomé applied its laws inconsistently,[515] because while only *Lefkoniko* entered into São Tomé port area, all three vessels were imposed a fine of EUR 28,875 based on Articles 12 and 13 of *Decreto-Lei* 4/2010.[516]

271. Malta also submits that *Duzgit Integrity* was treated differently than *Anuket Emerald* and *Energizer* (vessels operated by Monjasa to take delivery of the cargo it purchased from the private sale).[517] Malta submits that in the document production phase of these proceedings, São Tomé failed to show that *Anuket Emerald* and *Energizer* applied for the necessary authorisation for entry into port and paid for the duties for a commercial STS transfer.[518] According to Malta, the document produced by São Tomé in the document production phase and later submitted by Malta as AFE 28 "appears to be a general authorisation to Monjasa to conduct STS [operations] in the waters of São Tomé and Príncipe".[519] It also seems to predate both the court authorisation to sell the cargo of 8 October 2013[520] and the Sale and Purchase Agreement between Monjasa and São Tomé of 9 October 2013.[521]

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[513] Memorial, para. 338 referring to *Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (European Commission of Human Rights v. Belgium), Applications No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, Merits, Judgment of 23 July 1968, European Court of Human Rights, Plenary, para.10 (**ALE 24**).

[514] Memorial, paras 338-339.

[515] Reply, paras 151, 163.

[516] Reply, paras 154-155.

[517] Reply, paras 159-160.

[518] Reply, para. 161.

[519] Reply, para. 19.

[520] Court order of 8 October 2013 authorising the sale of the cargo on board *Duzgit Integrity* under article 851 of the Civil Procedure Code (**AFE 30**).

[521] Sale and Purchase agreement signed by São Tomé and Príncipe's Government and Monjasa DMCC on 9 October 2013 and receipt of payment (**AFE 29**).

272. Malta also submits that *Duzgit Integrity* was treated differently than *Marida Melissa* especially after the discharge of cargo from it.[522] Malta points out that *Marida Melissa* was released upon payment of just the IMAP fine of EUR 28,875. *Duzgit Integrity* on the other hand, was only released on 25 November 2013—one month after *Marida Melissa* was released—after the owner was coerced into signing an agreement, which called for payment of the initial fine of EUR 28,875 in addition to a payment of USD 625,000.[523] Malta alleges that the discriminatory treatment was openly declared in São Tomé's parliament to be due to *Duzgit Integrity*'s lack of cooperation during the discharge operation.[524]

ii. Respondent's position

273. São Tomé submits that it did not act arbitrarily because *Duzgit Integrity*'s conduct violated São Toméan law.[525] Drawing on ICJ jurisprudence, São Tomé submits that arbitrariness is "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety".[526]

274. São Tomé submits that *Lefkoniko* is not comparable, because its only violation was entering São Tomé's territorial sea without permission, and it never attempted an unauthorised STS operation.[527]

275. As regards Malta's comment on the authorisation of 2 October 2013 (AFE 28), São Tomé clarifies that this authorisation was issued following the court authorisation dated 8 August 2013.[528] As such, this authorisation does not predate the court order.[529]

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[522] Memorial, para. 343.

[523] Memorial, para. 343 referring to Letter from the Minister of Foreign Affairs of São Tomé and Príncipe to Malta, 12 December 2013 (**AFE 2.10**); Settlement Agreement signed between the Government of São Tomé and Príncipe and DS Tankers, 23 November 2013 (attached to **AFE 26; AFE 41**).

[524] Memorial, para. 343 referring to Letter from the Minister of Foreign Affairs of São Tomé and Príncipe to Malta, 12 December 2013 (**AFE 2.10**); Settlement Agreement signed between the Government of São Tomé and Príncipe and DS Tankers, 23 November 2013 (attached to **AFE 26; AFE 41**).

[525] Counter-Memorial, para. 391.

[526] Counter-Memorial, para. 390 referring to *Elettronica Sicula S.P.A. (ELSI)* (USA v. Italy), Judgment of 20 July 1989, ICJ Reports 1989, p. 15 at para. 128 (**RLE 43**).

[527] Counter-Memorial, para. 392.

[528] Rejoinder, para. 187 referring to Counter-Memorial, para. 114, [115].

[529] Rejoinder, para. 187.

276. São Tomé submits that the release of *Marida Melissa* is also not directly comparable because settlement negotiations with it progressed more smoothly than with *Duzgit Integrity*.[530]

iii. Decision of the Tribunal

277. The Tribunal does not consider the case of the *Lefkoniko* to be relevant given that she never attempted to make an unauthorised STS transfer within the archipelagic waters of São Tomé. The different circumstances in the settlement process in the case of the *Marida Melissa* may explain the later difference in treatment between the two vessels. Further, Malta has not established that *Anuket Emerald* and *Energizer* lacked authorisation for entry into port; rather it asks the Tribunal to infer this conclusion on the basis that São Tomé did not furnish documents demonstrating otherwise during the document production phase of this case. The Tribunal notes that AFE 28 provides sufficient evidence that "[t]he coast guard…authorize[d] Monjasa DMCC and any vessel chartered by Monjasa group to conduct [an] STS oil transfer within the territorial waters and the exclusive economic zone (EEZ)"[531] of São Tomé. Accordingly, the Tribunal is not satisfied that it should draw such an inference, and even if it did, it would not necessarily equate to a finding that São Tomé was not still acting within the discretion it enjoys as part of its law enforcement jurisdiction.

C. ALLEGED VIOLATION OF ARTICLES 192, 194 AND 225 OF THE CONVENTION IN CONNECTION WITH A VIOLATION OF ARTICLE 300

278. Articles 192, 194 and 225 of the Convention provide:

> **ARTICLE 192**
> *General obligation*
> States have the obligation to protect and preserve the marine environment.
>
> **ARTICLE 194**
> *Measures to prevent, reduce and control pollution of the marine environment*
> 1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.
>
> [. . .]

[530] Counter-Memorial, para. 394-397.

[531] General Authorisation granted by the Coast Guard of São Tomé and Príncipe on 2 October 2013 for Monjasa DMCC and any vessel chartered by Monjasa group to conduct STS oil transfer in the waters of São Tomé and Príncipe (**AFE 28**).

