**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**

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# AWARD ON REPARATION

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**ARBITRAL TRIBUNAL:**
**Professor Alfred H.A. Soons (President)**
**Judge James L. Kateka**
**Professor Tullio Treves**

**REGISTRY:**
**The Permanent Court of Arbitration**

**18 December 2019**

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## GLOSSARY OF DEFINED TERMS

| | |
|---|---|
| **Addendum No. 4** | Addendum No. 4 to the Settlement Agreement, providing for its extension from April/May 2013 for up to six months and, thereafter, for an additional six months at Stena Oil's discretion |
| **AFE** | Applicant Factual Exhibit |
| **ALE** | Applicant Legal Exhibit |
| **Articles on State Responsibility** | Articles on the Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001 |
| **Award on Jurisdiction and the Merits** | Award issued by the Tribunal on 5 September 2016 |
| **Claim for Reparation** | Malta's Claim for Reparation pursuant to Paragraphs 333 and 342(d) of the Award dated 5 September 2016 |
| **Convention** | United Nations Convention on the Law of the Sea, 1982 |
| **Counter-Memorial** | Counter-Memorial submitted by São Tomé dated 29 June 2015 |
| **Dissenting Opinion** | Dissenting Opinion of Judge Kateka dated 5 September 2016 |
| **HFO** | Heavy Fuel Oil |
| **LLI** | Lloyd's List Intelligence |
| **MGO** | Marine Gas Oil |
| **MT** | Metric ton, equal to one thousand kilograms |
| **Registry or PCA** | Permanent Court of Arbitration |
| **Rejoinder** | Rejoinder submitted by São Tomé dated 22 December 2015 |
| **Reply** | Reply submitted by Malta dated 23 October 2015 |
| **Rules of Procedure** | Rules of Procedure dated 27 May 2014 |
| **Settlement Agreement** | Settlement Agreement entered into between the Government of São Tomé and Príncipe and DS Tankers on 23 November 2013 |
| **Supplementary Submission** | Malta's Supplementary Submission pursuant to Procedural Order No. 10, dated 18 September 2018 |

## DRAMATIS PERSONAE

| | |
|---|---|
| **DS Tankers** | DS Tankers Limited, a Maltese company and the owner of the *Duzgit Integrity* |
| ***Duzgit Integrity*** | The M/T *Duzgit Integrity*, a chemical tanker registered in Malta, owned by DS Tankers, and chartered by Stena Oil |
| **IMAP** | Port and Maritime Institute (of São Tomé) |
| **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 |
| 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 AB, a Swedish company that chartered and operated the *Duzgit Integrity* and the *Marida Melissa* |

# I. INTRODUCTION

## A. THE PARTIES AND THEIR REPRESENTATIVES

1. The Applicant in the present arbitration is the Republic of Malta ("**Malta**"). The Applicant is represented in these proceedings by:

> Mr. Ramón García-Gallardo
> Agent and Counsel
> King & Wood Mallesons LLP
> Square de Meeüs 1
> Brussels B-1000
> Belgium

2. The Respondent in the present arbitration is the Democratic Republic of São Tomé and Príncipe ("**São Tomé**"). According to the last-received notification from the Respondent, it 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

3. The Tribunal notes that since December 2018 the Minister of Foreign Affairs of São Tomé is H.E. Elsa Maria Teixeira de Barros Pinto, but it has not been notified of any change in São Tomé representation for the purposes of these proceedings. The Respondent is no longer represented by Counsel in this phase of the proceedings.

4. The Tribunal notes, with regret, that the Respondent, other than confirming via its Co-Agent at the Embassy of São Tomé in Brussels that it was receiving the Tribunal's correspondence, did not submit a written submission or otherwise participate in this phase of the proceedings since its former Co-Agents and Counsel, Ms. Juliette Luycks and Mr. Ruud Niesink of Clifford Chance LLP, advised the Tribunal, on 27 June 2017, that they were no longer acting in that capacity.

5. The summary of the Respondent's arguments contained in the present Award is thus limited to the submissions it made on reparation in the preceding phase of the proceedings.

## B. OVERVIEW OF THE DISPUTE

6. The arbitration concerns the Parties' disagreement as to the lawfulness of São Tomé's conduct in respect of the M/T *Duzgit Integrity* (the "***Duzgit Integrity***"), a Maltese flagged vessel, as well as its Master, crew, owner and charterer. During the early hours of 15 March 2013, the *Duzgit Integrity* entered the archipelagic waters of São Tomé in order to conduct a scheduled ship-to-ship cargo transfer with the M/T *Marida Melissa* (the "***Marida Melissa***"), a fuel oil tanker registered in the Marshall Islands. Subsequently, during March and April 2013, São Tomé interrogated, detained, prosecuted, and imprisoned the Masters of the two vessels. The *Duzgit Integrity* was seized and its oil cargo was confiscated and discharged. In October 2013, while negotiations between Malta and São Tomé were taking place, the Masters were released from prison. Upon the conclusion of a settlement agreement between DS Tankers Limited ("**DS Tankers**")—a Maltese company and the owner of the *Duzgit Integrity*—and São Tomé (the "**Settlement Agreement**"), the *Duzgit Integrity* was released on 25 November 2013.

7. On 22 October 2013, Malta filed a Notice of Arbitration pursuant to Article 287 and Article 1 of Annex VII the United Nations Convention on the Law of the Sea (the "**Convention**") with regard to the above-described dispute.

8. In the earlier phase of the proceedings, Malta submitted that São Tomé, by taking the measures described above against the *Duzgit Integrity*, violated its obligations under the Convention and customary international law.

9. On 5 September 2016, the Tribunal rendered an award deciding matters of jurisdiction and admissibility and the merits of Malta's claims (the "**Award on Jurisdiction and the Merits**"), with Judge Kateka disagreeing with the majority on certain points through a dissenting opinion (the "**Dissenting Opinion**"). The operative part the Award on Jurisdiction and the Merits provides, at paragraph 342, as follows:

> 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.

10. The Tribunal also determined in its award that, while the Settlement Agreement was not relevant to the question of the admissibility of Malta's claims as they pertain to DS Tankers,[1] "[t]he Settlement Agreement *may* be relevant to a later phase of these proceedings as concerns the quantification of any damages suffered by DS Tankers".

11. In the present Award, the Tribunal will determine all questions concerning quantum, compensation, and interest which were not decided in the Award on Jurisdiction and the Merits, in accordance with paragraph 342(d) of that award.

## II. PROCEDURAL HISTORY

12. The Award on Jurisdiction and the Merits of 5 September 2016 recounts in detail the procedural history of this arbitration from its commencement through the date on which that award was issued. In the present Award, therefore, the Tribunal will record only the key procedural developments that have occurred since that date.

13. On 26 September 2016, after having been invited by the Tribunal to do so, each of the Parties submitted preliminary comments concerning the conduct of the reparation phase of these proceedings. In its comments, Malta requested the Tribunal to "make an additional award in respect of such quantification of reparation, as the Tribunal may find to be due by [São Tomé] to Malta," pursuant to paragraphs 333 and 342(d) of the Award on Jurisdiction and the Merits and Article 28 of the Rules of Procedure dated 27 May 2014 (the "**Rules of Procedure**"). In its comments, São Tomé did not contest Malta's request.

14. On 6 October 2016, the Tribunal circulated to the Parties a draft Procedural Order No. 9 concerning the conduct of the reparation phase of the proceedings, and invited the Parties to comment thereupon by 13 October 2016.

15. On 17 October 2016, after having received and taken into consideration such comments from the Parties, the Tribunal issued Procedural Order No. 9, in which it confirmed that it would make an additional award as requested by Malta and set out the procedural timetable for the reparation phase.

16. On 29 November 2016, the Parties sent a joint letter informing the Tribunal that the Parties had initiated settlement discussions "with a view to resolving the outstanding damages quantification aspect of [this] arbitration", and, with reference to Article 23 of the Rules of Procedure, requesting,

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1 Award on Jurisdiction and the Merits, para. 182.

*inter alia*, that the Tribunal suspend until 31 March 2017 the arbitral proceeding "pending the outcome of settlement negotiations".

17. On 30 November 2016, the Tribunal granted the request for the suspension of the proceedings.

18. By joint communication dated 31 March 2017, the Parties requested a one-month extension of the suspension of the proceedings in order to "continue negotiating an amicable solution of this case". On 3 April 2017, the Tribunal granted this request.

19. By joint letter dated 5 May 2017, the Parties, *inter alia*, provided an update as to the status of their settlement discussions, as had been requested by the Tribunal, and requested a further extension of the suspension of the proceedings until 15 June 2017, which was granted by the Tribunal on 9 May 2017.

20. On 19 June 2017, Malta (a) informed the Tribunal that "the Settlement Discussions [between the Parties] were unsuccessful and no settlement was reached", and (b) accordingly requested that the arbitration proceedings be resumed. On the same date, the Tribunal invited São Tomé to provide any comments it may have on the Claimant's letter. São Tomé did not provide any such comments.

21. On 27 June 2017, the Tribunal advised the Parties that "since there [was] no joint agreement between the Parties to continue to suspend the proceedings as required by Article 23 of the Rules of Procedure", the proceedings were resumed. The Tribunal accordingly amended the timetable for the filing of written submissions contained in Section 2.1 of Procedural Order No. 9.

22. On the same date, the then Co-Agents and Counsel of São Tomé, Ms. Juliette Luycks and Mr. Ruud Niesink of Clifford Chance LLP, informed the Tribunal that they were no longer representing São Tomé. In their letter, they asked that all future correspondence be addressed to H.E. Manuel Salvador Ramos and H.E. Américo Afonso Lima Viegas "until informed otherwise" by São Tomé.

23. On 10 July 2017, the Tribunal granted a request from Malta for an extension of two days to file its written submission for the reparation phase.

24. On 12 July 2017, Malta submitted its Claim for Reparation pursuant to Paragraphs 333 and 342(d) of the Award dated 5 September 2016 (the "**Claim for Reparation**"), with accompanying economic and factual exhibits.

25. On 26 July 2017, with reference to the supplementary deposit request originally made by the Tribunal on 6 October 2016,[2] which was subsequently suspended and resumed at the same time as the proceedings, Malta requested the Tribunal "to allow [it] to proceed to a deferred payment in three instalments." On the same date, the Tribunal granted this request.

26. On 25 August 2017, the Tribunal requested the Parties to provide an update on their outstanding supplementary deposit payments. On 11 September 2017, Malta provided such an update.

27. On 12 October 2017, the Tribunal, *inter alia*, noted that it had not received from São Tomé its response to Malta's Claim for Reparation (due the previous day) and that it still had not received any supplementary deposit payments, and requested the Parties to provide updates on these matters. The Tribunal advised that:

> Should [São Tomé] fail to provide such an update and continue to not participate in this phase of the proceedings, the Parties will be asked to bear in mind Article 9 of [the Convention] and Article 22 of the Rules of Procedure concerning the non-appearance of a Party. In particular, the Republic of Malta will be asked to state whether it requests the Tribunal to continue the proceedings and make its award.

28. The Tribunal also reminded the Parties to notify each other, the Tribunal and the Permanent Court of Arbitration ("**PCA**" or the "**Registry**") of any relevant changes in their contact details, as per section 10.6 of the Terms of Appointment dated 22 May 2014 and as previously requested by the Tribunal in its 9 May and 19 June 2017 letters.

29. On 16 October 2017, the Tribunal received from Malta the first instalment of Malta's share of the supplementary deposit.

30. On 31 October 2017, Malta (a) requested that "[i]n accordance with Article 9 of [the Convention] and Article 22 of the Rules of Procedure concerning the non-appearance of a Party . . . the Tribunal . . . continue with the proceedings and make its award"; (b) provided an update as to its outstanding supplementary deposit payments and confirmed that it would also make a substitute payment for São Tomé's share, for which it requested a "substantial reduction" and (c) informed the Tribunal of a change of contact details for its representatives.

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[2] Pursuant to Article 7 of Annex VII to the Convention, the costs of the proceedings are borne by the Parties through an advance deposit, ordinarily in equal shares. Earlier in the proceedings, São Tomé's share of the deposit was partially defrayed through an application to, and a grant from, the Financial Assistance Fund for the Settlement of International Disputes of the Permanent Court of Arbitration, a fund established by the PCA's Contracting Parties for voluntary contributions to facilitate recourse by States to arbitration and other means of peaceful settlement. No further application was made in respect of the final phase of the proceedings concerning reparation. The Terms of Reference and Guidelines of the PCA Financial Assistance Fund are available at <https://pca-cpa.org/wp-content/uploads/sites/6/2016/02/Financial-Assistance-Fund-for-Settlement-of-International-Disputes.pdf>.

31. On 3 November 2017, the Tribunal acknowledged Malta's request that the proceedings continue and confirmed that it would proceed accordingly and make the present Award. With respect to Malta's request for a reduction of São Tomé's share of the supplementary deposit, the Tribunal agreed that a small revision could be envisaged and reminded the Parties that "any surplus deposit after its Award has been rendered would be returned to them".

32. On 7 November 2017, the Tribunal received from Malta the second instalment of Malta's share of the supplementary deposit.

33. On 22 November 2017, Malta informed the Tribunal that it would "write . . . soon in relation to the timeline of the remaining payments."

34. On 19 January 2018, the Tribunal received from Malta the third instalment of Malta's share of the supplementary deposit.

35. On 4 April 2018, the Tribunal wrote to the Parties, seeking an update from Malta in relation to the outstanding deposit payments.

36. On 17 April 2018, the Tribunal received from Malta a first instalment of São Tomé's share of the supplementary deposit.

37. On 16 June 2018, the Tribunal issued Procedural Order No. 10, in which it sought clarification from Malta in respect of a number of aspects of its Claim for Reparation and invited the Parties' comments on the potential appointment by the Tribunal of an expert marine surveyor in respect of Malta's claim for extraordinary repairs to the *Duzgit Integrity* and for loss of hire during the period of such repairs.

38. On 2 July 2018, Malta wrote to the Tribunal, setting out its views on the necessary qualifications and mandate for the expert marine surveyor contemplated by the Tribunal. The Tribunal received no comments from São Tomé in respect of the potential appointment.

39. On 14 August 2018, the Tribunal wrote to the Parties, noting that the second instalment of São Tomé's share of the supplementary deposit remained outstanding. At the same time, the Tribunal requested a final deposit as an advance against the costs of arbitration. In requesting these amounts, the Tribunal emphasized that "[b]earing in mind Article 7 of Annex VII to the UNCLOS and Article 29(1) of the Rules of Procedure, any such substitute payment would be taken into account by the Tribunal in its award" and that any unused deposit will be returned to the Parties at the completion of the proceedings.

40. On 17 August 2018, the Tribunal wrote to the Parties, proposing the appointment of Mr. Peer van Oosterhout as expert marine surveyor to the Tribunal and circulating draft Terms of Reference for the appointment. In the same letter, the Tribunal invited the Parties' comments both in respect of the selection of Mr. van Oosterhout and the Terms of Reference.

41. On 31 August 2018, Malta wrote to the Tribunal, approving the appointment of Mr. van Oosterhout and providing several comments in respect of the Terms of Reference. The Tribunal received no comments from São Tomé in respect of the selection of Mr. van Oosterhout or the Terms of Reference.

42. On 2 September 2018, the Tribunal wrote to Parties, seeking an update from Malta in respect of outstanding deposits.

43. On 18 September 2018, the Tribunal wrote to the Parties, confirming the appointment of Mr. Peer van Oosterhout as the Tribunal's expert marine surveyor. Pursuant to the Terms of Reference, Mr. van Oosterhout was appointed to assist the Tribunal in:

> 3.1.1. examining and analysing the evidence relating to the repairs undertaken to the *Duzgit Integrity*;
>
> 3.1.2. assessing whether the evidence in the record is sufficient to understand and evaluate the repair work done to the *Duzgit Integrity*;
>
> 3.1.3. advising the Tribunal regarding any further information required from Malta to properly evaluate the repair work done to the *Duzgit Integrity*;
>
> 3.1.4. requesting, through the Tribunal, any further information or clarification required from Malta to properly evaluate the repair work done to the *Duzgit Integrity*;
>
> 3.1.5. assessing whether the 20-30 day period estimated for the *Duzgit Integrity*'s scheduled dry-docking in Las Palmas (that did not occur) was reasonable in light of the work planned;
>
> 3.1.6. assessing whether the extraordinary repair work undertaken at Gibraltar was necessary and related to damage reasonably caused by the prolonged detention of the vessel in São Tomé.
>
> 3.1.7. assessing whether the time taken for extraordinary repairs in Gibraltar (and corresponding loss of hire) was reasonable in light of the work done.
>
> 3.1.8. assessing whether the costs of the extraordinary repair work were reasonable in light of the work done.
>
> 3.1.9. considering any such other matters as the Tribunal or Expert may determine to be relevant during the course of the reference.

