

Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine
(ICSID Case No. ARB/08/8)

Excerpts of Award dated March 1, 2012 made pursuant to Rule 48(4) of the
ICSID Arbitration Rules of 2006

Claimants

Inmaris Perestroika Sailing Maritime Services GmbH (“IPS”) (incorporated in Germany);

Windjammer Beteiligungsgesellschaft mbH & Co. KG (“WKG”) (incorporated in Germany);

Dr. Sven-Holger Undritz as insolvency administrator of Inmaris Windjammer Sailing GmbH i.L.
 (“IWC”) (incorporated in Germany); and

Dr. Sven-Holger Undritz as insolvency administrator of Inmaris Windjammer Chartering GmbH i.L.
 (“IWS”) (incorporated in Germany)

Respondent

Ukraine

Tribunal

Dr. Stanimir A. Alexandrov (President; Bulgarian), appointed by agreement of the Parties

Mr. Noah Rubins (U.S.), appointed by the Claimants

Dr. Bernardo M. Cremades (Spanish), appointed by the Respondent

Award

Award of March 1, 2012 in English (unpublished)

Decision on Jurisdiction of March 8, 2010 available at

https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=D C1490_En&caseId=C320

Instrument relied on for consent to ICSID arbitration

Agreement between the Federal Republic of Germany and Ukraine for the Promotion and Reciprocal Protection of Investments, signed on February 15, 1993 and which entered into force on June 29, 1996 (“BIT”)

Procedure

Applicable Arbitration Rules: ICSID Arbitration Rules of 2006

Place of Proceedings: The Hague

Procedural Language: English

Full procedural details: Available at

<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C320&actionVal=viewCase>

Factual Background

Between 1991 and 2006, the Claimants and a state-owned education institution of Ukraine, [X], entered into a series of contracts concerning the use of the *Khersones*, a windjammer sail training ship owned by the institution. Under the contracts, the institution used the *Khersones* to train cadets for Ukraine's national fishery fleet while the Claimants used it to market sailing tours and other onboard events, thus lowering the ship's operational expenses.

The parties' relationship gradually deteriorated following disagreements concerning the proper operation of the contracts.

The Claimants contended that the relationship with the ship's owner worsened following Ukraine's change of government in 2005. On April 5, 2006, a Ministry of Ukraine prohibited the *Khersones* from leaving the borders of the territorial waters of Ukraine until clarification of matters related to its joint operation. This prevented the *Khersones* from making a scheduled departure for the 2006 summer sailing season. The Claimants never regained control of the *Khersones* after that date. Their main claim concerned damages incurred as a result of the travel ban.

A more detailed description of the factual background may be found in the Decision on Jurisdiction of March 8, 2010.

EXCERPTS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

INMARIS PERESTROIKA SAILING MARITIME SERVICES GMBH AND OTHERS
(Claimants)

and

UKRAINE
(Respondent)

ICSID CASE No. ARB/08/8

AWARD

Members of the Tribunal:

Dr. Stanimir A. Alexandrov, President
Prof. Bernardo M. Cremades
Mr. Noah Rubins

Secretary of the Tribunal: Ms. Aïssatou Diop
Ms. Alicia Martín Blanco

Representing Claimants:

Dr. Ulrich Theune
Dr. Richard Happ
Mr. Carl Philipp Herdt
LUTHER
RECHTSANWALTSGESELLSCHAFT MBH
Hamburg, Germany

Mrs. Svitlana Romanova
BAKER & MCKENZIE, LTD
Kyiv, Ukraine

Dr. Sven-Holger Undritz
Insolvency Administrator

Date of Dispatch to the Parties: March 1, 2012

Representing Respondent:

Dr. Sergei Voitovich
Mr. Dmitri Grischenko
Mr. Sava Poliakov
Mr. Dmitri Shemelin
GRISCHENKO & PARTNERS
Kyiv, Ukraine

Mr. David Pawlak
DAVID A. PAWLAK LLC,
Washington, D.C., USA

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I. PROCEDURAL BACKGROUND

A. Request for Arbitration

1. On 28 May 2008, the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received a request for arbitration dated 22 May 2008 (the “Request”) filed by Claimants Inmaris Perestroika Sailing Maritime Services GmbH (“IPS”), Windjammer Beteiligungsgesellschaft mbH & Co. KG (“WKG”), Dr. Sven-Holger Undritz as the insolvency administrator of Inmaris Windjammer Chartering GmbH i.L. (“IWC”) and Inmaris Windjammer Sailing GmbH i.L. (“IWS”) against Ukraine (“Respondent”) (collectively, the “parties”).