> 4. In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.
>
> **ARTICLE 225**
> *Duty to avoid adverse consequences in the exercise of the powers of enforcement*
>
> In the exercise under this Convention of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk.[532]

i. Applicant's position

279. Malta submits that São Tomé violated Articles 192, 194 and 225 of the Convention (as well as the provisions of Article 300 and other rules of international law) by performing the STS transfer from *Duzgit Integrity* to *Energizer*.[533]

280. Malta also claims that São Tomé breached its obligations under MARPOL, SOLAS, and STCW. Under MARPOL, State Parties should endeavour to "prevent the pollution of the marine environment by the discharge of harmful substances or effluents".[534] Malta states that under SOLAS, States Parties are "to prevent events that may put at risk the safety of life at Sea" and ensure "a ship is fit for the service for which it is intended".[535] Under STCW, States Parties are "to ensure (or otherwise not inhibit) continuous watchkeeping and manning appropriate to the prevailing conditions on ships, at all times, but especially when cargo operations are taking place".[536] Malta notes that São Tomé is party to all of these treaties.[537]

281. Malta contends that with only temporary classification, the vessel was not permitted to perform STS operations.[538] Malta submits that with "its reduced state of maintenance",[539] the Master being absent,[540] the Chief Officer being locked-up,[541] and crew under psychological duress and

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[532] Malta also invokes Article 235 (Responsibility and liability) of the Convention, *see* Reply, para 244.

[533] Reply, paras 240-241, 244.

[534] Memorial, para. 355 referring to MARPOL, Article 1(1) (**ALE 25**).

[535] Memorial, para. 356 referring to SOLAS, Article I(a)(b) (**ALE 26**).

[536] Memorial, para. 357 referring to STCW, Article 1 (1)(2), Regulation VIII/2 (**ALE 27**).

[537] Memorial, paras 355-357.

[538] Hearing Transcript (23 Feb. 2016), 83:18-23.

[539] Hearing Transcript (24 Feb. 2016), 22:7-25. Malta's Reply to Post-Hearing Submissions, paras 57-80, 84-99.

[540] Memorial, paras 359-360 referring to São Tomé and Príncipe's Coast Guard's prohibition against Master re-boarding *Duzgit Integrity*, 7 October 2013 (**AFE 22**); Reply, para. 247.

[541] Memorial, paras 359, 365; Reply, para. 247.

threat of imprisonment,[542] *Duzgit Integrity* was neither permitted nor in a fit condition to carry out an STS operation.[543] Malta adds that the STS operation was carried out "without a proper STS transfer plan"[544] or supervised by qualified individuals.[545] Malta alleges that the crew could not contact Maltese diplomatic representation because communication devices were confiscated.[546]

282. Malta submits that the absence of the Master was also "in breach of the STCW Convention requirements on watchkeeping" and the "minimum safe manning requirements under Maltese law".[547]

283. According to Malta, São Tomé's authorities undertook no preparations or precautions when performing the STS transhipment, in violation of the requirements of MARPOL and SOLAS.[548] Malta argues that São Tomé has offered no justification for its lack of preparation and was only able to produce a five-line statement on the qualifications of the persons carrying out the discharge.[549]

284. Malta submits that for a breach of Article 225, it is not necessary for an environmental disaster or loss of life to occur, but that "an unreasonable or excessive risk of danger" is sufficient.[550]

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[542] Memorial, paras 362-363.

[543] Memorial, paras 348, 359, 365 referring to Statement of the Chief Officer of *Duzgit Integrity* Mr. Sedat Ihtiyaroglu (**AWS 2**); Statement of the Second Officer of *Duzgit Integrity* Mr. Umut Kirmizigedik (**AWS 3**).

[544] Memorial, para. 363; Reply, para. 248.

[545] Reply, para. 247. Hearing Transcript (24 Feb. 2016), 20:16-21:11. Malta's Reply to Post-Hearing Submissions, paras 29-56.

[546] Memorial, para. 364; Reply, para. 247.

[547] Memorial, para. 361.

[548] Reply, para. 249 referring to Regulation 41 of Annex 2, Chapter 8 on "prevention of pollution during transfer of oil cargo between oil tankers at sea" of MARPOL, and Regulation 34-1 on "Master's discretion" of Chapter V of SOLAS. Malta also compared the discharge operation with a previous 39 page STS plan of *Duzgit Integrity*, *see*Reply, paras 250-254 referring to STS operation plan of the vessel *Duzgit Integrity* (**AFE 39**); Statement of the Chief Officer of *Duzgit Integrity* Mr. Sedat Ihtiyaroglu (**AWS 2**); Statement of the Second Officer of *Duzgit Integrity* Mr. Umut Kirmizigedik (**AWS 3**).

[549] Reply, paras 255-256 referring to Declaration issued by the Coast Guard explaining how the fuel on board the vessel *Duzgit Integrity* was transferred to the vessel *M. T. Energizer* (**AFE 40**).

[550] Memorial, para. 366.

285. Based on the above, Malta concludes that São Tomé "systematically and wilfully violated Article 225 and Article 300 of the Convention and . . . the most basic of international law principles aimed at protecting life at sea and the marine environment".[551]

ii. Respondent's position

286. In respect of Article 225 of the Convention, São Tomé contends that the key question is whether the measures taken were reasonable in the circumstances.[552] São Tomé argues that a margin of appreciation is implicit,[553] and it is "not for the tribunal to step into the shoes of the São Tomé authorities and decide the issue *de novo*".[554] São Tomé submits that the standard of unreasonableness is a high one.[555] São Tomé also indicates that it is the São Toméan laws that apply when *Duzgit Integrity* was in its waters and under its control, not Maltese law.[556]

287. According to São Tomé's interpretation, Articles 192, 194 and 225 of the Convention, create a duty for State Parties to protect and preserve the marine environment using the best practicable means at its disposal in accordance with their capabilities.[557] São Tomé points out that it was in its own interest to prevent harm to the environment and that no actual pollution occurred during the STS operation.[558] São Tomé also points out that no damage was done to the environment and Malta does not claim for such damage either.[559]

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[551] Memorial, paras 367-368; Reply, para. 246. "According to the Report of the International Law Commission on the work of its fifty-third session regarding ARSIWA, 'to be regarded as systematic, a violation would have to be carried out in an organized and deliberate way'", *see* Memorial, p. 97, n. 36.

[552] Counter-Memorial, para. 407.