44. Also on 18 September 2018, Malta submitted its Supplementary Submission pursuant to Procedural Order No. 10 (the "**Supplementary Submission**"), responding the Tribunal's requests for clarification of certain aspects of its Claim for Reparation.

45. On 24 September 2018, the Tribunal wrote to the Parties, inviting São Tomé to indicate by 8 October 2018 whether it wished to respond to Malta's Supplementary Submission. The Tribunal noted that, should São Tomé wish to do so, it would be provided with an equal period of three months to prepare its response.

46. On 10 October 2018, the Tribunal wrote to the Parties, noting that no response had been received from São Tomé, and that the Tribunal would accordingly proceed with its consideration of Malta's Claim for Reparation. At the same time, the Tribunal noted that its expert, Mr. van Oosterhout, had undertaken an initial review of the evidence supporting Malta's claim for extraordinary repairs and loss of hire and had identified certain questions for Malta. The Tribunal requested Malta to provide materials and clarifications responsive to the questions posed by its expert. The Tribunal also noted that no deposits had been received since April 2018, and that it would be unable to continue work in the absence of funds.

47. On 14 November 2018, Malta submitted its *Answer to List of Additional Documents and Clarifications Requested from Malta*, addressing the questions raised by the Tribunal's expert.

48. On 6 December 2018 and 1 February 2019, Malta wrote to the Tribunal, indicating that it was completing its administrative procedures to be able to provide the required deposit amounts.

49. On 6 February 2019, the Tribunal wrote to the Parties, taking note of Malta's communications and indicating that it would not be able to continue work in the absence of a deposit.

50. On 13 March 2019, the Tribunal received from Malta the second instalment of São Tomé's share of the supplementary deposit, originally requested on 6 October 2016.

51. On 3 April 2019, the Tribunal wrote to the Parties, indicating that its expert had resumed work and outlining the envisaged procedure for the Parties to comment on the expert's report.

52. On 9 April 2019, the Tribunal received Malta's share of the final deposit, originally requested on 14 August 2018.

53. On 17 May 2019, the Tribunal wrote to the Parties, conveying the Report of its expert, Mr. Peer van Oosterhout and inviting the Parties to provide any comments they wished to make by 14 June 2019.

54. On 20 May 2019, the Tribunal received from Malta a deposit comprising São Tomé's share of the final deposit originally requested on 14 August 2018.

55. On 14 June 2019, Malta submitted its *Comments to the Report of the Tribunal's Expert, Mr. Peer van Oosterhout*. The Tribunal received no comments from São Tomé in respect of its expert's Report.

56. On 1 July 2019, the Tribunal wrote to the Parties, inviting São Tomé to provide any response it wished to make to Malta's *Comments to the Report of the Tribunal's Expert, Mr. Peer van Oosterhout* by 29 July 2019. The Tribunal has received no such response from São Tomé.

## III. COMPENSATION

57. In the Award on Jurisdiction and the Merits, the Tribunal found "by majority, that Malta [was] entitled to proceed to claim reparation in respect of the heads of claim listed at paragraph 333 [of that award] in a further phase of these proceedings".[3] More specifically, the Tribunal established that Malta was entitled to claim damages in the current reparation phase, "to the extent that it can establish causation between the loss and São Tomé's unlawful conduct", with respect to the following heads of claim:

> (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 [S]ettlement [A]greement to release *Duzgit Integrity*: USD 626,048.84
>
> (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 and damages to the reputation and business relations of the owners, charterers, and all parties associated with the vessel.[4]

58. The present section first summarises the Parties' positions on the requests for relief with respect to the above (A). It then addresses whether Malta, in its Claim for Reparation, has sufficiently substantiated the quantum it claims and the causal link to São Tomé's unlawful conduct for each head of claim (B), whether any of the damages claimed by Malta can be mitigated by waiver of

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3 Award on Jurisdiction and the Merits, para. 342(d).

4 Award on Jurisdiction and the Merits, para. 333 (internal quotations omitted).

right (C) and contributory fault (D). Lastly, this section summarises the Parties' arguments and sets out the Tribunal's analysis with respect to interest (E).

## A. RELIEF REQUESTED

59. In its Claim for Reparation, Malta summarises its claim for damages with respect to each of the heads of claim listed in paragraph 333 of the Award on Jurisdiction and the Merits, as follows:[5]

| Head of Claim | Amount |
|---|---|
| 1. Loss of hire | USD 3,151,960.95 (2,403,960.95 + 748,000) |
| 2. Value of cargo | USD 7,779,651.49 |
| 3. Other damages suffered by the charterer | USD 331,007.98 |
| 4. Payment as part of the "settlement agreement" | USD 626,048.84 |
| 5. Port agency expenses | USD 153,704.81 |
| 6. Legal expenses pre-arbitration period | USD 339,942.15 |
| 7. Travel expenses | USD 67,381.48 |
| 8. Classification expenses and extension of Class expenses | USD 21,209.27 |
| 9. Wear and tear (extraordinary) | USD 432,172.86 |
| 10. Moral damages | USD 1,200,000.00 |
| **TOTAL** | **USD 12,903,079.83**[6] |

60. In its Supplementary Submission of 18 September 2019, Malta corrected and updated its claim for damages as follows:

| Head of Claim (Items of Paragraph 333) | Original Claim | Updated Claim |
|---|---|---|
| Loss of Hire | USD 3,151,960.95 (2,403,960.95+748,000) | USD 3,151,960.95 (2,403,960.95+748,000) |
| Value of cargo | USD 7,779,651.49 | USD 7,780,436 |
| Other damages suffered by the Charterer | USD 331,007.98 | USD 482,691.49 |
| Payment as part of the "Settlement Agreement" | USD 626.048,84. | USD 626,048.84. |
| Port Agency Expenses | USD 153.704,81 | USD 172,215.54 |
| Legal Expenses -pre arbitration period | USD 339.942,15 | USD 339,942.15 |

5 Claim for Reparation, para. 159.

6 Note: the total figure calculated by Malta does not include the USD 1,200,000.00 being claimed in moral damages.

| | | |
|---|---|---|
| Travel Expenses | USD 67,381.48. | USD 67,381.48. |
| Classification, survey expenses | USD 21,209.27 | USD 21,209.27 |
| Wear and tear | USD 432,172.86 | USD 432,172.86 |
| Moral damages | USD 1,200,000.00 *This figure was not originally included in the total below.* | USD 1,200,000.00 |
| **TOTAL** | **USD 12,903.079,83** | **USD 14,247,058.58** |

61. In submissions made in the preceding phase of these proceedings, São Tomé stated that, should the Tribunal find that "São Tomé is internationally responsible vis-à-vis Malta" – as the Tribunal thereafter did in its Award on Jurisdiction and the Merits – the compensation claimed by Malta "cannot be awarded because (a) Malta has failed to establish a sufficient nexus or causal connection between the actions of São Tomé and the injury allegedly suffered, (b) Malta has not sufficiently substantiated the quantum of the damages allegedly suffered, and (c) the *Duzgit Integrity* has materially contributed to the alleged injury".[7] São Tomé additionally submitted that "any claim brought by Malta that relate to damages suffered by DS Tankers must be dismissed in any event", in light of the Settlement Agreement between São Tomé and the vessel's owner, "pursuant to which DS Tankers has explicitly waived its rights to bring claims against São Tomé, including any request for damages or compensation".[8]

## B. WHETHER MALTA HAS SUFFICIENTLY SUBSTANTIATED ITS CLAIMS AND ESTABLISHED CAUSATION BETWEEN ITS LOSS AND SÃO TOMÉ'S UNLAWFUL CONDUCT

62. São Tomé's submission that Malta has not "sufficiently substantiated" the quantum it claims was made in response to the submissions made by Malta in the first phase of these proceedings, before it filed its Claim for Reparation. As a consequence of São Tomé's non-participation in this phase of the proceedings, the Tribunal has not had the benefit of São Tomé's views on the sufficiency of Malta's more detailed Claim for Reparation.

63. São Tomé further submits 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.[9]

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7 Rejoinder submitted by São Tomé dated 22 December 2015 (the "**Rejoinder**"), para. 215.

8 Rejoinder, para. 216.

9 Rejoinder, paras 218-219 *referring to* Article 31 of the Articles on the Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (12 December 2001); International Law Commission Commentary to the Articles on State Responsibility, Article 31(2), *in* Materials on the Responsibility of States for Internationally Wrongful Acts, ST/LEG/SER.B/25, United Nations, 2012, p. 208 (**Exhibit RLE 57**); *M/V Virginia G* (Panama v. Guinea-Bissau), Judgment of 14 April 2014, International Tribunal for the Law of the Sea Reports 2014, para. 435 (**Exhibit RLE 42**).

São Tomé argues that Malta has not established a direct nexus between the alleged violations of Article 49(3) and many of the categories of damages it claims as reparation (including: port agency fees, legal expenses, travel expenses, classification expenses, and dry-dock expenses).[10] São Tomé emphasises that these damages, "if they exist at all . . . are at best indirectly related to the enforcement actions taken by São Tomé".[11]

64. Pursuant to Article 9 of Annex VII to the Convention, the "[a]bsence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings." Nevertheless, "[b]efore making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law." In keeping with this duty, the Tribunal has undertaken to determine whether Malta has provided sufficient substantiation for its claims to enable the Tribunal to conclude that they are "well founded in fact and law." For this reason, the Tribunal has also appointed an Expert in Marine Surveying (see paragraph 43 above to assist it in considering the technical aspects of Malta's claim for loss of hire and extraordinary repairs to the *Duzgit Integrity*. The Tribunal will also consider whether Malta's claims are causally linked to São Tomé's unlawful conduct.

65. The Tribunal will review each of Malta's heads of claim in turn.

### 1. Owner's loss of hire of the *Duzgit Integrity*

#### (a) The Applicant's Position

##### i. Object

66. By way of background, Malta recalls that on 25 March 2011, DS Tankers and Stena Oil entered into a one-year charter party agreement, whereby the *Duzgit Integrity* "would be engaged in refuelling vessels along Western Africa offshore".[12] This agreement was extended several times, including, most relevantly, by an addendum ("**Addendum No. 4**"), which provided for its renewal from April/May 2013 for up to six months and, thereafter, for an additional six months at Stena Oil's discretion.[13] Under Addendum 4, the daily hire rate was to be increased from USD 9,100 to USD 9,350 for the first renewal, and to USD 9,650 for the second.[14] Malta notes that Addendum 4

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10 Rejoinder, paras 217 and 219.

11 Rejoinder, para. 219.

12 Claim for Reparation, para. 43 *referring to* Time Charter Party between DS Tankers Ltd and Stena Oil AB dated 25 March 2011 (**Exhibit AFE A.1**).

13 Claim for Reparation, para. 43 *referring to* Addendum No. 4 dated 28 January 2013 (**Exhibit AFE A.2**).

14 Claim for Reparation, para. 51 *referring to* Addendum No. 4 dated 28 January 2013 (**Exhibit AFE A.2**).

was concluded in anticipation of the completion of the vessel's first five-year survey of reclassification, which was scheduled to take place at the end of March 2013 in Las Palmas.[15] The renewal of the agreement was to start upon the delivery of the vessel, which was estimated to be on or around 20 April 2013.[16]

67. Malta submits that this head of claim covers two categories of loss. Firstly, it advances that, as a result of the seizure and detention of the vessel by São Tomé on 15 March 2015, DS Tankers could no longer continue to service to Stena Oil under the charter party agreement, effectively triggering the charter party agreement's "off-hire" clause, resulting in losses which Malta now claims.[17] Secondly, Malta points to the loss of hire owing to "the inability of the owner to put the *Duzgit Integrity* back into service immediately upon her release from São Tomé" while the vessel was undergoing "extraordinary repairs/maintenance, classification, certification."[18]

ii. Timing

68. The amount claimed by Malta covers the loss of hire suffered by the owner of the *Duzgit Integrity*, DS Tankers, for a period of 255.4 days from the moment the vessel was detained on 15 March 2013 until its re-engagement.[19] This period is divided into (a) the period from the date of detention to the date of the release of the *Duzgit Integrity* (covered by the first category of loss),[20] and (b) the period subsequent to the release of the vessel until its first voyage in "a seaworthy, ready and efficient state" (covered by the second category of loss).[21]

69. Regarding the first category of loss, Malta states that, upon the detention of the *Duzgit Integrity* on 15 March 2013, Stena Oil considered the ship to be "off-hire" within the meaning of Clause 21(a)(v) of the charter party agreement.[22] Consequently, Stena Oil reclaimed the hire paid in advance for the period 15 to 31 March 2013 and ceased paying the daily hire rate from 15 March

15 Claim for Reparation, paras 43-44.

16 Claim for Reparation, para. 51.

17 Claim for Reparation, paras 45 and 48.

18 Claim for Reparation, paras 49 and 62-63.

19 Claim for Reparation, para. 48.

20 Claim for Reparation, para. 49.

21 Claim for Reparation, para. 49.

22 Claim for Reparation, para. 53 *referring to* Time Charter Party between DS Tankers Ltd and Stena Oil AB dated 25 March 2011 (**Exhibit AFE A.1**).

2013 onwards.[23] Hence, Malta asserts that it should be compensated for the losses it suffered during the entire period of detention of the vessel, namely, from 15 March 2013 until her release on 25 November 2013. In the alternative, Malta recognises the Tribunal's ruling that the detention on 15 March 2013 was lawful and that the initial measures taken by São Tomé, including the initial fine issued by the Port and Maritime Institute ("**IMAP**"), were justified. However, Malta insists that, should the Tribunal wish to reduce the amount of damages under this head of claim, it limit the reduction to "the first [ten] days of detention".[24] In Malta's view, ten days reasonably account for the issuance and notification of the IMAP fine and the time needed for such fine to be paid.[25]

70. Regarding the second category of loss, Malta explains that the *Duzgit Integrity* spent a total of 110 days in Gibraltar, starting from 10 December 2013, when it arrived in Gibraltar LT, to 29 March 2014, when the vessel went on its first voyage.[26] Nevertheless, taking into account the planned thirty-day dry-docking in Las Palmas, Malta considers that the additional time during which loss of hire was incurred should be calculated at eighty days.[27]

iii. Quantum

71. With respect to the first category of loss, Malta avers that its damages should be quantified on the basis of the daily hire rates in the charter party agreement as follows:[28]

| Description | Quantity | Price in USD | Total in USD |
|---|---|---|---|
| 15.03.2013 9:20 – 19.04.2013 23:59<br>(35 days 14 hours 40 minutes) | 35.611 days | 9,100 per day | 324,060.10 |
| 20.04.2013 00:00 – 19.10.2013 23:59<br>(183 days 00 hours 00 minutes) | 183 days | 9,350 per day | 1,711,050.00 |
| 20.10.2013 00:00 – 25.11.2013 21:35<br>(36 days 21 hours 35 minutes) | 36.899 days | 9,650 per day | 356,075.35 |
| Communications, expenses and gratuities | 8.157 months | 1,500 per month | 12,775.50 |
| GRAND TOTAL | | | 2,403,960.95 |

23 Claim for Reparation, para. 55 *referring to* E-mail correspondence from Stena Oil AB to DS Tankers Ltd dated 4 April 2013 (**Exhibit AFE A.3**).

24 Claim for Reparation, para. 58.

25 Claim for Reparation, para. 58.

26 Claim for Reparation, paras 65-66.

27 Claim for Reparation, para. 70.

28 Claim for Reparation, para. 56 *referring to* Off-Hire Statements of DS Tankers dated 25 November 2013 (**Exhibit AFE A.4**).