2. The Request was made under the Agreement between the Federal Republic of Germany and Ukraine for the Promotion and Reciprocal Protection of Investments, which was signed on 15 February 1993 and entered into force on 29 June 1996 (the “BIT” or “Treaty”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”).

3. On 29 May 2008, the Centre acknowledged receipt of the Request and transmitted a copy to Respondent. On 16 June 2008, the Acting Secretary-General of ICSID sent the parties a Notice of Registration in accordance with Article 36(3) of the ICSID Convention.

B. Constitution of the Tribunal

4. Pursuant to Rule 2(3) of the Centre’s Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”), Claimants on 16 August 2008 elected to have the Tribunal constituted in accordance with Article 37(2)(b) of the ICSID Convention. The Centre acknowledged Claimants’ election by its letter of 18 August 2008 and invited the parties to proceed with the appointment of arbitrators.

5. On 18 August 2008, Claimants appointed Mr. Noah Rubins, a national of the United States, as a member of the Tribunal. By letter of 2 September 2008, Mr. Rubins made a disclosure with respect to two ongoing engagements on behalf of Ukraine, unrelated to the present case, as to which the parties expressly waived any objection in letters dated 4 and 5 September 2008.

6. On 27 August 2008, Respondent appointed Prof. Bernardo M. Cremades, a national of Spain, as a member of the Tribunal. On the same day, Claimants proposed Dr. Stanimir A. Alexandrov, a national of Bulgaria, to serve as the third arbitrator and President of the Tribunal. Respondent agreed to that proposal on 10 September 2008.

7. The Tribunal was formally constituted on 19 September 2008, in accordance with the ICSID Convention and Arbitration Rules. Ms. Aïssatou Diop, Consultant, ICSID, was designated to serve as the Secretary of the Tribunal. On 24 August 2011, the Secretary-General announced that Ms. Diop would take a temporary leave of absence and that Ms. Alicia Martín Blanco, Consultant, ICSID, had been designated to serve as the Secretary of the Tribunal during her absence.

C. First Session of the Tribunal

8. Shortly before the first session of the Tribunal, Respondent by letter dated 3 December 2008 advanced its objections to the Tribunal's jurisdiction. Respondent requested, pursuant to Arbitration Rule 41(3), that its objections be addressed as a preliminary matter in a separate jurisdictional phase and asked the Tribunal to set the schedule for this phase at the first session. By letter dated 8 December 2008, Claimants contended that the jurisdictional objections should be joined to the merits.

9. The first session of the Tribunal was held by telephone conference (with audio recording) on 9 December 2008. At the session, the parties expressly confirmed that the Tribunal had been properly constituted and that they had no objection to any of its members serving as an arbitrator.

10. After hearing both parties on, *inter alia*, the procedure to be adopted with respect to Respondent's objections to the Tribunal's jurisdiction, the Tribunal decided that Respondent's jurisdictional objections should be addressed in a separate, preliminary phase of the proceedings and set a schedule for the jurisdictional phase.

11. The agreement of the parties, and the decisions of the Tribunal on matters as to which the parties were not agreed, were recorded in the Minutes of the First Session signed by the President and Secretary of the Tribunal, dated 17 December 2008.

D. Submissions and Hearing on Jurisdiction

12. The parties filed their submissions on jurisdiction between 27 January 2009 and 6 July 2009, in accordance with the schedule established during the first session of the Tribunal and extensions granted by the Tribunal thereafter.

13. The hearing on Respondent's objections to jurisdiction was held in The Hague at the Permanent Court of Arbitration on 20 and 21 July 2009.