[553] Counter-Memorial, para. 408 referring to *Camouco* (Panama v. France), Prompt Release, Judgment of 7 February 2000, Dissenting Opinion of Judge Wolfrum, ITLOS Reports 2000, p. 66 at paras 11-14 (**RLE 44**).

[554] Counter-Memorial, para. 408.

[555] Counter-Memorial, paras 409-411 referring to *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6, [1984] 3 All ER 935, [1984] 3 WLR 1174, p. 410 (**RLE 45**). São Tomé also cites to another similar formulation in the dissenting opinion in the *M/V Virginia Case*, which requires the decision to be "manifestly arbitrary", based on facts do not exist, and "patently erroneous", *see M/V Virginia G* (Panama v. Guinea-Bissau), Judgment of 14 April 2014, Joint dissenting opinion of vice-president Hoffmann and judges Marotta Rangel, Chandrasekhara Rao Kateka, Gao and Bouguetaia, ITLOS Reports 2014, p.214 at para. 54 (**RLE 14**).

[556] São Tomé's Post-Hearing Submissions, para. 14.

[557] Rejoinder, paras 182-183 referring to Articles 192 and 194 of the Convention; M. Nordquist et al (Eds.), The United Nations Convention on the Law of the Sea 1982 – A Commentary, Vol. IV (1991), pp. 11-12 (**RLE 49**).

[558] Rejoinder, para. 204. São Tomé's Post-Hearing Submissions, para. 23.

[559] Hearing Transcript (23 Feb. 2016), 146:11-13.

288. São Tomé disputes the allegation that the vessel was left unseaworthy during its detention in São Tomé.[560] São Tomé argues that the vessel was being maintained while in São Tomé, and that no evidence has been presented to show it was not seaworthy.[561] São Tomé submits that at all times "[the] crew continued to stay on board the vessel and carried out routine maintenance operations".[562]

289. With respect to the STS operation itself, São Tomé submits that "there was not at any time any risk of endangering the environment"[563] or risk to the safety of life at sea,[564] and the operation was in fact carried out to ensure the safety of the marine environment.[565] São Tomé argues that "[e]ven if it were to be considered that the marine environment was exposed to some risk, this risk was not unreasonable given the circumstances".[566] São Tomé indicates that it had demanded explicit guarantees from Monjasa that it had the experience, qualifications and necessary resources to transport the cargo.[567] São Tomé, reports that the operation was carried out smoothly[568] under appropriate weather conditions[569] by a vessel that "would have had a[n] STS Operations Plan" with qualified personnel.[570] São Tomé also submits that the crew of *Duzgit Integrity* must have had necessary expertise as this is a requirement of STCW.[571] São Tomé further submits that the operation was "supervised by Coast Guard officers and local personnel trained in unloading fuel from Sonangol vessels that regularly supply São Tomé".[572]

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[560] Rejoinder, paras 185-186 referring to Statement by Second Lieutenant of the Coast Guard Mr. Valter Baieca Alfonso Fernandes (**RWS 3**); Statement of the Chief Officer of *Duzgit Integrity* Mr. Sedat Ihtiyaroglu (**AWS 2**).

[561] Rejoinder, para. 185.

[562] São Tomé's Post-Hearing Submissions, para. 21.

[563] Counter-Memorial, para. 412; Rejoinder, paras 188-189.

[564] Rejoinder, para. 189.

[565] Counter-Memorial, para. 412.

[566] São Tomé's Post-Hearing Submissions, para. 10.

[567] Rejoinder, para. 187 referring to Sale and Purchase agreement signed by São Tomé and Príncipe's Government and Monjasa DMCC on 9 October 2013 and receipt of payment (**AFE 29**).

[568] Rejoinder, para. 192 referring to Statement by Second Lieutenant of the Coast Guard Mr. Valter Baieca Alfonso Fernandes (**RWS 3**).

[569] Rejoinder, para. 190.

[570] Rejoinder, para. 191 referring to MARPOL, Annex I, Chapter 8, Regulations 41 (1)-(4); São Tomé's Post-Hearing Submissions, para. 30. São Tomé indicates that *Duzgit Integrity* has such a plan on board as well, *see* Rejoinder, para. 192 referring to STS operation plan of the vessel *Duzgit Integrity* (**AFE 39**).

[571] Rejoinder, paras 193-194 referring to STCW, Annex, Regulation V/1-1, paras 1, 3 (**ALE 27**).

[572] Counter-Memorial, para. 413.

290. São Tomé further denies that it acted in bad faith and "actively and knowingly endangered maritime safety and the marine environment", as argued by Malta.[573] São Tomé points out that the STS operation was carried out under a court order dated 8 August 2013, which contrary to Malta's allegation, was not predated by the 2 October 2013 authorisation for Monjasa to conduct the operation.[574]

291. São Tomé submits that the Coast Guard officers' actions were "legitimate and proportionate"[575] and their presence was natural to enforce a court order.[576] São Tomé reiterates that no force was used and only the Chief Officer was detained temporarily (since the Coast Guard officers considered it necessary as there was a threat that he would sabotage the operation, thereby posing enormous risks to the marine environment.[577] São Tomé submits that Malta failed to substantiate its allegation that the crew were operating "under a threat of imprisonment".[578] São Tomé denies that the Coast Guard officers exerted pressure on the crew by letting them suffer supply shortages, and points out that the Coast Guard actually attended to *Duzgit Integrity* regularly[579]and supplied it on 14 October 2013.[580]

iii. Decision of the Tribunal

292. The Tribunal notes that in support of its claim, Malta has submitted two witness statements[581] and several exhibits (consisting of documents and photographs):[582]

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[573] Rejoinder, para. 203.

[574] Rejoinder, para. 187 referring to Court's authorisation of 8 August 2013 (**RFE 18**); Court order of 8 October 2013 authorising the sale of the cargo on board *Duzgit Integrity* under article 851 of the Civil Procedure Code (**AFE 30**); General Authorisation granted by the Coast Guard of São Tomé and Príncipe on 2 October 2013 for Monjasa DMCC and any vessel chartered by Monjasa group to conduct STS oil transfer in the waters of São Tomé and Príncipe (**AFE 28**).

[575] Counter-Memorial, para. 415; Rejoinder, para. 195 referring to Statement by Second Lieutenant of the Coast Guard Mr. Valter Baieca Alfonso Fernandes (**RWS 3**).

[576] Rejoinder, para. 195 referring to Statement by Second Lieutenant of the Coast Guard Mr. Valter Baieca Alfonso Fernandes (**RWS 3**).