72. In the alternative, should the Tribunal find that a reduction would be appropriate in light of its earlier finding that the detention of the vessel was lawful and that the initial measures taken by São Tomé were justified, Malta submits the following figures:[29]

| Description | Quantity | Price in USD | Total in USD |
|---|---|---|---|
| 15.03.2013 9:20 – 19.04.2013 23:59 (35 days 14 hours 40 minutes) | 25.611 days | 9,100 per day | 233,060.10 |
| 20.04.2013 00:00 – 19.10.2013 23:59 (183 days 00 hours 00 minutes) | 183 days | 9,350 per day | 1,711,050.00 |
| 20.10.2013 00:00 – 25.11.2013 21:35 (36 days 21 hours 35 minutes) | 36.899 days | 9,650 per day | 356,075.35 |
| Communications, expenses and gratuities | 8.157 months | 1,500 per month | 12,775.50 |
| GRAND TOTAL | | | 2,312,960.95 |

73. To quantify the second category of loss, Malta suggests using the then market rate of USD 9,350 per day, which would amount to USD 748,000.00 in loss of hire for the relevant eighty-day period.

74. In total, Malta claims, under this head, an amount of USD 3,151,960.95 (or USD 3,060,960.95 if the Tribunal were to decide on a reduction with respect to the first category of loss).[30]

iv. Substantiation

75. Malta relies on the following documents to substantiate its claim:

(a) Ship in Survey Report by Bureau Veritas dated 29 April 2014, confirming the dates that the *Duzgit Integrity* spent in Gibraltar (**Exhibit AFE A.5**);

(b) E-mail correspondence dated 28 March 2014, containing proof of the first commercial re-engagement of the *Duzgit Integrity* (**Exhibit AFE A.6**);

(c) Reports from Clarksons on Specialized Products, Issue 7, 2014, containing proof of average hire rate in fourth quarter of 2013 and first quarter of 2014 (**Exhibit AFE A.7**); and

(d) E-mail correspondence dated 27 August 2014, containing proof of hire rate as of August 2014 when the *Duzgit Integrity* was chartered with Uni-Chartering at a rate of USD 9,750 per day (**Exhibit AFE A.8**).[31]

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29 Claim for Reparation, para. 60.

30 Claim for Reparation, para. 72.

31 Claim for Reparation, para. 73.

76. In its Supplementary Submission in response to the Tribunal's Procedural Order No. 10, Malta clarifies its claim as follows:

(a) Malta details the work done on the *Duzgit Integrity* between January and March 2014 and the dates on which certain work was performed.[32]

(b) Malta clarifies that its claim for loss of hire includes the period between when works were complete on 24 March 2014 and when the vessel left Gibraltar on 29 March 2014, insofar as time was required to identify a new charter party when the ship had not been trading for over a year.[33]

**(b) The Respondent's Position**

77. São Tomé considers this claim to be "unfounded and incorrect."[34] It questions Malta's assumption that the charter party agreement was fixed and non-cancellable, and thus, the extent to which damages can flow from this agreement (if at all).[35] It argues that, in any event, this constitutes one of the claims brought by Malta in relation to damages suffered by DS Tankers, which accordingly "must be dismissed" in light of the fact that the vessel's owner waived its right to bring any claim against São Tomé in the Settlement Agreement.[36]

**(c) The Expert's Report**

78. The Tribunal requested its expert marine surveyor to examine Malta's claim that the repairs to the *Duzgit Integrity* in Gibraltar led to increased loss of hire insofar as the vessel required significantly more work following its detention in São Tomé than had been planned for it dry-docking at Las Palmas. Specifically, the Tribunal asked its expert to assess "whether the 20-30 day period estimated for the *Duzgit Integrity*'s scheduled dry-docking in Las Palmas (that did not occur) was reasonable in light of the work planned" and "whether the time taken for extraordinary repairs in Gibraltar (and corresponding loss of hire) was reasonable in light of the work done."[37]

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32 Supplementary Submission pursuant to Procedural Order No. 10, 18 September 2018, paras. A.1-A.2.

33 Supplementary Submission pursuant to Procedural Order No. 10, 18 September 2018, para. A.3.

34 Rejoinder, para. 223.

35 Rejoinder, para. 223.

36 Counter-Memorial submitted by São Tomé dated 29 June 2015 (the "**Counter-Memorial**"), paras. 225, 421; Rejoinder, para. 216.

37 Terms of Reference for Expert, 14 September 2018, paras. 3.1.5, 3.1.7.

The Tribunal also asked its expert to examine the extent to which the repairs actually undertaken in Gibraltar related to damage reasonably caused by the detention of the vessel.

79. With respect to the planned dry-docking of the *Duzgit Integrity* in Las Palmas, the Tribunal's expert concluded as follows:

> The initial planning, based on the planned works, seems to have been reasonable. It is my expert opinion that various items were not properly considered and were overlooked. It is also clear that during the scheduled dry-dock at Las Palmas, more than the planned work would have been needed to be done, which would have required more time. It is not uncommon that dry dock periods are extended due to problems that surfaced during inspections at the yard.[38]

80. With respect to the work performed at Gibraltar, the Tribunal's expert noted:

> The total time taken for the repairs in Gibraltar was from arrival on 10 December 2013 at 15:20 hrs. until 29 March 2014.
>
> A total of 110 days.
>
> During the time at the yard, at least the following was done as Owners' work, abstracted from various reports:
>
> In dry-dock, rudder, tailshaft bearings, bush, blasting, painting:
>
> 12 / 12 – 9 / 1 = 28 days
>
> Gearbox repairs:
>
> 12 / 1 – 27 / 1 = 16 days
>
> 23 / 2 – 10 / 3 = 16 days
>
> 60 days
>
> I have not found further documentation or information that would rectify a reasonable proportion of days for account of the detention.
>
> The majority of the presented invoices from various suppliers and subcontractors and the works as invoiced by the yard, were all concerning works that, on the basis of the provided documents, could not be related to the detention.
>
> It is therefore, based on what is provided so far, that I cannot conclude other than that there was no further delay on account of the detention.
>
> The method that Malta uses to determine the number of days under repairs, viz. 110 days minus the scheduled days in dry dock in Las Palmas, does not take into account any additional works which also would have been executed when the Vessel would have called at Las Palmas and does also not count for the time under repairs for the gearbox.
>
> As mentioned before, and based on the provided documents, I cannot conclude otherwise than that, apart from what is referred to in this report, the same works would have been required in Las Palmas to update the Vessel to the same condition as she was in upon departure from Gibraltar on 29 March 2014.
>
> It should be further noted that due to the gearbox repair and the re-alignment of the main engine – tailshaft, these final works were only completed on 18 March 2014. The Vessel could not have departed anyhow before this date.

[38] Expert Report of Mr. Peer van Oosterhout, BMT Netherlands B.V., 15 May 2019, para. 3.1.3.

> It is unclear which further works were carried out until the Vessel finally departed from the yard on 29 March 2014.[39]

81. In particular, the Tribunal's expert noted that the timing of the *Duzgit Integrity*'s stay in Gibraltar was driven by the need for repairs to the gearbox and the alignment of the gearbox and tailshaft, which he did not consider to have been necessitated by the vessel's detention in São Tomé. Both the gearbox repairs and alignment work were undertaken by Turkish contractors who required visas for Gibraltar and were able to commence work only on 12 January and 23 February 2014, respectively.

82. In its comments, Malta contested the Tribunal expert's conclusions and noted in particular the following:

(a) According to Malta, the Tribunal's expert neglected to consider loss of hire during the voyage from São Tomé to Gibraltar, which was longer than had the vessel been able to stop at Las Palmas.[40]

(b) According to Malta, the Tribunal's expert neglected to consider the time required for DS Tankers to identify a new charter party following the completion of repairs.[41]

(c) According to Malta, the Tribunal's expert has not provided a basis for calculating a 75/25 ratio of the time spent under repairs in Gibraltar.[42]

(d) According to Malta, "had the vessel arrived at berth in Las Palmas as scheduled, the visa for the Turkish team coming to Gibraltar would never have been required. Therefore the delay in the commence of the works is undoubtedly linked exclusively to the detention."[43]

### (d) The Tribunal's Analysis

83. Malta's claim for the loss of hire relates to two periods of time that present issues that are essentially distinct. The claim for loss of hire during detention is principally a legal question, relating to the point of time at which São Tomé's detention of the *Duzgit Integrity* became unlawful and the effect, if any, of the terms of the charter party agreement. In contrast, Malta's claim for loss of hire while the vessel underwent repairs in Gibraltar is a technical question of

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39 Expert Report of Mr. Peer van Oosterhout, BMT Netherlands B.V., 15 May 2019, para. 3.1.3.

40 Malta's Comments to the Report of the Tribunal's Expert Mr. Peer van Oosterhout, 14 June 2019, p. 2.

41 Malta's Comments to the Report of the Tribunal's Expert Mr. Peer van Oosterhout, 14 June 2019, p. 2.

42 Malta's Comments to the Report of the Tribunal's Expert Mr. Peer van Oosterhout, 14 June 2019, p. 3.

43 Malta's Comments to the Report of the Tribunal's Expert Mr. Peer van Oosterhout, 14 June 2019, p. 3.

fact, regarding the extent to which the *Duzgit Integrity* was kept in port longer than would otherwise have been the case as a result of works necessitated by the detention of the vessel in São Tomé. The Tribunal will address each period of time in turn.

i. Loss of Hire during Detention

84. Malta's claim for loss of hire presents a question not addressed in the Tribunal's earlier Award on Jurisdiction and the Merits: at what point did the detention of the *Duzgit Integrity* by São Tomé become unlawful and a breach of the Convention? In its Award on Jurisdiction and the Merits, the Tribunal concluded that:

> 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). 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. [. . .]
>
> [. . .]
>
> 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 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.[44]

85. The Tribunal considers that its earlier finding of breach was based on the totality of the actions taken by São Tomé. It was the aggregate, cumulative effect of the prolonged detention of the Master and vessel, monetary sanctions, and confiscation of the cargo – rather than any individual act – that together constituted a breach of Article 49 of the Convention and São Tomé's duty to exercise its sovereignty and enforcement powers in its archipelagic waters in a reasonable and proportionate manner.[45] As a matter of the law of State responsibility, the Tribunal is of the view that São Tomé's breach of Article 49 of the Convention took the form of a composite act – a

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44 Award on Jurisdiction and the Merits, 5 September 2016, paras. 255-261.

45 See Award on Jurisdiction and the Merits, 5 September 2016, para. 209.

"series of actions or omissions defined in aggregate as wrongful"[46] – comprised in this instance of:

(a) the prolonged detention of the *Duzgit Integrity*, beginning on 15 March 2013, but only becoming prolonged thereafter;

(b) the prolonged detention of the Master of the *Duzgit Integrity*, beginning informally on 15 March 2013 and followed by a detention order on 20 March 2013,[47] but only becoming prolonged thereafter;

(c) the proceedings before the Customs Directorate General of São Tomé, comprising the initial imposition of a fine of EUR 1.08 million on 27 March 2013,[48] the arrest of the vessel and cargo by the Civil Court of First Instance as security for that fine on 27 or 29 March 2013,[49] and the Customs Directorate's rejection of DS Tankers' appeal of the fine on 26 April 2013.[50]

(d) the criminal proceedings against the Master of the *Duzgit Integrity*, comprising the judgment of the Criminal Court of First Instance on 29 March 2013, convicting the Master, imposing a fine of EUR 5 million, and ordering the forfeiture of the vessel and cargo;[51] and the judgment of the Supreme Court of 20 June 2013, upholding on appeal the decision of the Criminal Court of First Instance.[52]

(e) the court order of 8 August 2013 authorizing the sale of the cargo of the *Duzgit Integrity*,[53] the contract concluded between São Tomé and Monjasa DMCC on 9 October 2013 for the

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46 Articles on the Responsibility of States for Internationally Wrongful Acts, art. 15(1), G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (12 December 2001). Article 15(1) provides in full that "[t]he breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act."

47 Order of Detention of Master Cengiz Gulzen dated 19 March 2013 (**Exhibit AFE 16**).

48 Customs Directorate General Fine dated 2 April 2013 (**Exhibit AFE 14**).

49 Memorial, para. 93; Counter-Memorial, paras. 73-74.

50 Memorial, para. 92; Counter-Memorial, para. 75.

51 Judgement of the Court of First Instance dated 29 March 2013 (**Exhibit AFE 17**).

52 Judgement of the Supreme Court dated 20 June 2013 (**Exhibit AFE 18**).

53 Court Order of 8 October 2013 (**Exhibit AFE 30**).

purchase of the cargo of the *Duzgit Integrity*,[54] and the transfer of the majority of the cargo of the *Duzgit Integrity* to the *M.T. Energizer* on 20 and 22 October 2013.

86. Under the law of State responsibility, a breach of an obligation by way of a composite act "extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation."[55] In the present case, the Tribunal finds the first element of São Tomé's composite act to have occurred with the completion of the Customs Directorate proceedings and the rejection of DS Tankers' appeal of the Customs fine on 26 April 2013; *i.e.*, the first of the decisions on appeal where acts of organs of São Tomé could have been corrected.[56] Accordingly, the Tribunal finds São Tomé's detention of the *Duzgit Integrity* to have been incompatible with Article 49 of the Convention and internationally wrongful as from that date, extending until release of the vessel on 25 November 2013.

87. The Tribunal takes note of São Tomé's argument that Malta should not be entitled to damages insofar as the Charter Party Agreement was cancellable and could have been cancelled by Stena Oil within the initial period of lawful detention. The Tribunal agrees with São Tomé with respect to the content of the Charter Party Agreement – Addendum No. 4 of 28 January 2013 provides for cancellation on five days' notice if the vessel is unavailable for longer than 21 consecutive days – but not with respect to the implications of this fact. The Tribunal notes, in the first place, that the Charter Party Agreement was not cancelled during the detention of the *Duzgit Integrity*, and that São Tomé's argument relies upon a counterfactual. More importantly, however, while wrongfully detained in São Tomé, the *Duzgit Integrity* was unavailable for service by any charterer, irrespective of whether or not Stena Oil elected to exercise its cancellation option. Malta is entitled to claim for the harm to its vessel that follows from this unavailability.

88. With respect to the rate of hire available for the *Duzgit Integrity*, the Tribunal accepts that the rate actually agreed in the Charter Party Agreement with Stena Oil represents appropriate evidence of the value of lost hire to DS Tankers. Accordingly, the Tribunal calculates the value of the loss of hire of the *Duzgit Integrity* during its detention in São Tomé as follows:

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54 Sale and Purchase Agreement dated 9 October 2013 (**Exhibit AFE 29**).

55 Articles on the Responsibility of States for Internationally Wrongful Acts, art. 15(2), G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (12 December 2001).

56 The Tribunal notes that, with respect to the date of São Tomé's breach of the Convention, one of the members of the majority would have preferred the earlier date of 29 March but accepts the 26 April 2013 date.

| Start Date | Start Time | End Date | End Time | Days | Price in USD | Total in USD |
|---|---|---|---|---|---|---|
| 26/04/2013 | 00:00:00 | 19/10/2013 | 23:59:00 | 177.00 | 9,350.00 | 1,654,943.51 |
| 20/10/2013 | 00:00:00 | 25/11/2013 | 21:35:00 | 36.8993 | 9,650.00 | 356,078.30 |
| | | | | | **Total:** | **USD 2,011,021.81** |

89. The Tribunal will address the effect of the Settlement Agreement on Malta's claims separately below (see paragraphs 186 to 192).

ii. Loss of Hire during Repairs

90. While the extent to which loss of hire during the detention of the *Duzgit Integrity* was principally a legal question, Malta's claim for loss of hire during repairs raises factual concerns. There is no question that the vessel was unavailable for hire while undergoing repairs in Gibraltar; but Malta's claim requires it to prove that the time required for these repairs was extended (beyond what would otherwise have been the case) by damage sustained while detained in São Tomé.

91. As this is a technical matter, the Tribunal gives significant weight to the conclusion of its expert marine surveyor that extended time for repairs in Gibraltar was entirely unrelated to the detention of the vessel. The basis for this conclusion is the following. The most time-consuming repair to the *Duzgit Integrity* was the repairs to the gearboxes. This damage pre-dated the detention of the vessel and would not reasonably be expected to have been aggravated while the vessel was immobile in São Tomé. The repairs to the gearbox required a specialist who was only able to begin work in Gibraltar on 12 January 2013. The *Duzgit Integrity* completed most other repairs and left dry dock on 9 January 2013. It then remained in Gibraltar until 24 March 2013 only because of the need for further work on the alignment of the gearbox and tailshaft, which required the attendance of specialists from Turkey.