14. The parties were represented in The Hague as follows:

Claimants:

Dr. Ulrich Theune, Dr. Richard Happ, Mr. Georg-Maximilian von Arnim, and Ms. Yun-I Kim of *Luther Rechtsanwaltsgesellschaft mbH*

Respondent:

Dr. Sergei Voitovich, Mr. Dmitri Grischenko, Mr. Dmitri Shemelin, and Mr. Sava Poliakov of *Grishenko & Partners*

15. Ms. Jozanneke Deelstra of Omni Bridgeway was also present at the hearing as part of Claimants' delegation.

16. The parties submitted Post-Hearing Briefs simultaneously on 1 September 2009.

E. Decision on Jurisdiction

17. On 8 March 2010, the Tribunal issued its Decision on Jurisdiction. The Tribunal dismissed Respondent's objections to jurisdiction and reserved its determination on costs until the conclusion of the proceedings. The Decision on Jurisdiction is incorporated herein by reference, except where specifically indicated below.

F. Submissions on the Merits

18. On the basis of the agreement of the parties, on 2 June 2010, the Tribunal set the following schedule for the merits phase:

- Claimants to file their Memorial on the Merits by 1 September 2010;
- Respondent to file its Counter-Memorial on the Merits by 1 December 2010;
- Claimants to file their Reply on the Merits by 27 January 2011;
- Respondent to file its Rejoinder on the Merits by 24 March 2011; and
- A Hearing on the Merits to be held in The Hague between 16 and 20 May 2011.

By letter dated 3 August 2010, Claimants requested an extension to file their Memorial on the Merits and proposed revisions to the schedule for the written submissions. On 5 August 2010, the Tribunal invited the parties to agree on a revised schedule in light of Claimants' request.

Respondent subsequently informed the Tribunal by letter dated 10 August 2011 that the parties had failed to reach an agreement on a revised schedule and asked the Tribunal to rule on the

matter. On 11 August 2011, the Tribunal informed the parties that it had revised the schedule for written submissions, but the dates of 16- 20 May 2011 reserved for the hearing would remain unchanged.

19. Claimants filed their Memorial on 8 September 2010 in accordance with the revised schedule. Due to time constraints, the expert reports in support of Claimants' Memorial (an expert legal opinion by [...] of the law firm [...] and an expert damages report by [...]) did not accompany the submission but were sent directly to the Centre on the same date.

20. On 15 December 2010, Respondent filed its Counter-Memorial on the Merits, in which Respondent raised a counterclaim for the first time. By letter dated 5 January 2011, Claimants requested that the Tribunal allow them two weeks following the Respondent's submission of its Rejoinder on the Merits to submit comments specifically on the counterclaim. On 6 January 2011, Respondent objected to Claimants' request as being contrary to the schedule set by the Tribunal and prejudicial to Respondent's procedural right to have sufficient preparation time for the hearing. On 7 January 2011, the Tribunal decided that, in accordance with procedural fairness and the principle of equality of the parties, Claimants would be granted ten calendar days after the due date of Respondent's Rejoinder to provide further comments on the counterclaim in addition to any response made in Claimants' Reply.

21. By letter dated 26 January 2011, Claimants informed the Tribunal and Respondent of an error in the submission of the expert damages report by [...]. The electronic and hard copy versions of the report contained differences with respect to the modeling of income and expenses. Claimants noted that Respondent's damages expert, [...], appeared to have relied on the erroneous electronic version in arguing that there were discrepancies between Claimants' Memorial and the accompanying damages report. Respondent

stated on 27 January 2011 that, in view of Claimants' error, it reserved its right to respond separately to the hard copy report in its Rejoinder on the Merits. Claimants submitted the corrected electronic report on the same date.

22. On 10 February 2011, Claimants submitted their Reply on the Merits. By letter of 11 February 2011, Respondent identified two documents, the electronic copies of which had not been submitted with Claimants' Reply. Claimants submitted the missing documents electronically on the same date.

23. Respondent filed its Rejoinder on the Merits on 7 April 2011. Pursuant to the Tribunal's decision of 7 January 2011, Claimants filed their Rejoinder to the Counterclaim after ten calendar days, on 17 April 2011.