[577] Counter-Memorial, para. 414. São Tomé's Post-Hearing Submissions, para. 17. Rejoinder, para. 195 referring to Statement by Second Lieutenant of the Coast Guard Mr. Valter Baieca Alfonso Fernandes (**RWS 3**).

[578] Counter-Memorial, para. 414.

[579] Hearing Transcript (23 Feb. 2016), 131:16-132:8.

[580] São Tomé's Post-Hearing Submissions, para. 18.

[581] Statement of the Chief Officer of *Duzgit Integrity* Mr. Sedat Ihtiyaroglu (**AWS 2**); Statement of the Second Officer of *Duzgit Integrity* Mr. Umut Kirmizigedik (**AWS 3**); Statement by Second Lieutenant of the Coast Guard Mr. Valter Baieca Alfonso Fernandes (**RWS 3**).

[582] São Tomé and Príncipe's Coast Guard's prohibition against Master re-boarding *Duzgit Integrity*, 7 October 2013 (**AFE 22**); Bureau Veritas Classification certificate of *Duzgit Integrity*, 28 June 2013 and accompanying correspondence from ship owners to São Tomé and Príncipe's authorities (**AFE 25**); Sale and Purchase

a. the witness statements of the Chief Officer and Second Officer of the *Duzgit Integrity*[583] by which they provide their accounts of the events of 11 October 2013 and seek to establish that the STS operation was not conducted in compliance with the required international standards contained in 'The STS operation plan of the *Duzgit Integrity*';[584]

b. a series of photographs allegedly showing the poor conditions of the vessel after eight months of idleness;[585]

c. the 'Bureau Veritas Classification certificate' and correspondence from ship owners to São Tomé demonstrating that the certification of the *Duzgit Integrity* had expired at the time of the STS operation, of which, São Tomé was aware;[586]

d. a request to the Supreme Court for permission to accelerate the sale of the cargo on board the *Duzgit Integrity* allegedly demonstrating that São Tomé knew that the ship was not in perfect operating condition and potentially posed a risk to the marine environment;[587]

e. photographs of armed soldiers on board the *Duzgit Integrity* allegedly showing the duress and stress to which the crew was subjected by São Tomé.[588] The Tribunal notes that such evidence is contradicted by the statement of the Second Lieutenant of the Coast Guard;[589]

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agreement signed by São Tomé and Príncipe Government and Monjasa DMCC on 9 October 2013 and receipt of payment (**AFE 29**); STS operation plan of the vessel *Duzgit Integrity* (**AFE 39**); Declaration issued by the Coast Guard explaining how the fuel on board the vessel *Duzgit Integrity* was transferred to the vessel *M. T. Energizer* (**AFE 40**); Total of 16 photographs accompanying Malta's reply to the Question No.3 set by the Tribunal on 23 February 2013 (**AFE 46**); Copy of the request of 5 August 2013 for authorisation to sell the cargo (**RFE 17**).

[583] Statement of the Chief Officer of *Duzgit Integrity* Mr. Sedat Ihtiyaroglu (**AWS 2**); Statement of the Second Officer of *Duzgit Integrity* Mr. Umut Kirmizigedik (**AWS 3**).

[584] STS operation plan of the vessel *Duzgit Integrity* (**AFE 39**).

[585] Total of 16 photographs accompanying Malta's reply to the Question No.3 set by the Tribunal on 23 February 2013 (**AFE 46**).

[586] Bureau Veritas Classification certificate of *Duzgit Integrity*, 28 June 2013 and accompanying correspondence from ship owners to São Tomé and Príncipe's authorities (**AFE 25**).

[587] Copy of the request of 5 August 2013 for authorisation to sell the cargo (**RFE 17**).

[588] Total of 16 photographs accompanying Malta's reply to the Question No.3 set by the Tribunal on 23 February 2013 (**AFE 46**).

[589] Statement by Second Lieutenant of the Coast Guard Mr. Valter Baieca Alfonso Fernandes (**RWS 3**).

f. 'São Tomé's prohibition against Master re-boarding *Duzgit Integrity*' dated 7 October 2013, by which Malta seeks to establish that although his supervision was required, the Master was absent during the STS operation;[590]

g. the Sale and Purchase agreement signed by São Tomé and Monjasa DMCC on 9 October 2013, in which São Tomé demanded explicit guarantees from Monjasa that it had the experience, qualification and necessary resources to transport the goods, because São Tomé did not.[591] The Tribunal notes that during the document production phase of this arbitration, São Tomé was not able to produce documents to confirm the qualifications of either Monjasa or the crew of *Energizer*. According to Malta, this illustrates that the STS operation was not conducted by individuals with the required qualifications.

293. In the view of the Tribunal, the determination of whether the marine environment was exposed to an unreasonable risk by the STS operation between 19 and 23 October 2013 must be made on the basis of the actual circumstances under which the operation was carried out, irrespective of whether it was carried out in full compliance with any national laws. Based on the evidence before it, the Tribunal is not persuaded that São Tomé exposed the marine environment to an unreasonable risk in breach of Article 225. Accordingly, the Tribunal determines that Malta has failed to meet its burden of proof under this head of claim.

D. ALLEGED VIOLATION OF ARTICLES 2(3) AND 25 OF THE CONVENTION

(a) Alleged breach of Article 2(3) of the Convention

294. Article 2(3) of the Convention provides:

> **ARTICLE 2**
> *Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil*
>
> 3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

[590] São Tomé and Príncipe's Coast Guard's prohibition against Master re-boarding *Duzgit Integrity*, 7 October 2013 (**AFE 22**).