92. Malta raises four objections to these conclusions, three of which can be dealt with succinctly:

(a) First, Malta's argument that the Tribunal's expert failed to consider loss of hire for the voyage from Las Palmas to Gibraltar necessarily fails. Malta has never claimed loss of hire for this period, nor has it provided the Tribunal with any evidence that would enable it to calculate the time spent by the *Duzgit Integrity* on this voyage.

(b) Second, the Tribunal agrees with Malta that the time required to locate a new charter party after a long period off hire is causally linked to the detention of the vessel and would be compensable as loss of hire. The Tribunal understands this to relate to the period from

24 March 2014 when the *Duzgit Integrity* completed repairs until 29 March 2014 when it was re-chartered.

(c) Third, Malta's objection that the Tribunal's expert provided no basis for a 75/25 split of the days spent by the vessel in Gibraltar appears to misunderstand the expert's conclusions. The Tribunal's expert suggested that certain costs could be considered as 25 percent related to the detention of the vessel. But his unequivocal view was that "I cannot conclude other than that there was no further delay on account of the detention."[57]

93. In the Tribunal's view, Malta's fourth objection – *i.e.*, that the visa issues which delayed the arrival of the Turkish specialists in Gibraltar would not have occurred had the *Duzgit Integrity* been dry-docked in Las Palmas as planned – bears careful consideration. Repairs that are unrelated to the detention of the vessel, but that are nevertheless delayed as a result of the change of plans, could constitute a harm proximately following from the detention. Ultimately, however, this argument fails as a matter of evidence and causation. Malta has not provided the Tribunal with any evidence that specialists for the repair of the gearbox and alignment of the tailshaft were available and in possession of the necessary Spanish visas, had the *Duzgit Integrity* been able to complete its planned dry-dock in Las Palmas. Moreover, the record indicates that DS Tankers considered a competing quote from a Gibraltar-based firm to perform the tailshaft alignment work. The decision to proceed with a Turkish contractor, notwithstanding the potential for delays in the procurement of visas, breaks the chain of causation potentially linking these delays to the detention of the *Duzgit Integrity* in São Tomé.

94. Accordingly, the Tribunal finds that the time spent by the *Duzgit Integrity* in Gibraltar was not caused by the actions of São Tomé. The Tribunal considers that only the six days spent awaiting a new charter party warrant reparation for loss of hire.

iii. Loss of Hire (In Total)

95. Combining the conclusions reached in paragraphs 88 and 94 above, the Tribunal finds that Malta has substantiated a claim and established causation for a total of 219.8993 days of lost hire. The Tribunal also accepts Malta's claim for administrative expenses with respect to periods of lost hire, bringing the total value of lost hire to the following:

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57 Expert Report of Mr. Peer van Oosterhout, BMT Netherlands B.V., 15 May 2019, para. 3.1.3.

| Description | Quantity | Price in USD | Total in USD |
|---|---|---|---|
| 26.04.2013 00:00 – 19.10.2013 23:59<br>177 days 00 hours 00 minutes | 177 days | 9,350 per day | 1,654,943.51 |
| 20.10.2013 00:00 – 25.11.2013 21:35<br>36 days 21 hours 35 minutes | 36.899 days | 9.650 per day | 356,078.30 |
| 24.3.2014 00:00 – 29.3.2014 23:59<br>5 days 00 hours 00 minutes | 6 days | 9,350 per day | 56,093.51 |
| Communication, expenses, and gratuities | 7.190 months | 1,500 per month | 10,785.25 |
| | | **Grand Total:** | **USD 2,077,900.57** |

## 2. Value of cargo owned by the charterer of the *Duzgit Integrity* (Stena Oil)

### (a) The Applicant's Position

#### i. Object

96. This head of claim is intended to cover the value of the entire cargo of Marine Gas Oil ("**MGO**") and Heavy Fuel Oil ("**HFO**"), the confiscation of which by São Tomé has been found by the Tribunal to be disproportionate.[58]

#### ii. Quantum

97. Malta submits that the value of the cargo carried by the *Duzgit Integrity* at the time of its detention amounts to USD 7,780,436, broken down as follows:[59]

| Held as | Type/quality | Quantity (MT) | Value (/MT) (USD) | Total (USD) |
|---|---|---|---|---|
| Cargo | HFO(IFO380cst) | 8852 | 680,40 | 6,023,063 |
| Cargo | MGO | 1564 | 1.026,29 | 1,605,256 |
| Bunkers | HFO (IFO380cst) | 208 | 659,68 | 137,439 |
| Bunkers | MGO | 14 | 1.028,72 | 14,678 |
| **Total** | | | | **USD 7,780,436** |

98. In Malta's view, despite the Tribunal's finding that the initial measures taken by São Tomé were lawful, there should be no alternative calculation, on the basis that "the cargo was not intended for import" and that there was "no question of importation or even of an economic transaction".[60]

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58 Claim for Reparation, paras 74-75.

59 Supplementary Submission pursuant to Procedural Order No. 10, 18 September 2018, para. B.1.

60 Claim for Reparation, paras 77-80.

iii. Substantiation

99. To support its claim, Malta submits the following documents:

(a) Letter from Stena Oil AB to DS Tankers Ltd dated 22 March 2013 (**Exhibit AFE B.1**);

(b) Letter from Ince & Co (Stena Oil's Counsel) to Watson Farley & Williams (DS Tankers' Counsel) dated 19 December 2013, with accompanying annex, providing estimates of cargo-volumes on board the *Duzgit Integrity* at the time of its detention (**Exhibits AFE B.2 and AFE B.3**);

(c) Bill of Lading, Certificate of Origin and Certificate of Quality (**Exhibit AFE B.4**);

(d) Record of *Duzgit Integrity* on board own bunker volumes at time of detention (**Exhibit AFE.B.5**);

(e) Ullage Report dated 14 March 2013 (**Exhibit AFE B.6**);

(f) *Duzgit Integrity* Noon Report dated 15 March 2013 (**Exhibit AFE B.7**);

(g) *Duzgit Integrity* Noon Report dated 16 March 2013 (**Exhibit AFE B.8**);

(h) Ullage Report dated 21 March 2013 (**Exhibit AFE B.9**);

(i) Certificate of Transfer IFO380CST dated 20 October 2013 (**Exhibit AFE B.10**);

(j) Certificate of Transfer IFO380CST dated 22 October 2013 (**Exhibit AFE B.11**);

(k) Certificate of Transfer of MGO/Cargo Receipt dated 22 October 2013 (**Exhibit AFE B.12**);

(l) Record of remaining Cargo and Bunkers on board by dates from 15 March 2013 to 22 October 2013 (**Exhibit AFE B.13**); and

(m) Record of Bunkers consumed by the *Duzgit Integrity* since its detention (**Exhibit AFE B.14**).[61]

100. In its Supplementary Submission in response to the Tribunal's Procedural Order No. 10, Malta clarifies its claim as follows:

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61 Claim for Reparation, para. 82.

(a) Malta clarifies that its claim for the value of the cargo of the *Duzgit Integrity* is based on the cost to Stena Oil of sourcing the MGO and HFO and transporting it to the West African coast.[62]

(b) Malta provides, at the Tribunal's request, evidence of the market value of HFO and MGO (of the type and grade carried by the *Duzgit Integrity*) on the West African coast throughout the period from 15 March to 25 November 2013 (KPI Bridge Oil, Price Details, March-November 2013, **Exhibit AFE B.15**), noting that its claimed value was below the market value throughout the relevant period.

(c) Malta provides evidence that 334,00 MT of HFO and 27.5 MT of MGO remained in the *Duzgit Integrity*'s bunkers upon her departure from São Tomé on 25 November 2013 (Departure Report, **Exhibit AFE B.16**).

(d) Malta clarifies certain discrepancies in the volume of cargo recorded, which it considered to be "minor and acceptable in liquid cargoes due to unpumpable amounts and change of volumes due to different temperatures" [63] (Noon Report, 15 March 2013, **Exhibit AFE B.17**).

**(b) The Respondent's Position**

101. São Tomé challenges the calculation of the value of the cargo confiscated put forward by Malta. It advances that the value of HFO on board the *Duzgit Integrity* was USD 4,920,000 (approximately 8200 Metric Tons ("**MT**") at around USD 600/MT) and that the value of MGO on board was roughly USD 1,088,500 (approximately 1555 MT at around USD 700/MT). São Tomé further submits that only 1300 MT of MGO was sold, making the amount of USD 7,779,651.49 put forward by Malta "in any event" incorrect.[64]

**(c) The Tribunal's Analysis**

102. The Tribunal accepts the evidence before it with respect to the quantity of MGO and HFO aboard the *Duzgit Integrity*, both as cargo and bunkers, upon its entry into São Tomé on 15 March 2013 and the quantity in the *Duzgit Integrity*'s bunkers upon its departure on 25 November 2013. The Tribunal also accepts Malta's cost basis valuation of these cargo and bunkers, noting that this

62 Supplementary Submission pursuant to Procedural Order No. 10, 18 September 2018, para. B.1.

63 Supplementary Submission pursuant to Procedural Order No. 10, 18 September 2018, para. B.7.

64 Rejoinder, para. 223.

value was, in any event, below the market value for MGO and HFO on the West African coast throughout the relevant period. The Tribunal notes São Tomé's argument that Malta overstates the value of HFO and MGO, but considers the price evidence provided by Malta to be acceptable in the absence of further explanations from São Tomé of its argument. In the Tribunal's view, however, certain amounts claimed by Malta must be excluded from its value of cargo claim, as follows.

103. First, Malta includes within its claim both the cargo and bunkers of *Duzgit Integrity* as at 15 March 2013, when the vessel entered São Tomé. Certain amounts of both MGO and HFO were subsequently transferred from cargo to bunkers and used for the ongoing operation of the vessel while in São Tomé. While the Tribunal accepts that bunkers used during the period in which the *Duzgit Integrity* was unlawfully detained properly form part of a claim for the value of cargo, the Tribunal recalls that it found the initial detention of the vessel to be lawful. Accordingly, the Tribunal considers that the bunkers used by the *Duzgit Integrity* while in São Tomé must be pro-rated and that only that portion used during the period of unlawful detention may properly be claimed.

104. Second, the Record of remaining Cargo and Bunkers on Board provided by Malta indicates that, as of 22 October 2013 (after the majority of the cargo was transferred to the *M.T. Energizer* and slightly more than one month before the release of the vessel), 104.667 MT of MGO remained aboard the *Duzgit Integrity* as cargo.[65] Despite a question from the Tribunal, Malta has only confirmed the amount remaining in the vessel's bunkers – as opposed to cargo – upon its departure from São Tomé. While the Tribunal cannot exclude that this amount of MGO cargo was transferred to bunkers and consumed in the operation of the *Duzgit Integrity* subsequent to 22 October 2013, there is no evidence of this and it would have constituted a substantial increase in the vessel's consumption rate during its final month of detention. The Tribunal considers the most likely scenario to be that this MGO remained aboard the *Duzgit Integrity* upon its departure from São Tomé and should be excluded from Malta's claim. The same Record of remaining Cargo and Bunkers on Board also records a small discrepancy, in the amount of 86.978 MT of HFO and 29.161 MT of MGO, between the volumes recorded on 15 March 2013 and those recorded on 22 October 2015 that was written off in the Record. The Tribunal considers that this amount must also be excluded from the claim for confiscated cargo.

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65 Record of remaining Cargo and Bunkers on board by dates from 15 March 2013 to 22 October 2013 (**Exhibit AFE B.13**).

105. Third, the record indicates that the certain volumes of both MGO and HFO were transferred from the *Duzgit Integrity* to the *Marida Melissa*. According to Malta, "[w]hile both ships were detained by Sao Tome the ships were using some fuel to keep the auxiliary engines running on board to provide electricity on board. The transfers were done with the request of MARIDA MELISSA's operator and with the approval of both Stena Oil and Sao Tome authorities."[66] Malta has also submitted to the Tribunal that these amounts have not be claimed by the *Marida Melissa* and that there is no overlap in the claim.[67] The Tribunal notes that it has no information regarding what portion of the MGO and HFO transferred to *Marida Melissa* was actually consumed as bunkers, or what portion may have left São Tomé with that vessel. While the Tribunal sees nothing improper concerning the voluntary transfer of this cargo to the *Marida Melissa*, it does consider that any claim in respect of such amounts would need to be brought by the flag State of the *Marida Melissa*. Accordingly, the Tribunal considers that these amounts must also be excluded from the claim for confiscated cargo.

106. Fourth, Malta has confirmed that 334 MT of HFO and 27.5 MT of MGO remained in the bunkers of the *Duzgit Integrity* upon its departure from São Tomé. The Tribunal does not see that these amounts can possibly form part of a claim for confiscated cargo and considers that they must be excluded from Malta's claim.

107. In light of the foregoing adjustments, the Tribunal calculates the value of the *Duzgit Integrity*'s confiscated cargo, and bunkers consumed during the unlawful detention of the vessel, as follows.

| **Fuel Type** | **Quantity Transferred to *M.T. Energizer* (MT)** | **Bunkers Consumed by *Duzgit Integrity* (MT, prorated)** | **Total Confiscated or Consumed** | **Cost Basis Value (USD/MT)** | **Total (USD)** |
|---|---|---|---|---|---|
| HFO (IFO380cst) | 8088.089 | | 8088.089 | 680.40 | 5,503,135.76 |
| HFO (IFO380cst) | | 49.07441909 | 49.07441909 | 659.68 | 32,373.41 |
| MGO | 1115.157 | 213.0540192 | 1328.211019 | 1,026.29 | 1,363,129.69 |
| | | | | **Total:** | **USD 6,898,638.86** |

66 Supplementary Submission pursuant to Procedural Order No. 10, 18 September 2018, para. B.3.

67 Supplementary Submission pursuant to Procedural Order No. 10, 18 September 2018, para. B.3.

### 3. Other damages suffered by the charterer (replacement vessel hire difference, equipment transfer, ballast voyage expenses, local agents expenses, legal fees)

#### (a) The Applicant's Position

##### i. Object

108. Malta claims the present head of damages on behalf of Stena Oil for all costs incurred as a consequence of the detention of the *Duzgit Integrity* to maintain its commercial operation.[68]

##### ii. Quantum

109. Malta submits that its damages under this head amount to USD 482,691.49, including:

(a) USD 58,800 for vessel hire difference;

(b) USD 20,526.72 for equipment transfer;

(c) USD 251,529.73 for ballast voyage expenses; and

(d) USD 151,535.04 for legal expenses.[69]

##### iii. Substantiation

110. Malta refers to the letter from Ince & Co (Stena Oil's Counsel) to Watson Farley & Williams (DS Tankers' Counsel) dated 19 December 2013 (**Exhibit AFE C.1**) to substantiate its claim.

111. In its Supplementary Submission in response to the Tribunal's Procedural Order No. 10, Malta clarifies its claim as follows:

(a) Malta corrects certain discrepancies in its calculations under this head of claim.[70]

(b) Malta elaborates on the rationale for the additional cost of a replacement vessel and ballast voyage.[71]

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68 Claim for Reparation, para. 83.

69 Claim for Reparation, para. 84. Note: the above-listed amounts do not add up to the total being claimed by Malta under this head of claim (USD 331,007.98).

70 Supplementary Submission pursuant to Procedural Order No. 10, 18 September 2018, paras. C.1-C.2.

71 Supplementary Submission pursuant to Procedural Order No. 10, 18 September 2018, paras. C.3-C.4.

(c) Malta declines to provide further supporting documentation to substantiate the expenses claims, noting that "the amounts claimed are based on Stena Oil's claim and, therefore, it cannot provide any supporting documentation other than its claim."[72]

**(b) The Respondent's Position**

112. São Tomé submits that these represent amounts that the charterer would have incurred under the charter party agreement absent the events in 2013 in any event and that they therefore cannot be regarded as damages.[73]

**(c) The Tribunal's Analysis**

113. In the Tribunal's view, Malta's claim for damages suffered by the charterer faces a serious issue of sufficiency of evidence. In its Claim for Reparation, Malta submitted that "[u]pon request of the Tribunal, Malta can request detailed copy of those claims to Stena's counsel."[74] The Tribunal requested such detailed substantiation in its Procedural Order No. 10, but was met with the response that further evidence was unavailable.