[591] Sale and Purchase agreement signed by São Tomé and Príncipe Government and Monjasa DMCC on 9 October 2013 and receipt of payment (**AFE 29**).

i. Applicant's position

295. Malta has argued that Article 2(3) applies in this case. Malta submits that São Tomé's sovereignty under Article 2(3) was triggered when the vessel first entered São Tomé's territorial sea and extended to the archipelagic waters when the vessel entered that area with the result that Article 2(3) applies to the events in dispute.[592]

296. Malta argues that São Tomé was not aware of the intentions of the two vessels until the first visit by the Coast Guard. Therefore, what concerned São Tomé first was the fact that vessels had entered its territorial sea.[593] Malta submits that this is the moment in time that São Tomé's sovereignty was triggered[594] as São Tomé's first and foremost complaint is that the *Duzgit Integrity* entered its territorial waters, rather than archipelagic waters, "without notification and without authorisation".[595] As a result, it cannot be said that this dispute concerns only events that took place in the archipelagic waters.[596]

297. Malta insists that it is evident from the statements in the Counter-Memorial and from several documents on record at national level, in which, the only term used was "territorial waters" rather than "archipelagic waters", that São Tomé referred to events in the territorial sea.[597]

ii. Respondent's position

298. São Tomé argues that Article 2(3) does not apply to the present case because the arrest of *Duzgit Integrity* took place in São Tomé's archipelagic waters. But even if Article 2(3) were to apply, São Tomé argues that it has not exercised its sovereignty in violation of its international law obligations as applicable in its territorial sea.

299. São Tomé argues that the fact that *Duzgit Integrity* passed through São Tomé's territorial sea prior to its arrival in São Tomé's archipelagic waters does not have the effect of rendering Part II of the Convention—the legal regime applicable to São Tomé's territorial sea—applicable.[598] São Tomé contends that the application of Part IV of the Convention is also not disturbed by the

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[592] Hearing Transcript (23 Feb. 2016), 17:10-11; Hearing Transcript (24 Feb. 2016), 50:11-17.

[593] Reply, paras 328-330.

[594] Reply, para. 332.

[595] Hearing Transcript (24 Feb 2016), 47:2-9.

[596] Reply, para. 333.

[597] Hearing Transcript (24 Feb 2016), 44:1051:7.

[598] Rejoinder, paras 64-65; Counter-Memorial, para. 161.

fact that various São Toméan authorities have referred to "territorial waters" in documentation issued in proceedings related to this dispute.[599]

iii. Decision of the Tribunal

300. The Tribunal finds that the relevant events in this dispute occurred within the archipelagic waters of São Tomé and that therefore the relevant provisions of the Convention are those contained in Part IV.

301. The Tribunal rejects Malta's submission that by virtue of the *Duzgit Integrity*'s passing through São Tomé's territorial sea on its way to São Tomé's archipelagic waters, the legal regime applicable to São Tomé's territorial sea was invoked and remained applicable to the events that occurred within São Tomé's archipelagic waters.

(b) Alleged breach of Article 25(1) of the Convention

302. Article 25(1) of the Convention provides:

> **ARTICLE 25**
> *Rights of protection of the coastal state*
>
> 1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.

i. Applicant's Position

303. Malta submits that São Tomé contravened the principle of proportionality, a well-known principle of law[600] reflected in Article 25(1) of the Convention:

304. Malta argues in this regard that because the provision on innocent passage applies in both territorial sea and archipelagic waters,[601] the restraints on the enforcement of sovereign powers also apply in both contexts.[602] Malta maintains that the provision remains relevant (even when innocent passage is not invoked) as it still imposes limitations and duties on the coastal State when passage is <u>not</u> innocent. [603]

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[599] Hearing Transcript (24 Feb. 2016), 93:5-12, 94:4-8.

[600] Reply, para. 107.

[601] Reply, paras 109, 114.

[602] Reply, paras 113, 115.

[603] Reply, para. 113.

305. In relation to this principle, Malta argues that São Tomé suffered no harm,[604] however, its enforcement measures were disproportionate.[605]

ii. Respondent's position

306. São Tomé states that Article 25 is irrelevant because *Duzgit Integrity* was not in passage.[606] São Tomé contends that passage requires the vessel to navigate through the territorial sea or archipelagic waters continuously and expeditiously, with only stopping and anchoring incidental to ordinary navigation permitted.[607] São Tomé submitted that the STS operation intended is not incidental to ordinary navigation.[608]

307. The Respondent argues that Article 25 cannot be a legal basis for Malta's claim that São Tomé acted beyond what was necessary because São Tomé was not acting to prevent passage that was not innocent; it was taking enforcement action in response to serious infringements of its domestic laws.[609] São Tomé disagrees with Malta's *a contrario* reading of Article 25 to argue that a coastal State may not take unnecessary steps to prevent passage which is not innocent. São Tomé considers this to be a strained reading of a provision which was intended to confirm that coastal states are permitted to do what is necessary to prevent passage that threatens the peace, security and good order of a coastal State.[610]

308. São Tomé argues that it cannot be the basis of Malta's claim also because it does not relate to "enforcement action". In this regard São Tomé submits that it was not acting to "prevent passage that was not innocent", but rather was taking "enforcement actions" in response to "serious infringements . . . of its domestic laws".[611]

309. Even if Article 25 were to be applicable to enforcement action, São Tomé argues that the arrest of a vessel that is reasonably suspected of violating applicable rules cannot be considered to be unnecessary.[612]

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[604] Reply, para. 117.

[605] Reply, paras 116, 118.

[606] Hearing Transcript (23 Feb. 2016), 118:5-7.

[607] Hearing Transcript (23 Feb. 2016), 118:7-12.

[608] Hearing Transcript (23 Feb. 2016), 118: 12-16.

[609] Rejoinder, paras 207-209.

[610] Hearing Transcript (23 Feb. 2016), 117:22-118:4.

[611] Rejoinder, para. 208.

[612] Rejoinder, para. 209; São Tomé cites to Article 19(2) of the Convention.

iii. Decision of the Tribunal

310. Article 25(1) applies to archipelagic waters (Part IV) through incorporation of Articles 17 to 32 of Part II of the Convention. It allows the coastal State to take the necessary steps in its territorial sea and in its archipelagic waters to prevent passage which is not innocent. The *Duzgit Integrity*, however, was not in passage while it was engaged in preparing for an STS transfer, since the notion of "passage" requires continuous and expeditious navigation through the territorial sea or archipelagic waters. Stopping or anchoring are only covered by 'passage' if these are incidental to ordinary navigation, which STS operations are not. There was thus no breach of obligation by São Tomé of Article 25.

VIII. REPARATION

311. Malta argues that São Tomé is liable to provide reparation under international law as detailed below.[613] São Tomé denies that it committed internationally wrongful acts, and therefore claims that it is not responsible to make any reparation. São Tomé also argues, on separate grounds, that the compensation claimed cannot be awarded.[614]

i. Applicant's position

312. Malta argues that São Tomé is responsible for violations of its international obligations and is, therefore, liable to provide full reparation for the injuries caused to Malta, *Duzgit Integrity*, its owners and charterer, Master, crew, and cargo owners.[615]

313. Malta submits that as the flag State of *Duzgit Integrity*, it has the right to bring claims in respect of violations against the vessel and all persons on board or interested in its operation, irrespective of their nationalities.[616]

[613] Memorial, para. 369; Reply, para. 428.

[614] Counter-Memorial, paras; 416-418; Rejoinder, paras 214-216.

[615] Memorial, paras 369, 386; Reply, paras 426-429.

[616] Memorial, paras 370-372 referring to *M/V Saiga* (Saint Vincent and the Grenadines v. Guinea), Case No. 2, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10 at para. 106 (**ALE 28; RLE 15**), where ITLOS held that "the Convention considers a ship as a unit".

314. Malta further submits that the principle of responsibility for wrongful acts and the obligation to make reparations are well established in international law,[617] and require reparation which will "wipe out" all the consequences of its wrongful acts.[618]

315. The reparation sought by Malta from São Tomé is provisionally categorised and estimated as follows.[619]

> a) First, in full satisfaction, a declaratory judgment on the wrongfulness of the conduct of São Tomé and Príncipe in respect to the internationally wrongful acts indicated in Malta's Memorial and Reply;
>
> b) Second, a formal apology from São Tomé and Príncipe for those wrongful misconduct acts;
>
> c) Third, a compensation for material and non-material damages suffered by the Republic of Malta as a result of the law enforcement acts against all the interests of the *Duzgit Integrity*, including the shipowner, charterer and crews, as requested in this or in final submissions that the parties may yet be required to make if the quantification takes place.[620]

316. Malta submits that the principal amount claimed is at minimum USD 12,921,796.84 (provisionally calculated).[621]

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[617] Memorial, paras 373-385 referring to I. Brownlie, Principles of Public International Law, 5th Edition (1999), p. 435; *The Spanish Zone of Morocco Claims*, Award of 1 May 1925, RIAA Vol. II, p. 615 at p. 641 (**ALE 31**); J. Crawford, The International Law Commission's Articles on State Responsibility: Introduction, text and Commentaries (2001), pp. 77-78 (**ALE 5**); *Phosphates in Morocco* (Italy v. France), Preliminary Objections, 1938 PCIJ Series A/B No. 74, p. 28 (**ALE 30**); *Corfu Chanel* (United Kingdom v. Albania), Merits, Judgment of 9 April 1949, ICJ Reports 1949, p. 4 at p. 23 (**ALE 32**); *Gabcikovos-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, ICJ Reports 1997, p. 7 at p. 38, para. 47(**ALE 33**); *Rainbow Warrior* (New Zealand v. France), Award of 30 April 1990, RIAA Vol. XX (1990), p. 215 at p. 251, para. 75 (**ALE 4**); *M/V Saiga* (Saint Vincent and the Grenadines v. Guinea), Case No. 2, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10 at para. 169 (**ALE 28**; **RLE 15**).

[618] Malta refers to the *Factory at Chorzów Case* that laid down the guiding principle for reparation and articulated its different forms, and refers to ICJ cases and to arbitral awards that applied the principle. Note is made of Article 304 of the Convention, which refers to the application of "rules regarding responsibility and liability under international law". Malta also refers to Articles 1, 31 and 36 of the ILC's Draft Articles on the Responsibility of States for International Wrongful Acts ("**ARSIWA**"), *see* Memorial, paras 374-385 referring to *Factory at Chorzów* (Germany v. Poland), Jurisdiction, 1927 PCIJ Series A No. 9, p. 21 (**ALE 29**); *Factory at Chorzów* (Germany v. Poland), Merits, 1928 PCIJ Series A No. 17, p. 47.

[618] Memorial, para. 380.

[619] Memorial, paras 387-388, 390 referring to Provisional estimation of damages prepared by the owner of *Duzgit Integrity*, 11 December 2014 (**AEE 1**); Reply, paras. 433-434.

[620] Hearing Transcript (24 Feb. 2016), 67:25-68:15.

[621] Reply, paras 434-436. The minimum amount of compensation as quantified in the Memorial is USD 12,718,747.28, *see* Memorial, para. 391. In this section reference is made to the most updated amounts submitted in the Reply.

317. This amount corresponds to the quantification in respect of damages for the period 15 March 2013 at 9:20 a.m. until the re-engagement of *Duzgit Integrity* on 10 December 2013 at 3:20 p.m. The overall breakdown submitted by Malta is:

a. Owner's loss of hire of *Duzgit Integrity*: USD 2,403,960.95;

Malta explains that during the 270.25 days that *Duzgit Integrity* was held in São Tomé it was not possible to continue service to Stena Oil under the charter party agreement with DS Tanker. It notes that Stena Oil and DS Tankers relations were badly affected and that no future business is likely anymore.

b. Value of cargo owned by charterer of *Duzgit Integrity* (Stena Oil): USD 7,779,651.00 (1,564MT gasoil, 8,852MT fuel oil, 14 MT gasoil as bunkers, and 208MT fuel oil as bunkers);

Malta claims that São Tomé was not justified in confiscating the cargo from on board *Duzgit Integrity* and that it is entitled to recover its value.

c. Other damages suffered by the charterer (replacement vessel hire difference, equipment transfer, ballast voyage expenses, local agents expenses, legal fees): USD 562,691.49;

d. Payment allegedly under duress as part of the settlement agreement to release *Duzgit Integrity*: USD 626,048.84;

e. Payment to IMAP: USD 38,680.95 (EUR 28,875);

f. Port agency expenses (remuneration of Agência Equador): USD 150,000 (EUR 111,452.71);

g. Legal expenses incurred through the duration of the detention of *Duzgit Integrity* (legal counsel, technical consultants and financial analysts): minimum USD 500,000 (temporary estimate, still on-going) (USD 83,438, GBP 144,291.21, EUR 153,115.61);

h. Travel expenses incurred (travelling costs of owners, representatives, lawyers, ship's crew, etc. for the purpose of finding an amicable solution, legal investigation, keeping informed of mortgagee bank purposes): USD 67,381.48;

i. Classification expenses and extension of Class expenses: USD 21,209.27;

Malta notes that additional costs were incurred since *Duzgit Integrity* could not attend the scheduled 5-year dock survey;

j. Wear and tear (extraordinary) on *Duzgit Integrity*: USD 772,172.86;