114. As a result, the only evidence before the Tribunal in respect of this head of claim is a letter from counsel to Stena Oil detailing the amounts claimed. While the Tribunal does not doubt that Stena Oil incurred some costs as a result of the detention of the *Duzgit Integrity* and considers that these costs could be potentially recoverable by Malta as the flag State of the vessel, the evidence before it does not permit the Tribunal to consider Malta's claim to be "well founded in fact and law." The Tribunal considers that Malta has not met its burden of proof with respect to this head of claim.

**4. Payment made by DS Tankers as part of the Settlement Agreement to release the *Duzgit Integrity***

**(a) The Applicant's Position**

i. Object

115. Under this head of damage, Malta requests reimbursement of the amount paid by DS Tankers to São Tomé under the Settlement Agreement. Malta reasons that the circumstances leading up to

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72 Supplementary Submission pursuant to Procedural Order No. 10, 18 September 2018, para. C.5.

73 Rejoinder, para. 223.

74 Claim for Reparation, para. 86(a).

the negotiation and conclusion of that agreement were unlawfully and unjustifiably created by São Tomé, as confirmed by the Tribunal in its earlier finding.[75] Therefore, from Malta's perspective, "all actions and measures [that] São Tomé sought to justify by such circumstances", including the payment it received under the Settlement Agreement, are invalid.[76] Malta submits that the Tribunal's finding that the Settlement Agreement was not concluded under duress does not prevent it from reclaiming on behalf of DS Tankers the unjustified payment made in respect of an unlawful situation.[77]

ii. Quantum

116. Malta's claim under this head of claim amounts to USD 626,048.84, representing the amount paid by DS Tankers to São Tomé under the Settlement Agreement.

iii. Substantiation

117. Malta relies on the following documents to substantiate its claim:

(a) The Settlement Agreement dated 23 November 2013 (**Exhibit AFE 41**);

(b) A Remittance (swift transfer) bank note dated 25 November 2013 (**Exhibit AFE D.1**).

118. In its Supplementary Submission in response to the Tribunal's Procedural Order No. 10, Malta clarifies that the amount claimed of USD 1,048.84 additional to the amount of the settlement (USD 625,000) represent bank transfer charges.

**(b) The Respondent's Position**

119. In São Tomé's view, the amount offered by DS Tankers to São Tomé to settle the dispute cannot be regarded as having been paid under duress and the fact that the agreed settlement amount was higher than the offer does not make the settlement null and void.[78] It argues that, in any event, this constitutes one of the claims brought by Malta in relation to damages suffered by DS Tankers,

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75 Claim for Reparation, paras 91-95.

76 Claim for Reparation, para. 96.

77 Claim for Reparation, paras 97-98.

78 Rejoinder, para. 223.

which accordingly "must be dismissed" in light of the fact that the vessel's owner waived its right to bring any claim against São Tomé in the Settlement Agreement.[79]

#### (c) The Tribunal's Analysis

120. The Tribunal considers the amount paid by DS Tankers pursuant to the Settlement Agreement to be well documented, both by the Settlement Agreement itself and by evidence of the bank transfer through which it was paid. However, while Malta has asserted that the additional claim of USD 1,048.84 relates to bank charges on the transfer payment, it has provided no evidence of this. The Tribunal is of the view that, in the absence of evidence, it cannot consider this aspect of Malta's claim to be "well founded in fact and law" and considers that the bank charges must be excluded from Malta's claim.

121. The Tribunal will address the effect of the Settlement Agreement on Malta's claims separately below (see paragraphs 186 to 192).

### 5. Port agency expenses (remuneration of Agência Equador)

#### (a) The Applicant's Position

##### i. Object

122. Malta notes that, during the detention of the *Duzgit Integrity*, DS Tankers had to retain a local agency representative, Agência Equador, to act on its behalf. DS Tankers remunerated Agência Equador for the work it carried out in that regard, including the provision of administration and operational support and supplies for the vessel to "maintain [it] in a basic state of idle operation for basic subsistence, health and safety of the crew".[80] Malta submits that the payment it made to Agência Equador covers the period from 15 March 2013 until 25 November 2013, the date on which the vessel was released. Malta now, claims, on behalf of DS Tankers, reimbursement of that payment.

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79 Counter-Memorial, paras. 225, 421; Rejoinder, para. 216.

80 Claim for Reparation, para. 104.

ii. Quantum

123. According to Malta, the total expenses relating to agency and port fees incurred by DS Tankers amount to USD 172,215.54.[81]

iii. Timing

124. Alternatively, in light of the Tribunal's finding that the initial actions and measures taken by São Tomé were justified, Malta proposes that any reduction in the amount of damages should be confined to the first ten days of detention.[82]

iv. Substantiation

125. This head of claim is substantiated by Malta with the list of expenses and accompanying documents, including copies of the bank transfers to the local agent (**Exhibit AFE E.1**).

126. In its Supplementary Submission in response to the Tribunal's Procedural Order No. 10, Malta clarifies the discrepancy between its itemized expenses and the amounts transferred to its port agent, Agência Equador. Malta notes that the larger amount was advanced to Agência Equador, but that the agent "although . . . requested several times never sent to Owners the Final DA (Disbursement Amount)."[83]

**(b) The Respondent's Position**

127. São Tomé contends that the amount that the local agent 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.[84] It contends that, in any event, this constitutes one of the claims brought by Malta in relation to damages suffered by DS Tankers, which "must be dismissed" in light of the fact that the vessel's owner waived its right to bring any claim against São Tomé in the Settlement Agreement.[85]

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81 Claim for Reparation, para. 106.

82 Claim for Reparation, para. 109.

83 Supplementary Submission pursuant to Procedural Order No. 10, 18 September 2018, para. E.1.

84 Rejoinder, para. 223.

85 Counter-Memorial, paras. 225, 421; Rejoinder, para. 216.

**(c) The Tribunal's Analysis**

128. The Tribunal considers that Malta has substantiated the expenses incurred by Agência Equador through 8 November 2013. These amount to a fee of Euro 26,750 to Agência Equador for its representation from 30 March through 31 October 2013 (calculated at a rate of EUR 125 per day), as well as EUR 84,702.74 in miscellaneous expenses, all of which appear reasonably related to the *Duzgit Integrity*.

129. Malta has not documented the fees of Agência Equador for November 2013 or expenses incurred between 8 and 25 November 2013, except through evidence of the amounts transferred to Agência Equador. The Tribunal is prepared to accept this as sufficient evidence to conclude that Agência Equador's daily fee of EUR 125 continued through the departure of the *Duzgit Integrity* on 25 November 2013. This, however, still leaves EUR 9,922.52 of the amount transferred to Agência Equador unaccounted for. While the Tribunal has no reason to doubt that the remaining amount transferred to the port agent was also disbursed for expenses related to the final weeks of the *Duzgit Integrity*'s detention, the Tribunal cannot consider these expenses to be "well founded in fact and law" in the absence of evidence.

130. The Tribunal also considers that the fees of Agência Equador and those expenses incurred by the port agent during the period in which the *Duzgit Integrity* was lawfully detained (15 March – 26 April 2013) must be excluded from this head of claim. Accordingly, the Tribunal considers the amount of EUR 108,170.01 to be compensable under this heading.

131. The Tribunal will address the effect of the Settlement Agreement on Malta's claims separately below (see paragraphs 186 to 192).

**6. Legal expenses incurred through some months of the period of the detention of the *Duzgit Integrity* (legal counsel, technical consultants and financial analysts) prior to the institution of this arbitration**

**(a) The Applicant's Position**

i. Object

132. Under this head of damages, Malta seeks to obtain, on behalf of DS Tankers, reimbursement of the expenses it incurred for legal counsel and other technical consultants and financial analysts

instructed to assist during the national legal proceedings and other discussions, as well as in preparation for arbitration before an international tribunal.[86]

ii. Quantum

133. Malta submits that, under this head of claim, DS Tankers incurred a total amount of USD 339,942.15, representing the fees it paid to the following law firms and legal advisors: SJ Berwin LLP (later King & Wood Mallesons LLP), France P&I, Raposo Bernardo, Reed Smith, Temple Translation, Pascoal Daio & Albero Paulino and Advocate Ilke Yener of Yener & Esenyel. Malta notes that it did not include in this amount the costs of local counsel retained on the first few days of the vessel's detention; it therefore rejects any alternative calculation.[87]

iii. Substantiation

134. This head of claim is substantiated by Malta with:

(a) A summary table of the relevant invoices (**Exhibit AFE F.1**);

(b) A copy of all invoices from law firms and translation costs (**Exhibit AFE F.2**).[88]

135. In its Supplementary Submission in response to the Tribunal's Procedural Order No. 10, Malta clarifies its claim as follows:

(a) Malta provides copies of certain invoices missing from its Claim for Reparation (**Exhibit AFE F.3**).

(b) Malta clarifies the relationship among the various providers of legal services and elaborated generally only the role of each firm or attorney.[89]

**(b) The Respondent's Position**

136. São Tomé makes no specific submissions in relation to this claim. It simply argues that it constitutes one of the claims brought by Malta in relation to damages suffered by DS Tankers,

86 Claim for Reparation, para. 111.

87 Claim for Reparation, para. 112.

88 Claim for Reparation, para. 115.

89 Supplementary Submission pursuant to Procedural Order No. 10, 18 September 2018, paras. F.2-F.3.

which "must be dismissed" in light of the fact that the vessel's owner waived its right to bring any claim against São Tomé in the Settlement Agreement.[90]

**(c) The Tribunal's Analysis**

137. The Tribunal accepts that Malta has substantiated the expenses incurred by DS Tankers for legal support in relation the detention of the *Duzgit Integrity*. The Tribunal is of the view, however, that this head of claim is only partially compensable, for two reasons:

(a) First, Malta's legal expenses claim includes a claim for legal work conducted during the initial period of detention, which the Tribunal has found to have been lawful and which must necessarily be excluded from reparation.

(b) Second, Malta's legal expenses claim includes work done in preparation for these arbitral proceedings. In its Award on Jurisdiction and the Merits, the Tribunal held that "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."[91] The Tribunal went on to order, unanimously, that "the Parties shall bear their own legal costs."[92] In its Claim for Reparation, Malta has excluded any claim for legal expenses incurred after the commencement of these proceedings. In the Tribunal's view, however, the Parties' legal costs, which they must themselves bear, include work done in preparation for these proceedings, prior to the formal submission of the notice of arbitration. These amounts have not been excluded from Malta's claim.

138. The invoices provided by Malta include varying levels of detail. In some instances, it is possible to determine the date on which services were provided and the nature of the work done. Other invoices, however, are more general. In its Procedural Order No. 10, the Tribunal invited Malta to

> detail the nature of the work done under each invoice sufficiently to enable the Tribunal to confirm the link between the work done and the detention of the vessel and to confirm that the work done did not relate to the initial, justified detention of the *Duzgit Integrity* or to the initial preparation of a potential claim under the UN Convention on the Law of the Sea.[93]

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90 Counter-Memorial, paras. 225, 421; Rejoinder, para. 216.

91 Award on Jurisdiction and the Merits, para. 341.

92 Award on Jurisdiction and the Merits, para. 342(F).

93 Procedural Order No. 10, 18 June 2018, para. F.3.

The Tribunal regrets that Malta has only partially fulfilled this invitation, providing only a series of general statements regarding the work done by each of DS Tankers' counsel.

139. Under the circumstances, the Tribunal is of the view that the evidence of DS Tankers' legal expenses in respect of the *Duzgit Integrity* should be treated as follows:

(a) Invoiced amounts for local counsel for work conducted while the *Duzgit Integrity* was lawfully detained must be excluded.

(b) Invoiced amounts for local counsel for work conducted during the *Duzgit Integrity*'s unlawful detention are compensable.

(c) Invoiced amounts for local counsel for work covering both periods should be pro-rated.

(d) Invoiced amounts for work done by SJ Berwin must be excluded in keeping with the Tribunal's decision that the Parties shall each bear their own legal costs. Malta has indicated that SJ Berwin was principally responsible for preparing the notice of arbitration, but has not provided the detail to distinguish work done in relation to the arbitration from other work.

(e) Invoiced amounts for work done by Reed Smith are compensable, but must be reduced to exclude amounts related to the preparation of an ITLOS claim or consultation with SJ Berwin.

(f) Invoiced amounts for translation work following the date of breach should be awarded.

140. Applying the foregoing principles, the Tribunal considers that Malta's claim for legal expenses would be reduced to the following:

| **Provider** | **Compensable Amount** |
|---|---|
| SJ Berwin LLP | EUR 0 |
| France P&I (includes Pascoal Daio, Alberto Paulino, SVNF, Jean-Marie Ecrepont) | EUR 54,086.56 |
| Raposo Bernardo | EUR 22,500.00 |
| Reed Smith LLP | GBP 52,389.96 |
| Temple Translation | GBP 2,470.44 |
| Pascoal Daio & Alberto Paulino (initial fees) | USD 0 |
| Ilke Yener | USD 0 |

141. The Tribunal will address the effect of the Settlement Agreement on Malta's claims separately below (see paragraphs 186 to 192).

### 7. Travel expenses incurred (travelling costs of owners, representatives, lawyers, ship's crew, etc. for the purposes for finding an amicable solution, legal investigation, keeping informed of mortgage bank purposes)

#### (a) The Applicant's Position

##### i. Object

142. The object of this head of claim for Malta is to recover the travel costs incurred by DS Tankers during the detention of the *Duzgit Integrity*, including travel expenses of the owners themselves, its lawyers and ship crew to São Tomé, London (where its maritime lawyers are based) and Bremen (where the bank which, at the time, had a mortgage and a loan on the vessel, is headquartered).[94] Malta explains that such expenses were incurred "directly and exclusively as a result of the Vessel's prolonged detention", which has been found by the Tribunal to be unjustified.[95]

##### ii. Quantum

143. The relevant travel expenses amount to a lump sum of USD 67,381.48.[96] In this respect, Malta requests the Tribunal to assess this sum *ex aequo et bono*.[97]

##### iii. Substantiation

144. This head of claim is substantiated by Malta with a list of invoices from relevant travel agencies (**Exhibit AFE G.1**).[98]

145. In its Supplementary Submission in response to the Tribunal's Procedural Order No. 10, Malta clarifies its claim as follows:

(a) Malta provides a further 27 invoices relating to travel expenses (**Exhibit AFE G.1'**).

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94 Claim for Reparation, paras 116-117.

95 Claim for Reparation, paras 118 and 121.

96 Claim for Reparation, para. 119.

97 Claim for Reparation, para. 121.

98 Claim for Reparation, para. 120.

(b) Malta provides a general statement regarding the purpose of travel by persons associated with the *Duzgit Integrity*.

**(b) The Respondent's Position**

146. São Tomé makes no specific submissions in relation to this claim. It simply argues that it constitutes one of the claims brought by Malta in relation to damages suffered by DS Tankers, which "must be dismissed" in light of the fact that the vessel's owner waived its right to bring any claim against São Tomé in the Settlement Agreement.[99]

**(c) The Tribunal's Analysis**

147. In the Tribunal's view, Malta's claim for travel expenses faces a serious issue of sufficiency of evidence. Malta's evidence in support of this claim consists of several dozen invoices from travel agents, predominantly in Turkish and provided without translation.[100] Accordingly, in its Procedural Order No. 10, the Tribunal invited Malta to

> detail its claim for travel expenses sufficiently to enable the Tribunal to appreciate for each trip: (a) who was traveling; (b) the destination of the trip; (c) the purpose of the trip and the relationship to the detention of the *Duzgit Integrity*; and (d) the expenses incurred (including any applicable currency conversion).[101]

148. The Tribunal regrets that Malta has only partially fulfilled this invitation, providing only additional invoices, again without translation, and a general statement on the types of the travel undertaken. While the Tribunal does not doubt that much, or perhaps even all, of the travel undertaken by DS Tankers' representatives was necessary and related to the detention of the vessel, the record before the Tribunal does not permit it to conclude that Malta's claim is "well founded in fact and law." The Tribunal considers that Malta has not met its burden of proof with respect to this head of claim.

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99 Counter-Memorial, paras. 225, 421; Rejoinder, para. 216.