Malta claims that low maintenance while *Duzgit Integrity* was in São Tomé anchorage caused extraordinary wear and tear of the steel structure of the vessel and equipment on board.[622]

318. Additionally, Malta claims for damages and other losses suffered by the Master and the crew of *Duzgit Integrity*, including moral damages,[623] and for damages to the reputation and business relations of the owners, charterers, and all parties associated with the vessel.[624]

319. Malta reserves all rights in respect of additional grounds or categories of claim for compensation, namely regarding damages for the period following re-engagement of *Duzgit Integrity*.[625]

320. Malta further claims interests on any principal amount payable in order to ensure full reparation and, by way of indication, submits that interest from 25 November 2013 to 22 October 2015 (696 days) at 9% *per annum* over its principal claim of USD 12,921,796.84 amounts to USD 2,248,392.65.[626]

321. Malta emphasises that the above-mentioned amounts and categories are not final and reserves all rights in respect of all and any additional claims without limitation.[627]

322. Finally, Malta reiterates that the alleged "settlement" agreement does not prevent Malta from claiming damages in any way, including in respect of DS Tankers.[628] Malta also denies there is contributory fault on the part of Malta or *Duzgit Integrity*.[629] Malta argues in this regard that São Tomé granted its authorisation during the first visit to *Duzgit Integrity* and that, if it acted in due

[622] Reply, paras 438-440; Memorial, para. 391(a).

[623] Reply, para 438, v; Memorial, para. 391(d) referring to *Velasquez Rodriguez*, Compensatory Damages (Art. 63(1) American Convention on Human Rights), Judgment of 21 July 1989, Inter-American Court of Human Rights (Ser. C) No. 7 (1990), paras 26-27 (**ALE 34**); European Convention of Human Rights, 1950, Article 41.

[624] Reply, para 438,vi; Memorial, para. 391(c).

[625] Memorial, para. 391(b).

[626] Reply, para. 437; Memorial, para. 391(g).

[627] Reply, para. 447.

[628] Reply, paras 430-431.

[629] Reply, paras 441-442, 445.

diligence and as a responsible sovereign State, the circumstances that followed would have been avoided.[630]

323. Malta, therefore, concludes that São Tomé "actively, directly, abusively and in bad faith caused or led to a situation that was by no measure the fault of Malta or the *Duzgit Integrity*".[631]

ii. Respondent's Position

324. São Tomé submits that it has committed no internationally wrongful act, not having breached any of the provisions of the Convention that Malta invokes nor exercised its sovereignty in an abusive or arbitrary manner.[632] Consequently, São Tomé maintains that it is not responsible under international law to make reparation for any injuries.[633]

325. Alternatively, if the Tribunal finds that São Tomé is internationally responsible *vis-à-vis* Malta and is under an obligation to make reparation, it submits that the compensation claimed cannot be awarded because: (i) Malta has failed to establish a sufficient nexus between São Tomé's action and the injuries alleged; (ii) Malta has not sufficiently substantiated the quantum of the damages allegedly suffered; and (iii) *Duzgit Integrity* has materially contributed to the alleged injury.[634] São Tomé also states that any claims related to damages suffered by DS Tankers must be dismissed because DS Tankers explicitly waived its rights to bring any claim against São Tomé and confirmed that it would not transfer such rights to any other party.[635]

326. Regarding the nexus between action and injury, São Tomé emphasises that the obligation to make reparation only arises if a direct causal link can be established between an internationally wrongful act committed and the injuries suffered.[636] It notes that Malta's claims for reparation all relate to the enforcement actions taken by São Tomé against *Duzgit Integrity*, which, São

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[630] Reply, para. 443.

[631] Reply, para. 444.

[632] Counter-Memorial, paras 416-417.

[633] Counter-Memorial, para. 418; Rejoinder, para. 214.

[634] Counter-Memorial, para.422; Rejoinder, para. 215.

[635] Counter-Memorial, paras 420-421; Rejoinder, para. 216. In particular, São Tomé submits that the amounts claimed under Reply, para. 440, (a), (d), (e)-(j), are damage claims that cannot be brought in this arbitration.

[636] Rejoinder, paras 218-219 referring to Article 31 of the ARSIWA; ILC Commentary to ARSIWA, Article 31, para. 2, *in* Materials on the Responsibility of States for Internationally Wrongful Acts, ST/LEG/SER.B/25, United Nations, 2012, p. 208 (**RLE 57**); *M/V Virginia G* (Panama v. Guinea-Bissau), Judgment of 14 April 2014, ITLOS Reports 2014, p. 4, at para. 435 (**RLE 42**).

Tomé avers, can only relate to the breach of Articles 2(3) and 25(1) and 49(3), whether or not in connection with Article 300, of the Convention.[637]

327. São Tomé maintains that Article 2(3) does not apply in the present case and that Malta has not established a direct nexus between the alleged violations of Articles 25(1) and 49(3) and many of the categories of damages claimed as reparation (including: port agency fees, legal expenses, travel expenses, classification expenses, and dry-dock expenses).[638]

328. Regarding the substantiation of the amounts claimed, São Tomé submits that it is for Malta to substantiate and prove the quantum of the injuries, however that it only "sparsely" does so.[639] São Tomé states that it cannot verify and defend itself properly against most of Malta's claims in the absence of underlying documents substantiating the amounts claimed.[640]

329. São Tomé adds that certain claims appear to be unfounded and incorrect, namely:

- Malta assumes that the charter party contract was fixed and non-cancellable without knowing the exact content of the contract;
- The value of cargo of *Duzgit Integrity* that was confiscated by São Tomé is wrongly calculated;
- The amounts the charterer would have incurred under the charter party agreement absent the events in 2013 cannot be regarded as damages;
- The amount offered by DS Tankers to settle the dispute cannot be regarded as having been paid under duress and the fact that the settlement amount agreed was higher does not make the settlement null and void;
- The IMAP fine imposed was in fact only USD 37,752.06, considering the exchange rate as per the date it was imposed;

[637] Rejoinder, para. 217.

[638] Rejoinder, paras 217, 219.

[639] Rejoinder, para. 220-222 referring to Article 36(2) of the ARSIWA; *The Rompetrol Group N.V. and Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, para. 190 (**RLE 58**).

[640] Rejoinder, para. 223; Counter-Memorial, para. 419.

- The amount the local agent Agência Equador is said to have invoiced for its services (USD 150,000) must be incorrect, given that the GDP per capita in São Tomé is approximately USD 3,200 per year;

- DS Tankers was due to incur classification expenses in any event so these cannot be regarded as damages;

- Malta does not follow the mode of calculation of interest rate established in Article 38(1) of the ARSIWA.[641]

330. Regarding the issue of contributory fault, São Tomé submits that the acts and omissions of *Duzgit Integrity*, the Master, DS Tankers, and Stena Oil should be taken into account in the determination of reparation, under the concept of contributory fault.[642] São Tomé refers to Article 39 of the ARSIWA and to the principle that full reparation is due for the injury caused by an internationally wrongful act, but nothing more.[643]

331. São Tomé submits that *Duzgit Integrity* has materially contributed to the damages claimed by Malta by not complying with applicable rules and regulations. São Tomé notes that *Duzgit Integrity* chose to meet with *Marida Melissa* in São Tomé waters, failed to observe administrative and customs formalities, did not provide essential and clear information when contacted by a patrol boat of the Coast Guard, and attempted to carry out an oil transhipment without the mandatory prior written authorisation and without payment of customs duties.[644]

iii. Decision of the Tribunal

332. As regards the first two forms of reparation claimed by Malta in its final submissions (see *supra* paragraph 315), the Tribunal considers that this award determining the international wrongfulness of São Tomé's conduct under Article 49(3) of the Convention provides appropriate satisfaction in the present case. In light of this, the Tribunal considers that it is unnecessary to order that São Tomé issue a formal apology.

333. As regards the third form of reparation claimed by Malta (see *supra* paragraph 315), the Tribunal finds that Malta is entitled to proceed in a further phase of these proceedings to claim damages

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[641] Rejoinder, para. 223.

[642] Counter-Memorial, paras 422-424; Rejoinder, paras 224-225.

[643] Counter-Memorial, paras 423-424; Rejoinder, para. 225.

[644] Counter-Memorial, para. 425; Rejoinder, para. 226.

in respect of the following heads of claim to the extent that it can establish causation between the loss and São Tomé's unlawful conduct:

a. Owner's loss of hire of *Duzgit Integrity*

b. Value of cargo owned by charterer of *Duzgit Integrity* (Stena Oil)

c. Other damages suffered by the charterer (replacement vessel hire difference, equipment transfer, ballast voyage expenses, local agents expenses, legal fees)

d. Payment allegedly made under duress as part of the settlement agreement to release *Duzgit Integrity*: USD 626,048.84[645]

e. Port agency expenses (remuneration of Agência Equador)

f. Legal expenses incurred through the duration of the detention of *Duzgit Integrity* (legal counsel, technical consultants and financial analysts)

g. Travel expenses incurred (travelling costs of owners, representatives, lawyers, ship's crew, etc. for the purpose of finding an amicable solution, legal investigation, keeping informed of mortgagee bank purposes)

h. Classification expenses and extension of Class expenses

i. Wear and tear (extraordinary) on *Duzgit Integrity*

j. damages and other losses suffered by the Master and the crew of *Duzgit Integrity*, including moral damages[646] and damages to the reputation and business relations of the owners, charterers, and all parties associated with the vessel.

334. The Applicant is not entitled to claim damages in respect of the payment to IMAP of USD 38,680.95 (EUR 28,875).

[645] *See supra* footnote 333.

[646] Memorial, para. 391(d) referring to *Velasquez Rodriguez*, Compensatory Damages (Art. 63(1) American Convention on Human Rights), Judgment of 21 July 1989, Inter-American Court of Human Rights (Ser. C) No. 7 (1990), paras 26-27 (**ALE 34**); European Convention of Human Rights, 1950, Article 41; Reply, para 438, v.

IX. COSTS

335. Malta claims that São Tomé should "bear all costs and expenses incurred by [Malta] in this case, including, without limitation, the cost incurred . . . before the Arbitral Tribunal, legal costs . . . with interest thereon".[647]

336. São Tomé requests the Tribunal to order Malta to bear, in full, the costs, disbursements, and legal fees of São Tomé in accordance with Article 30 of the Rules of Procedure, and the full expenses of the Tribunal, including the remuneration of its members.[648]

337. In support of its request São Tomé argues that Malta started this arbitration while it knew, or should have known, that it was fruitless from the start, given that the arrest of *Duzgit Integrity* took place in archipelagic waters, and that it refused to withdraw the proceedings when it was informed that the majority of the claims had already been settled.[649]

338. Article 7 of Annex VII to the Convention provides:

> **ARTICLE 7**
> *Expenses*
>
> Unless the arbitral tribunal decides otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares.

339. This is reiterated in Article 29 of the Rules of Procedure.

340. In the present case, the Tribunal considers that there are no "particular circumstances" that would justify departing from the presumption of equal allocation of the expenses of the Tribunal. The Tribunal therefore considers that its expenses shall be borne by the Parties in equal shares.

341. As regards the Parties' costs arising from this arbitration, the Tribunal considers that the normal rule is that each party bears its own costs. In the view of the Tribunal, there is no reason to depart from this rule at this stage of the present case.

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[647] Hearing Transcript (24 Feb. 2016), 68:21-25.

[648] Counter-Memorial, paras 426, 430; Rejoinder, Submissions para. 1(iv); Hearing Transcript (24 Feb. 2016), 105:5-12.

[649] Counter-Memorial, paras 427-429.

X. DECISION

342. In light of the foregoing, the Tribunal:

a. DECIDES, unanimously, that it has jurisdiction over the present dispute;

b. DECIDES, unanimously, that Malta's claims are admissible;

c. FINDS, by majority, that São Tomé violated Article 49(3) of the Convention;

d. FINDS, by majority, that Malta is entitled to proceed to claim reparation in respect of the heads of claim listed at paragraph 333 in a further phase of these proceedings;

e. ORDERS, unanimously, that the Tribunal's expenses shall be borne in equal shares by the Parties pursuant to Article 7 of the Convention;

f. ORDERS, unanimously, that the Parties shall bear their own legal costs;

g. DISMISSES, unanimously, all other claims.

343. Judge Kateka attaches a dissenting opinion.

Dated: 5 September 2016

Professor Tullio Treves
Arbitrator

Judge James L. Kateka
Arbitrator

Professor Alfred. H.A. Soons
President of the Tribunal

Ms. Sarah Grimmer
Registrar