100 Article 13(2) of the Tribunal's Rules of Procedure provides that "[w]hen a document submitted to the Arbitral Tribunal is written in a language other than English, the relevant or applicable sections or text shall be accompanied by an informal translation into English." Malta's submission did not comply with this rule and leaves the Tribunal unable to evaluate the evidence provided.

101 Procedural Order No. 10, 18 June 2018, para. G.2.

### 8. Classification expenses and extension of Class expenses

#### (a) The Applicant's Position

##### i. Object

149. Malta claims, under this head, costs paid by DS Tankers to cover the classification expenses and the extension of Class expenses for the *Duzgit Integrity*, both of which expired on 31 March 2013. Malta contends that such costs were incurred as a direct result of the prolonged detention of the vessel, which prevented the vessel from attending the scheduled reclassification and to maintain its classification.[102]

##### ii. Quantum

150. The total amount being claimed under this head is USD 21,209.27.[103]

##### iii. Substantiation

151. To support its claim, Malta submits the following documents:

(a) A Bureau Veritas invoice dated 13 May 2013 (**Exhibit AFE H.1**);

(b) A Bureau Veritas invoice dated 16 August 2013 (**Exhibit AFE H.2**); and

(c) A Bureau Veritas invoice dated 9 December 2013 (**Exhibit AFE H.3**).[104]

152. In its Supplementary Submission in response to the Tribunal's Procedural Order No. 10, Malta clarifies its claim as follows:

(a) Malta elaborates on the extension of class process and why repeated reclassification was required in 2013.

(b) Malta provides six missing invoices in relation to extension of class expenses (**Exhibits AFE H.4-H.9**)

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102 Claim for Reparation, paras 122-125.

103 Claim for Reparation, para. 123.

104 Claim for Reparation, para. 127.

### (b) The Respondent's Position

153. São Tomé notes that, since DS Tankers was due to incur classification expenses in any event, these cannot be regarded as damages.[105] It contends that, in any event, this constitutes one of the claims brought by Malta in relation to damages suffered by DS Tankers, which "must be dismissed" in light of the fact that the vessel's owner waived its right to bring any claim against São Tomé in the Settlement Agreement.[106]

### (c) The Expert's Report

154. In his expert report, the Tribunal's expert marine surveyor suggested that the claimed costs of the *Duzgit Integrity*'s class extension are only partially related to the detention of the vessel. Mr. van Oosterhout noted that "[t]he invoices under H1 and H2 are issued respectively in May and August 2013, during the time of the detention. It is unclear what kind of works [Bureau Veritas] actually executed. There are no reports from their visits in these months."[107] He went on to note, however, that "[t]he third invoice from December 2013 would seem to be for regular survey work, which would also have been carried out during regular dry dock."[108]

### (d) The Tribunal's Analysis

155. The Tribunal considers that Malta has substantiated the amounts spent by DS Tankers on the extension of the *Duzgit Integrity*'s class certification, but that only those amounts related to the certification of the vessel during its unlawful detention may properly be claimed as reparation. The Tribunal also accepts its expert's view that the work done by Bureau Veritas following the release of the *Duzgit Integrity* would have been undertaken in any event.

156. Accordingly, the Tribunal considers that Malta's claim under this heading must be reduced to include only the five Bureau Veritas invoices issued between 13 May and 11 October 2013, totalling Euro 10,150.00.

157. The Tribunal will address the effect of the Settlement Agreement on Malta's claims separately below (see paragraphs 186 to 192).

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105 Rejoinder, para. 223.

106 Counter-Memorial, paras. 225, 421; Rejoinder, para. 216.

107 Expert Report of Mr. Peer van Oosterhout, BMT Netherlands B.V., 15 May 2019, para. 3.1.7.

108 Expert Report of Mr. Peer van Oosterhout, BMT Netherlands B.V., 15 May 2019, para. 3.1.7.

### 9. Wear and tear (extraordinary) on the *Duzgit Integrity*

#### (a) The Applicant's Position

##### i. Object

158. This head of claim is intended to cover reparation costs for the additional and extraordinary wear and tear on the *Duzgit Integrity* caused by its prolonged detention and idleness beyond its normal usage.[109] Malta submits that, the vessel's eight months of anchorage in the hot waters of Equateur "coupled with the low maintenance able to be carried out during that time" resulted in significant damage to its steel structure and on board equipment. It adds that the vessel's coatings "were not able to preserve their quality after keeping a heated cargo of fuel oil in tank" during that same period of time.[110]

##### ii. Quantum

159. The total amount being claimed under this head is USD 432,172.86, representing the difference between the originally anticipated expenses of dry-docking in Las Palmas and the actual costs of repair.[111] According to Malta, this amount mainly comprises the cost of the Marine Line coating repair, which was USD 390,000.[112]

##### iii. Substantiation

160. Malta relies on the following documents to substantiate its claim:

(a) The *Duzgit Integrity* Las Palmas Special Survey Shipyard Budget from ASTICAN, Shipyard at Las Palmas in the Canary Islands (**Exhibit AFE I.1**);

(b) A record of repairs, spare parts and related costs in Gibraltar in 2013 (**Exhibit AFE I.2**);

(c) A record of repairs, spare parts and related costs in Gibraltar in 2014 (**Exhibit AFE I.3**); and

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109 Claim for Reparation, para. 129.

110 Claim for Reparation, para. 130.

111 Claim for Reparation, para. 131.

112 Claim for Reparation, para. 133.

(d) Three invoices and proof of payment from Gibdock, the shipyard at Gibraltar (**Exhibit AFE. I.4**).[113]

161. In its Supplementary Submission in response to the Tribunal's Procedural Order No. 10, Malta clarifies its claim as follows:

(a) Malta submits that all of the work done in Gibraltar, with the exception of the class renewal survey, would not have been done in Las Palmas.[114]

(b) Malta states that much of the work done at Gibraltar was undertaken at increased cost, due to more work being required as a result of the detention of the vessel.[115]

(c) Malta clarifies certain currency discrepancies in the invoices and documents provided.[116]

162. In response to the questions posed by the Tribunal's expert marine surveyor, Malta provides copies of the following additional documents and materials:

(a) The Bureau Veritas Survey Report of the *Duzgit Integrity* dated 24 March 2014;

(b) Photos of work performed on the reduction gear box output shaft and a copy of a report by marine surveyors Evdemon, Ertem & Partners dated 14 March 2014;

(c) The Bureau Veritas Survey Report of the *Duzgit Integrity* dated 4 January 2013;

(d) E-mail correspondence with the Astican shipyard in Las Palmas from March 2013 concerning the scope of planned works;

(e) A quotation from the Astican shipyard in Las Palmas dated 5 March 2013;

(f) Invoices from Industrial & Marine Supplies Ltd.; Smith Imossi Shipping Agents and Insurance; Armona Denizcilik A.Ş.; Borusan Makina ve Güç Sistemleri; Düzgit Gemi Inşa Sanayi A.Ş.; Emerson Process Management; EMS Ship Supply (Gibraltar) Ltd.; Gali Internacional S.A.; GEA Westfalia Separator Group GmbH; HTI-GESAB GmbH; Metro Otomotiv Ticaret Ltd. ŞTI.; Neta Denizcilik; Yurtdişi Harcama Listesi; Özsay Deniz Elektroniği A.Ş.; Scanjet Marine AB; Soyteknik Endüstriyel Malz.San.Tic.A.Ş.; Topsafe

113 Claim for Reparation, para. 134.

114 Supplementary Submission pursuant to Procedural Order No. 10, 18 September 2018, para. I.3.

115 Supplementary Submission pursuant to Procedural Order No. 10, 18 September 2018, para. I.4.

116 Supplementary Submission pursuant to Procedural Order No. 10, 18 September 2018, paras. I.2, I.5, I.6.

Co. Ltd.; Valveco -technical supply- Algeciras S.L.U.; Wouter Witzel Eurovalve B.V. in respect of materials and works undertaken in Gibraltar;

(g) The Gibdock Arrival Inspection Report dated 30 December 2013 and photos from the December 2013 drydocking of the *Duzgit Integrity*;

(h) The Dieter Weiß Survey Report of the *Duzgit Integrity* dated 14 December 2013 and accompanying photos;

(i) Photos of the *Duzgit Integrity* taken between January 2012 and May 2013;

(j) The Jotun Drydocking Report and accompanying documents concerning the paint of the *Duzgit Integrity*;

(k) A signed copy of the Gibdock invoice dated 31 January 2014;

(l) Photos showing the condition of the main deck (in connection with blasting and painting) and damage to the port and starboard side main deck steel repairs;

(m) Three additional invoices issued by Gibdock;

(n) Copies of the *Duzgit Integrity*'s Port State Control Reports;

(o) Clarification of the repairs to the tail shaft, PV valves, and piping;

**(b) Respondent's Position**

163. São Tomé makes no specific submissions in relation to this claim. It simply argues that it constitutes one of the claims brought by Malta in relation to damages suffered by DS Tankers, which "must be dismissed" in light of the fact that the vessel's owner waived its right to bring any claim against São Tomé in the Settlement Agreement.[117]

**(c) The Expert's Report**

164. With respect to whether "the extraordinary repair work undertaken at Gibraltar was necessary and related to damage reasonably caused by the prolonged detention of the vessel in São Tomé", the Tribunal's expert marine surveyor concluded as follows:

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117 Counter-Memorial, paras. 225, 421; Rejoinder, para. 216.

> The additional cleaning underwater by divers can reasonably be fully attributed to the detention. The subsequent blasting and paint jobs can partly be considered a result of the detention. The blasting and the first two (2) layers of paint are suggested to be accounted for 50% to the detention.
>
> The costs for docking are not for the detention, the Vessel needed to be docked anyhow. That also counts for the days in dry-dock, although not for all days. I have not come across clear indications that the time in dry dock was prolonged on account of the detention. For example, the painting was completed before the repairs to the gearbox and refitting of the propeller shaft were completed, which were necessary for the vessel to leave the dry dock.
>
> I have suggested to split the dry dock costs as 75/25, considering that more time was needed for Owners' work and less for works as a result of the detention.
>
> In the overview of the costs of the shipyard and the individual invoices, it can be seen how and why certain costs are suggested to be for account of Owners or detention. Eventually, it is concluded that the majority of costs were for works or parts that would have also been required had the detention not taken place.[118]

165. With respect to whether "whether the costs of the extraordinary repair work were reasonable in light of the work done," the Tribunal's expert concluded as follows:

> Based on the provided documentation, I have concluded that the majority of costs claimed by Malta are not related to the detention. The final allocated costs that would be related to the detention, on basis of the provided documentation, have been summarised as follows:

| | | |
|---|---|---|
| - Provided separate invoices : | 11.6 | GBP 3,449.00 |
| | 11.7.4 | EUR 3,885.00 |
| | 11.7.11 | EUR 1,201.00 |
| - Gibdock invoices, 11.11.13 : | 3509 | GBP 78,106.00 |
| | 3536 | GBP 6,360.00 |

166. In its comments, Malta contested the Tribunal expert's conclusions and suggested that a significantly higher proportion of the repair costs should be considered as related to the detention of the vessel.

### (d) The Tribunal's Analysis

167. Malta's claim under this heading is technical in nature and depends upon knowledge of marine surveying to assess whether particular repairs were factually related to the detention of the *Duzgit Integrity*. In light of this, the Tribunal considered it essential to have recourse to an expert marine surveyor.

168. The Tribunal also considered it essential that it have before it supporting documents in respect of all of Malta's claimed expenses. In this respect, the Tribunal's Procedural Order No. 10 requested Malta to provide

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118 Expert Report of Mr. Peer van Oosterhout, BMT Netherlands B.V., 15 May 2019, para. 3.1.5.

> copies of invoices to substantiate all of the repair work undertaken in Gibraltar on the *Duzgit Integrity*, in addition to the three invoices from Gibdock provided in document AFE I4, together with sufficient explanatory detail for the Tribunal, or an expert in marine surveying, to understand and appreciate the nature of the work done.[119]

At the request of its expert, the Tribunal again requested in October 2018 that Malta provide "Copies of the specific invoices or reports (for all amounts exceeding US$5,000 and in addition to the three invoices set out in Annex AFE I.4) supporting the figures set out in Annex AFE I.3 to Malta's Claim for Reparation".[120] Malta provided a large number of invoices further to these requests, and the Tribunal considers that Malta was afforded ample opportunity to document its claims.

169. Despite Malta's repeated assertion that a significant portion (allegedly USD 390,000) of the costs of repairs to the *Duzgit Integrity* related to the replacement of the MarineLine epoxy coating of the cargo tanks, the Tribunal can find no evidence that this repair was actually undertaken, or paid for. The Dieter Weiß Survey Report, carried out in December 2013 at Gibraltar notes that "[a]ll cargo tanks are made of mild steel and were reported to be in satisfactory condition without structural deficiencies but locally in need of some upgrade to the epoxy coating MARINELINE SYSTEM."[121] These local problems, however, were not considered sufficiently important to address in the Report's conclusions, which focused on the topside and hull condition of the vessel. Nor does any expense related to the replacement of the MarineLine coating appear in any of the invoices provided by Malta. The Tribunal can only conclude that this repair was most likely not undertaken or, in any event, that Malta has not met its burden of proof to demonstrate that this claim is "well founded in fact and law."

170. With respect to those expenditures that have been substantiated with evidence, the Tribunal understands the conclusions of its expert to be essentially as follows. A significant portion of work performed on the *Duzgit Integrity* was related to pre-existing damage to the reduction gears that required the removal of the tailshaft and rudder. Damage to the alignment of the engine, gearbox, and tailshaft would not reasonably be expected to worsen while at anchor and should thus be considered unrelated to the detention of the vessel. Work on the reduction gear and tailshaft, rather than other repairs, controlled the timing of the vessel's departure from Gibraltar, such that the extended time in port cannot be considered related to the detention. Photos of the *Duzgit Integrity* taken upon its arrival in Gibraltar show a level of corrosion and deterioration that significantly exceeds that which could occur during an eight-month period, even with the vessel

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119 Procedural Order No. 10, 18 June 2018, para. 1.I.1.

120 Letter to the Parties, 10 October 2018.

121 Dieter Weiß, *MT Düzgit Integrity Survey Report in December 2013*, p. 11.

immobile in tropical waters, although the detention would certainly have exacerbated the condition. And photos of the *Duzgit Integrity* from January 2012, over year before the detention of the vessel, also already show significant corrosion and coating breakdown. Accordingly, the majority of the work performed on the *Duzgit Integrity* would have been required in any event, regardless of the detention.

171. The Tribunal has carefully considered Malta's response to the expert's report, but does not see that Malta has provided evidence that could lead to a different conclusion. Malta's assertion that "the extended detention in Sao Tome could be the reason of deteriorating alignment of main engine, reduction gear and shaft thus requiring additional repairs"[122] is essentially speculative. Likewise, Malta asserts that the *Duzgit Integrity* remained longer in Gibraltar than would otherwise have been the case, but does not confront Mr. van Oosterhout's analysis that this was due to factors unrelated to the detention.

172. Rather than follow Malta's approach of reducing its total actual expenditure in Gibraltar by its budgeted expenditure in Las Palmas and crediting the difference to the detention of the vessel, the Tribunal considers it more appropriate to identify the specific items of work that were required, or exacerbated, by the detention of the vessel. Expenses relating to the maintenance of the vessel in dry dock would appropriately be apportioned and considered partially compensable. Adopting this approach, the Tribunal concludes that Malta's claim for extraordinary repairs must be reduced to cover only the following items:

(a) Twenty-five percent of the agency fees invoiced by Smith Imossi;

(b) Fifty percent of the amount invoiced by Emerson for the attendance of a service engineer;

(c) Twenty-five percent of the invoice from Ogün Yavuz Masraf for food, lodging, transport;

(d) Twenty-five percent of the Gibdock fees invoiced for days in dry dock, spillage assistance, shore power, and fire line pressure;

(e) Fifty percent of the Gibdock fees for hull scraping, grit blasting, the first two coats of paint on the hull, the cleaning and painting of the sea chest grids, the refitting of the bow thrusters, and propeller polishing;

(f) One hundred percent of the Gibdock fees for diver work.

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122 Malta's Comments to the Report of the Tribunal's Expert Mr. Peer van Oosterhout, 14 June 2019.

173. In total, these compensable expenses amount to GBP 87,914.90 and EUR 5,085.93.

## 10. Damages and other losses suffered by the master and crew of the *Duzgit Integrity*, including moral damages and damages to the reputation and business relations of the owners, charterers and all parties associated with the vessel

### (a) The Applicant's Position

#### i. Object

174. Under this head, Malta seeks to claim compensation for non-material damages, which have been awarded for wrongful detention in *M/V "SAIGA" (No.2)* and *Admadou Sadio Diallo*.[123] Such damages, Malta alleges, have been suffered by the owners, charterers, master, crew and all persons associated with the *Duzgit Integrity*.

175. On the one hand, Malta observes that the arrest of the *Duzgit Integrity* by São Tomé, along with the allegation of smuggling, was reported by Lloyd's List Intelligence ("**LLI**"), a world-renowned information service with wide coverage, as well as several press articles.[124] Malta asserts that such widely publicised but wrongful allegation has severely affected and will continue to damage the reputation of the vessel's owners and charterers.[125] Malta points to the enquiries made by global companies who were interested in chartering the *Duzgit Integrity* regarding the LLI report.[126] Furthermore, Malta alleges that a company even considered the vessel "unacceptable for future . . . business".[127] Malta takes the view that a damaged reputation will necessarily result in "loss of business relations and loss of income" for the owners and charterers, which can be immeasurable, particularly in cases where they have not been given the opportunity to defend themselves.[128]

176. On the other hand, Malta submits that measures imposed by São Tomé have caused moral damages for the master and the crewmembers.[129] In respect of the master, he was subject to an

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123 Claim for Reparation, para. 136 *referring to* the *M/V "SAIGA" (No.2)* (Saint Vincent and the Grenadines v. Guinea), Judgement of 1 July 1999, para. 175; *Ahmadou Sadio* Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgement, I.C.J. Reports 2012, p. 324, paras 21-24.

124 Claim for Reparation, paras 138-140 and 149 *referring to* Report on the arrest of the *Duzgit Integrity* by LLI (**Exhibit AFE J.1**).

125 Claim for Reparation, para. 137.

126 Claim for Reparation, paras 143-144 *referring to* E-mail correspondence between BP and DS Tankers (**Exhibit AFE J.2**); E-mail correspondence from Chevron Tankers Ltd (**Exhibit AFE J.3**).

127 Claim for Reparation, para. 145 *referring to* E-mail correspondence between BP and DS Tankers (**Exhibit AFE J.2**).

128 Claim for Reparation, para. 150.

129 Claim for Reparation, para. 151.

unfair judicial process, wrongfully convicted of serious offences, and imprisoned.[130] As a consequence, he had to undergo medical treatment upon his return to Turkey.[131] Concerning the crewmembers, Malta submits that they were subject to ill treatment, particularly after 11 October 2013.[132]

ii. Quantum

177. Malta proposes an amount of USD 1,200,000, comprising of: USD 500,000 for the owners, USD 300,000 for Stena Oil, USD 150,000 for the Master and USD 250,000 for other crew members.[133] In Malta's submission, this amount is estimated based on the principle of equity and adequate compensation.[134] With specific regard to the human right violation of the master, Malta suggests that the Tribunal follow the practice of international human rights courts and tribunals, which usually awards compensation for emotional/moral harm in the form of pecuniary compensation.[135] Lastly, Malta adds that the above amount has accounted for the Tribunal's declaration that the initial detention of the vessel was lawful.[136]

178. In its Supplementary Submission in response to the Tribunal's Procedural Order No. 10, Malta clarifies that "there were 17 crew members on board the *Duzgit Integrity*, however the Crew members onboard was reduced to 15 (including Master) during the detention period."[137]

**(b) The Respondent's Position**

179. São Tomé makes no specific submissions in relation to this claim. However, the portion of the claim relating to damages suffered by DS Tankers could be said to fall under "other damages that have not been specified" in the preceding phase of these proceedings and which, according to São Tomé, "must be dismissed" in light of the fact that the vessel's owner waived its right to bring any claim against São Tomé in the Settlement Agreement.[138]

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130 Claim for Reparation, para. 153.

131 Claim for Reparation, para. 153.

132 Claim for Reparation, para. 151.

133 Claim for Reparation, para. 158.

134 Claim for Reparation, para. 154.

135 Claim for Reparation, paras 155-157 *referring to* Article 41 of the European Convention on Human Rights 1950 and Article 63(1) of the American Convention on Human Rights 1969.

136 Claim for Reparation, para. 158.

137 Supplementary Submission pursuant to Procedural Order No. 10, 18 September 2018, para. J.1.

138 Counter-Memorial, paras. 225, 421; Rejoinder, para. 216.

### (c) The Tribunal's Analysis

180. The Tribunal accepts, in principle, that non-material damages may be necessary to achieve full reparation, in particular where harm has been suffered that cannot readily be quantified in economic terms. In the Tribunal's view, however, Malta's claim for reputational damage to DS Tankers and Stena Oil differs from its claim for moral damages for the treatment of the Master and crew.

181. Malta's claim for reputational damage to DS Tankers and Stena Oil is based on an entry for the *Duzgit Integrity* in Lloyd's List Intelligence that provides as follows: "Seized in Sao Tome for illegal entry into the country's territorial waters & smuggling while performing a STS operation."[139] Malta also demonstrates that BP Group Shipping and Chevron Marine Assurance both sought clarification in respect of this entry when corresponding with DS Tankers regarding the possible charter of the *Duzgit Integrity*.[140]

182. In the Tribunal's view, the entry in Lloyd's List Intelligence is essentially factual in nature and correctly notes that the *Duzgit Integrity* was detained in São Tomé. The entry does not provide sufficient detail for a potential reader to be able to determine responsibility for this fact. Malta's remaining evidence shows only that potential charter parties sought clarification in respect of this entry; it does not show what happened after DS Tankers was able to provide its side of the story. The Tribunal having found that the *Duzgit Integrity* did perform an unauthorized ship-to-ship transfer in the archipelagic waters of São Tomé and that its initial detention by São Tomé was lawful, the Tribunal does not see that the publication of these facts can potentially give rise to non-material damages.

183. The Tribunal reaches a different conclusion with respect to the Master and crew. The Tribunal recalls that the prolonged detention of the ship (with the crew on board) and of the Master, as well as the fines imposed on the Master, formed part of the circumstances the Tribunal considered to be disproportionate and in breach of the São Tomé's obligations under the Convention. Under these circumstances, the Tribunal considers that an award of moral damages in respect of the treatment of the Master and Crew would further the objective of achieving full reparation.

184. Other courts and tribunals awarding moral damages for individuals deprived of their liberty have taken a wide range of approaches and awarded varying amounts, often with little explanation. In

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139 Lloyd's List Intelligence Entry (**Exhibit AFE J.1**).

140 E-mail correspondence with BP Group Shipping (**Exhibit AFE J.2**); E-mail Correspondence with Chevron Marine Assurance (**Exhibit AFE J.3**).

the Tribunal's view, an appropriate method would be to determine a daily rate per person in light of the circumstances in which the individuals in question were kept. In the present case, the Tribunal finds the following considerations to be relevant:

(a) The length of unlawful detention of the vessel with its crew on board was quite long, at 214 days.

(b) With the possible exception of the circumstances surrounding the transfer of cargo from the *Duzgit Integrity*, there is no indication that the Master or crew were physically threatened, abused, or placed in danger.

(c) The welfare of the Master and crew was looked after by DS Tankers, which appears to have supported them to the best of its ability.

(d) The persons in question were engaged in a profession that regularly involves lengthy periods of time aboard ship or in foreign ports.

(e) The master was subjected to criminal prosecution that the Tribunal has found to be disproportionate and in breach of São Tomé's obligations under the Convention.

185. The Tribunal considers it appropriate to award moral damages in the amount of USD 50 per person per day for both the Master and the crew for their enforced stay in São Tomé as from the date on which the Tribunal has found São Tomé's conduct to have been in breach of the Convention, i.e., 26 April 2013 until their departure from São Tomé. In this respect, the Tribunal recalls that the Master was forced to depart São Tomé on 10 October 2013, prior to the departure of the vessel and crew. Additionally, the Tribunal considers it appropriate to award moral damages in the amount of USD 100 per day to the Master for the criminal process faced, with this amount to run from 26 April 2013 until the Master's departure from São Tomé. The Tribunal calculates the total moral damages as follows:

| Category | Number of Persons | Days | Daily Rate | Amount |
|---|---|---|---|---|
| Enforced presence of the crew in São Tomé | 14 | 214 days (26 April 2013 to 25 Nov. 2013) | USD 50 | 14 x 214 x USD 50 = USD 149,800.00 |
| Enforced presence of the Master in São Tomé | 1 | 168 days (26 April 2013 to 10 October 2013) | USD 50 | 1 x 168 x USD 50 = USD 8,400.00 |
| Detention and Prosecution of the Master | 1 | 168 days (26 April 2013 to 10 October 2013 | USD 100 | 1 x 168 x USD 100 = USD 16,800.00 |
| | | | **Total Moral Damages:** | **USD 175,000.00** |

## C. WHETHER THE SETTLEMENT AGREEMENT MITIGATES ANY OF THE DAMAGES SUFFERED BY DS TANKERS

186. São Tomé submits that the claims for damages suffered by the owner of the *Duzgit Integrity*, DS Tankers — including claims under the above-listed heads of claim 1 and 4-9[141] — are inadmissible given that they were the object of the Settlement Agreement entered into between DS Tankers and São Tomé.[142] 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*.[143]

### (a) The Respondent's Position

187. São Tomé argues that DS Tankers, through the Settlement Agreement, waived its rights to bring claims against it, and that the waiver precludes Malta from bringing the relevant claims in this reparation phase.[144] Citing the relevant clauses of the Settlement Agreement, São Tomé submits that DS Tankers has "explicitly (i) agreed to waive its right to bring claims against São Tomé, including any request for damages or compensation and (ii) confirmed that it has not transferred its alleged claims to third parties, including Malta".[145] São Tomé therefore contends that "any

141 São Tomé lists these to be as follows: (i) loss of hire (USD 2,459,175); (ii) settlement payment (USD 626,048.84), (iii) IMAP fine (USD 38,680.95), (iv) port agency expenses (USD 175,800); (v) legal and consultancy expenses (USD 500,000); (vi) travel expenses (USD 55, 000); (vii) classification expenses (USD 21,000); (viii) various expenses (USD 10,000); (ix) vessel wear and tear (USD 500,000) and (x) other damages that have not been specified. Counter-Memorial, para. 225.

142 Counter-Memorial, paras 226-229.

143 Reply submitted by Malta dated 23 October 2015 (the "**Reply**"), paras 403-404, 408 and 410.

144 Counter-Memorial, para. 420; Rejoinder, para. 216.

145 Counter-Memorial, paras 134-135 and 420.

claim brought by Malta that relate to damages suffered by DS Tankers must be dismissed in any event".[146]

### (b) The Applicant's Position

188. In its Claim for Reparation, Malta notes that while in its Award on Jurisdiction and the Merits the Tribunal "did not accept São Tomé's contention that the Settlement Agreement, in essence, renders Malta's claims inadmissible," it also "did not accept Malta's contention that the Settlement Agreement was concluded in duress".[147]

189. Malta advances that this, however, "does not preclude Malta from claiming on behalf of its ship owner the amounts suffered as a result of [São Tomé's] illegal conduct, including an amount equal to the amount purportedly paid under a settlement agreement in respect of a situation that has since been found to be unjustified",[148] namely, the USD 626,048.84 it claims under the above-listed head of claim concerning the payment made by DS Tankers as part of the Settlement Agreement to release the *Duzgit Integrity*.

### (c) The Tribunal's Analysis

190. The Tribunal recalls that it addressed the effect of the Settlement Agreement on the admissibility of Malta's claims in the course of its Award on Jurisdiction and the Merits. In that decision, the Tribunal noted as follows:

> 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.[149]

191. The Tribunal also emphasized that, DS Tankers having settled its claim with São Tomé, the claim brought by Malta was a direct claim for injury to its rights as the flag State of the *Duzgit Integrity*,

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146 Counter-Memorial, para. 421; Rejoinder, para. 216.

147 Claim for Reparation, paras 89-90.

148 Claim for Reparation, para. 98.

149 Award on Jurisdiction and the Merits, 5 September 2016, paras. 181-182.

and not a claim of diplomatic protection.[150] The Tribunal reserved only the possibility that DS Tankers' settlement agreement might bear on the calculation of damages in this reparation phase of the proceedings.[151]

192. The question facing the Tribunal, therefore, is whether the settlement agreement precludes Malta from quantifying the harm to its rights as the flag State on the basis of harm for which DS Tankers itself could no longer claim. In the Tribunal's view, the answer to this question must be no. To hold otherwise would effectively empower a ship owner to settle an international claim on the flag State's behalf, without its consent and potentially without its knowledge. Such an outcome would be incompatible with the particular status and rights of the flag State under the Convention.

## D. WHETHER THE ACTS AND OMISSIONS OF THE *DUZGIT INTEGRITY*, ITS MASTER, OWNER AND CHARTERER MITIGATE ANY OF THE DAMAGES CLAIMED BY MALTA

193. São Tomé argues that the contributory fault of Malta should be taken into account in the determination of reparation as a well-established rule under international law.[152] Malta objects to this position, arguing that there is no such contributory fault by the *Duzgit Integrity*, its Master, owner, and charterer.[153]

### (a) The Respondent's Position

194. São Tomé submits that the acts and omissions of the *Duzgit Integrity*, its Master, owner DS Tankers, and charterer Stena Oil, should be taken into account in the determination of reparation, under the concept of contributory fault.[154] In support of its submission, São Tomé refers to Article 39 of the Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission (2001) (the "**Articles on State Responsibility**"), which "recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation"; and to the principle that full reparation is due for the injury caused by an internationally wrongful act, but nothing more.[155]

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150 Award on Jurisdiction and the Merits, 5 September 2016, paras. 151-157.

151 Award on Jurisdiction and the Merits, 5 September 2016, para. 183.

152 Counter-Memorial, paras 422-425; Rejoinder, paras 224-226.

153 Reply, paras 441-445.

154 Counter-Memorial, paras 422-424; Rejoinder, paras 224-225.

155 Counter-Memorial, paras 423-424; Rejoinder, para. 225.

195. São Tomé contends that the *Duzgit Integrity* has materially contributed to the damages claimed by Malta by not complying with applicable rules and regulations. More specifically, São Tomé notes that the *Duzgit Integrity* chose to meet with the *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 São Tomé Coast Guard, and attempted to carry out an oil transhipment without the mandatory prior written authorisation and without payment of customs duties.[156]

**(b) The Applicant's Position**

196. Malta contends that São Tomé's reliance on the principle of contributory fault is "deplorable".[157] It denies the allegation that an oil transhipment was carried out.[158] Further, Malta points out that São Tomé granted its authorisation during its first visit to the *Duzgit Integrity* on 15 March 2013 and that São Tomé would have avoided the "grossly excessive circumstances" that followed if it had acted "in due diligence and as a responsible sovereign State".[159] Malta stresses that São Tomé "not only failed to avoid such escalation of events but 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*]".[160]

**(c) The Tribunal's Analysis**

197. The Tribunal sees no actions on the part of DS Tankers, Stena Oil, the Master, or the crew that could potentially give rise to a finding of contributory fault.

198. In this respect, the Tribunal considers the essential fact to be that it has previously found the initial detention of the *Duzgit Integrity* to have been a lawful exercise of São Tomé's sovereignty and enforcement powers under the Convention. It is only São Tomé's subsequent acts that the Tribunal considers to have become disproportionate and in breach of the Convention. Accordingly, the Tribunal does not see that the *Duzgit Integrity*'s actions prior to its detention by São Tomé can potentially give rise to a finding of contributory fault. The *Duzgit Integrity*'s unauthorized ship-to-ship transfer certainly prompted the initial detention of the vessel. But this detention was not in breach of the Convention.

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156 Counter-Memorial, para. 425; Rejoinder, para. 226.

157 Reply, para. 445.

158 Reply, para. 442.

159 Reply, para. 443.

160 Reply, para. 444.

199. To amount to contributory fault, the Tribunal would need to find that some action by Malta, DS Tankers, Stena Oil, the Master, the crew, or other agents acting on their behalf served to prolong the detention of the *Duzgit Integrity* in São Tomé or prompted the criminal proceedings and fines that the Tribunal has found to be disproportionate. The Tribunal sees no evidence of this. On the contrary, all parties appear to have acted zealously to explain their position to the authorities of São Tomé and to secure the release of the *Duzgit Integrity* at the earliest possible moment.

## E. INTEREST

### (a) The Applicant's Position

200. To ensure full reparation, Malta argues that "interest should be paid on any principal sum payable under the rules on reparation".[161] While Malta considers that the interest rate and mode of calculation should be determined by the Tribunal, it requests that the Tribunal award it payment of interest in respect of "monetary losses, property damage and other economic losses", as the International Tribunal for the Law of the Sea did in *M/V Saiga (Case No. 2)*.[162]

201. Malta proposes that the Tribunal grant it interest from the date of its Notice of Arbitration on 22 October 2013 until the date of the adoption of the present Award.[163]

202. It further proposes that the interest rate be fixed at 6%, representing "the average of the minimum average cost of financing available to [DS Tankers] to build up the vessel".[164] From Malta's perspective, such rate is in line with "commercial conditions prevailing in the countries where the expenses were incurred or the principal operations of the party being compensated are located".[165] Applying this rate, the calculation of provisional interest expenses would amount to USD 3,166,336.46.[166] Malta adds that this rate, however, may be increased by the Tribunal at its discretion for the period subsequent to the issuance of this Award as penalty for any delay by São Tomé to pay the amount ordered therein.[167]

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161 Claim for Reparation, para. 160.

162 Claim for Reparation, paras 160-161 *referring to M/V "SAIGA" (No.2)* (Saint Vincent and the Grenadines v. Guinea), Judgement of 1 July 1999, para. 173.

163 Claim for Reparation, para. 162.

164 Claim for Reparation, para. 164.

165 Claim for Reparation, para. 164 *referring to M/V "SAIGA" (No.2)* (Saint Vincent and the Grenadines v. Guinea), Judgement of 1 July 1999, para. 173.

166 Claim for Reparation, para. 164.

167 Claim for Reparation, para. 165.

**(b) The Respondent's Position**

203. São Tomé questions the 9% rate originally advanced by Malta and submits that the interest rate and mode of calculation "shall be set so as to achieve reparation", in accordance with Article 38(1) of the Articles on State Responsibility.[168]

**(c) The Tribunal's Analysis**

204. Interest is well established as an element of full reparation where monetary damages are awarded and is recognized as such within the Articles on State Responsibility.[169] Whether an award of interest is required in a particular case, however, and the appropriate rate and mode of calculation depend upon what is required to achieve full reparation. Neither the Convention nor the Articles on State Responsibility provide guidance on how full reparation would best be achieved in a particular case. Rather, this determination falls within the Tribunal's discretion, subject to the overarching goal of achieving full reparation.[170]

205. The Tribunal considers that this determination involves three elements: (a) the rate or rates of interest applicable to the award of damages, (b) whether simple or compound interest will be awarded, and (c) the date or dates from which interest will run.

206. With respect to the rate of interest, the Tribunal concurs with the view, followed in *Arctic Sunrise* and *M/V Saiga (No. 2)*, that the rate of interest applicable to material and non-material damages may differ.[171] As discussed above (see paragraphs 180 to 185), non-material damages represent a notional representation of the value of non-financial losses. Non-material damages are not based on actual economic loss. Material damages, in contrast, represent economic harm actually incurred at a specific point in time.

207. For material damages, the award of interest serves to achieve full reparation in two respects. First, it serves to compensate for the decrease in economic value of the sums awarded between the point when the losses were incurred and the time when payment is made. Second, interest serves to

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168 Rejoinder, para. 223.

169 Articles on the Responsibility of States for Internationally Wrongful Acts, art. 38, G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (12 December 2001).

170 *Arctic Sunrise Arbitration* (Netherlands v. Russian Federation), Award on Compensation, 10 July 2017, para. 119.

171 *Arctic Sunrise Arbitration* (Netherlands v. Russian Federation), Award on Compensation, 10 July 2017, para. 121; *M/V "SAIGA" (No. 2)* (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, ITLOS Reports 1999, p. 10, para. 175.

provide compensation for the loss of use of the amounts in question, insofar as these funds could not be productively employed or as the borrowing of alternative capital may have been required.

208. In the present case, the Tribunal considers that the appropriate rate of interest to achieve full reparation is the borrowing rate of DS Tankers, as the entity that actually suffered economic loss. Malta argues that DS Tankers' borrowing rate should be calculated at approximately 6 percent. In support, Malta provides copies of two loan term sheets from Bremer Landesbank from November and December 2015 that show that, at this time, DS Tankers was able to borrow U.S. dollars at between 3.73138 and 4.17 percent per annum.[172] The Tribunal understands that Malta reaches the claimed rate of 6 percent by averaging this rate with the higher rate of 6 to 9 percent payable by DS Tankers on overdrafts. In the Tribunal's view, however, the higher rate of interest payable on an overdraft facility (the terms of which are not, in any event, before the Tribunal) is not an appropriate representation of DS Tankers' borrowing costs. The Tribunal finds the better evidence of DS Tankers' borrowing costs to be the rates on principal in the two term sheets in the record.

209. The evidence before the Tribunal indicates DS Tankers' borrowing costs in U.S. dollars only, and only at a particular point in time. International courts and tribunals have increasingly favoured the use of a variable interest rate to reflect the fact that economic conditions and prevailing interest rates will likely fluctuate over any extended period. In the present case, the Tribunal considers that the appropriate variable rate to be that of short-term government securities in the currency in question, with a mark-up to reflect the higher rates actually available to a private borrower. The loan evidence before the Tribunal indicates that DS Tankers in November and December 2015 was able borrow at approximately 3.4 percent above the rate of one-year U.S. treasury bills. The Tribunal accordingly finds a mark-up of 3.4 percent on the rate of sovereign borrowing to be an appropriate approximation of DS Tankers' actual borrowing costs.[173] For the sovereign rate itself, the Tribunal adopts that rate applicable on U.S. (for dollar amounts), British (for pounds sterling

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172 Bremer Landesbank, DS Tankers Term Sheet dated 12 November 2015 (Exhibit AFE K.1); Bremer Landesbank, DS Tankers Term Sheet dated 28 December 2015 (Exhibit AFE K.2).

173 The Tribunal is aware of the practice of many international tribunals of calculating interest on the basis of the London Inter-Bank Offered Rate, or LIBOR. Insofar, however, as the interbank lending market is considered no longer liquid and LIBOR is scheduled to be discontinued from 2021, the Tribunal considers it appropriate to adopt a different reference rate in the present Award. The Tribunal notes that the interest calculated pursuant to this method is essentially the same as that that would have been achieved by the applying the one-year LIBOR Rate (for dollars, euros, and sterling) with a 2.9 percent markup, the difference between DS Tankers actual borrowing costs in November and December 2015 and the one-year U.S. dollar LIBOR rate at that time.

amounts), and German (for euro amounts) government securities with a remaining maturity of one year.

210. For non-material damages, the Tribunal recalls that the amount awarded is not based on actual economic loss and considers that DS Tankers' borrowing rate is not an appropriate measure of interest on compensation for the harm suffered by the Master and crew. For non-material damages, the Tribunal adopts a fixed rate of 2 percent.

211. The Tribunal also recalls that Malta has encouraged it to apply a higher, penalty rate of interest following the Award. In this respect, the Tribunal notes that many municipal systems adopt a higher rate of statutory interest on judgment debt in furtherance of a public policy of encouraging prompt compliance. The Tribunal has not been convinced, however, that such a policy applies as a matter of public international law, which operates generally on the principle that "bad faith is not presumed."[174] In the Tribunal's view, the rate of interest should achieve full economic reparation, but should neither discourage compliance with the award through too low a rate of interest, nor punish the Respondent for any delay in payment. Accordingly, the Tribunal declines to adopt a penalty rate for post-Award interest.

212. With respect to the question of compound or simple interest, the Tribunal notes that Malta has claimed compound interest.[175] Historically, compound interest was not accepted in international law, and the commentary to the Articles on State Responsibility noted in 2001 that "[t]he general view of courts and tribunals has been against the award of compound interest".[176] Since that date, however, a broad shift in the practice of courts and tribunals has occurred in favour of compound interest. In proceedings under the Convention, compound interest was awarded in *M/V Virginia G* and *M/V Norstar*. Compound interest was not awarded in the *Arctic Sunrise Arbitration*, but on the grounds that the Netherlands had not claimed compound interest. In the Tribunal's view, this shift reflects the fact that nearly all financial transactions take place on the basis of compound interest. Insofar as interest is intended to achieve full reparation by addressing the cost to DS Tankers of securing alternative capital, this must recognize the fact that DS Tankers (like the

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174 *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, para. 447; *quoting Affaire du lac Lanoux (Spain/France)*, Award of 16 November 1957, RIAA, Vol. XII, p. 281 at p. 305.

175 Malta's interest calculation is elaborated in the Compliance Letter provided by Moore Stephens Turkey (**Exhibit AFE 2**) and is described as "compound interest method with monthly returns by using 6% annual interest rate for the period between November 2013 (first month after the notice of Initiation of Arbitration lodged by Malta) and July 2017)".

176 International Law Commission, Commentary to the Articles on State Responsibility, Article 38, *in* United Nations, Materials on the Responsibility of States for Internationally Wrongful Acts, ST/LEG/SER.B/25, p. 255 (2012)(**Exhibit RLE 57**).

governments of both Malta and São Tomé) borrows funds on the basis of compound interest. The Tribunal considers that interest in the present case should be compounded annually.

213. Finally, with respect to date from which interest will run, the Tribunal recalls that Malta has proposed a uniform date of 22 October 2013, the date of the notice of arbitration. This date, however, precedes some of the events giving rise to the harm claimed by Malta. In the Tribunal's view, the date from which interest should run is not uniform across Malta's heads of claim. The Tribunal considers that interest on the value of cargo should run from 22 October 2013, the cargo of the *Duzgit Integrity* having been transferred to the *M.T. Energizer* on 20 and 22 October 2013. Interest on Malta's claims for the settlement agreement payment, port agency expenses, and legal expenses should run from 25 November 2013, the date on which the *Duzgit Integrity* departed São Tomé. Interest on Malta's claims for loss of hire, extraordinary repairs, and classification expenses should run from 29 March 2014, the date on which the *Duzgit Integrity* departed Gibraltar.

214. The Tribunal considers that non-material damages differ with respect to the commencement of interest. Unlike Malta's claims for material damages, which reflect a specific value at the time the harm was incurred, non-material damages are a notional form of reparation, the value of which is determined in this Award. Accordingly, the Tribunal considers that interest on non-material damages should run only from the date of this Award.

215. Interest on all claims runs until reparation is paid.

216. Applying the foregoing principles, the Tribunal calculates the interest due as of the date of this Award as follows:[177]

| Head of Claim | Date from which Interest Runs | Interest as of 18 December 2019 |
|---|---|---|
| Loss of Hire | 29 March 2014 | USD 585,447.90 |
| Value of Cargo | 22 October 2013 | USD 2,033,298.15 |
| Settlement Agreement Payment | 25 November 2013 | USD 185,753.47 |
| Port Agency Expenses | 25 November 2013 | EUR 21,009.29 |
| Legal Expenses | 25 November 2013 | EUR 14,875.01 and GBP 13,871.77 |
| Classification Expenses | 29 March 2014 | EUR 1,843.29 |

177 The Tribunal's interest rates of sovereign borrowing (to which a 3.4 percent markup is applied) are derived from published rate of the U.S. Federal Reserve for Treasury obligations with a constant maturity of one year for U.S. dollar amounts, from the published yield of the Deutsche Bundesbank for Federal securities with a remaining maturity of one year for Euro amounts, and from the spot curve of nominal yields published by the Bank of England for government securities with a remaining maturity of one year. Interest is compounded annually, beginning one year from the date on which it began to run.

| | | |
|---|---|---|
| Wear and Tear (Extraordinary) | 29 March 2014 | EUR 923.63 and<br>GBP 20,862.40 |
| Moral Damages | 18 December 2019 | n/a |
| **Total Interest as of 18 December 2019:** | | USD 2,804,499.52 and<br>EUR 37,727.59 and<br>GBP 34,734.16 |

217. Following this Award, interest will be subject to a three-month grace period, intended to recognize the unavoidable administrative steps inherent in complying with an award requiring payments. Thereafter, interest will run until the date of effective payment at the same rate applicable to each head of claim for pre-Award interest, compounded annually.

## IV. COSTS

218. In its Award on Jurisdiction and the Merits, with reference to Article 7 of Annex VII to the Convention and Article 29 of the Rules of Procedure, the Tribunal considered that its expenses shall be borne by the Parties in equal shares, on the basis that there were no "particular circumstances" that would justify departing from the presumption of equal allocation of the expenses of the Tribunal.[178]

219. Regarding the Parties' costs arising from this arbitration, the Tribunal similarly concluded that there was no reason to depart from the "normal rule" that each party bears its own costs at that stage.

220. The Tribunal notes that no further submissions on expenses and costs have been made by the Parties. While there are no circumstances or reasons that would justify departing from the principal that the Parties shall bear the expenses of the Tribunal in equal shares in this final phase of the proceedings, the implementation of this principle requires consideration. During the earlier phases of these proceedings, both Parties contributed in equal shares to the deposit for the fees and expenses of the Tribunal. In light of São Tomé's non-participation in this final phase of the proceedings, however, the deposit for the Tribunal's expenses has been paid by Malta alone. In order to effect an equal division of the Tribunal's expenses, the Tribunal determines that São Tomé shall pay to Malta the amount of EUR 82,500.00, representing 50 percent of the costs of the final phase of the proceedings.

178 Award on Jurisdiction and the Merits, paras 338-340.

## V. DECISION

221. In light of the foregoing, the Tribunal decides, by majority, that São Tomé shall pay to Malta the following amounts:

(a) USD 2,077,900.57 as compensation for the loss of hire of the *Duzgit Integrity*;

(b) USD 6,898,638.86 as compensation for the value of the cargo of the *Duzgit Integrity*;

(c) USD 625,000.00 as compensation for the amount paid by DS Tankers pursuant to the settlement agreement for the use of the *Duzgit Integrity*'s cargo as bunkers;

(d) EUR 108,170.01 as compensation for the fees and expenses of DS Tankers' port agent;

(e) EUR 76,586.56 and GBP 54,860.40 as compensation for legal expenses related to the detention of the *Duzgit Integrity*, other than in respect of the present proceedings;

(f) EUR 10,150.00 as compensation for classification expenses;

(g) EUR 5,085.93 and GBP 87,914.90 as compensation for the cost of repairs to the *Duzgit Integrity* necessitated by the detention of the vessel;

(h) USD 175,000.00 as compensation for non-material damage to the Master and crew, according to the breakdown set out at paragraph 185 of this Award;

(i) EUR 82,500.00 as reimbursement for São Tomé's share of the costs of the final phase of these proceedings, borne by Malta in the first instance.

(j) USD 2,804,499.52, EUR 37,727.59, and GBP 34,734.16 as pre-Award interest on the amounts awarded in paragraphs (a) through (g) above;

(k) Post-Award interest on the foregoing amounts, beginning three months from the date of this Award and running until the date of effective payment at the following rates:

i. For the amounts in paragraphs (a), (b), (c), and (j) above denominated in U.S. dollars: the rate applicable to U.S. treasury bills with a remaining maturity of one year, plus 3.4 percent, compounded annually;

ii. For the amounts in paragraphs (d), (e), (f), (g), and (j) above denominated in Euros: the rate applicable to German federal securities with a remaining maturity of one year, plus 3.4 percent, compounded annually;

iii. For the amounts in paragraphs (e), (g), and (j) above denominated in Pounds sterling: the rate applicable to the government bonds of the United Kingdom of Great Britain and Northern Ireland with a remaining maturity of one year, plus 3.4 percent, compounded annually;

iv. For the amounts in paragraphs (h) and (i) above: 2 percent, compounded annually;

222. Judge Kateka attaches a dissenting opinion.

Dated: 18 December 2019

Professor Tullio Treves
Arbitrator

Judge James L. Kateka
Arbitrator

Professor Alfred H.A. Soons
President of the Tribunal

Mr. Garth L. Schofield
Registrar