G. Procedural Orders Regarding Production of Documents

24. The Tribunal issued three procedural orders during the written phase of the proceedings, all in relation to Respondent's document production request of 5 November 2010.

25. The Tribunal issued Procedural Order No. 1 on 29 November 2010. For a number of Respondent's requests, which Claimants opposed as being overly burdensome, the Tribunal accepted Claimants' offer to allow Respondent's damages experts to review the documents, and invited the parties to reach an agreement on the modalities of the inspection and inform the Tribunal. These requests related to documents concerning the insolvency claims of IWC and IWS; tourist cruises booked in 2006; the frustrated investments claimed by Claimants; and documents reviewed by Claimants' damages expert, [...], and listed in Appendix A of his report of 31 August 2010. Similar instructions to reach an agreement on an inspection of the documents by Respondent's experts were issued with respect to the request for correspondence dated between 5 April 2006 and the end of the 2006 sailing season, to the extent that the

documents were in the possession of Claimants or their legal representative and the request did not overlap with other documents already produced or requested. Following agreement by the parties, Respondent's experts visited the offices of Claimants' counsel in Hamburg to inspect these documents during the preparation of their second expert damages report.

26. For requests by Respondent involving categories of documents over which Claimants had asserted legal privilege, the Tribunal invited Claimants to specify the nature of the privileges asserted with respect to each type of document requested, to confirm that the documents were in the possession of Claimants or their legal representative, and to state whether German law would allow the documents to be disclosed to the Tribunal and Respondent pursuant to a confidentiality undertaking.

27. The Tribunal issued an order with respect to the remainder of Respondent's document requests, granting some and rejecting others. Where Claimants had already produced documents responsive to the request, the Tribunal either ordered Claimants to produce other responsive documents, if they existed, or denied the request.

28. On 15 December 2010, the Tribunal issued Procedural Order No. 2 to address, *inter alia*, further requests for documents over which Claimants had asserted legal privilege. The Tribunal instructed Claimants to make further document production responsive to these requests only to the Tribunal. For one request, Claimants were to provide all documents relating to a narrower category of documents than that requested by Respondent; for other requests, Claimants were to provide a log of all responsive documents, which would enable the Tribunal to determine whether it would be appropriate to order that these documents be produced.

29. The Tribunal issued Procedural Order No. 3 on 21 January 2011, directing Claimants to produce all documents, correspondence, and communications exchanged between

Claimants and [...], a third-party funder that had decided not to fund Claimants in this arbitration, because, to the extent that any privilege had applied to such documents, it had been waived by Claimants' submission of an affidavit by [...], in-house counsel with [...].

H. Pre-Hearing Decisions and Conference

30. By letters dated 12 and 14 April 2011, the parties exchanged lists of witnesses whom they intended to call for cross-examination. On 15 April 2011, Claimants disputed Respondent's selection of four witnesses – [...], [...], [...], and [...] – on the ground that they had submitted witness statements only during the jurisdictional phase of the proceedings, and had not supplemented their statements during the merits phase. On 19 April 2011, the Tribunal decided that Respondent was entitled to call the four witnesses for cross-examination at the hearing, since their testimony related in part to merits issues.

31. A pre-hearing conference with the President of the Tribunal and the parties was held on 26 April 2011 by telephone (with audio recording). The parties agreed on a number of procedural matters for the upcoming hearing, and the Tribunal resolved the remaining issues on which the parties had not agreed.

32. The parties' agreements and the Tribunal's decisions were recorded in the Minutes of the Pre-Hearing Conference, which were circulated to the parties on 5 May 2011.

I. Hearing on the Merits

33. The Hearing on the Merits was held in The Hague at the Permanent Court of Arbitration between 16 and 20 May 2011.

34. The parties were represented as follows:

Claimants:

Dr. Richard Happ, Dr. Ulrich Theune, Dr. Carl Phillip Herdt, and Dr. Jan Asmus
Bischoff of *Luther Rechtsanwaltsgesellschaft mbH*

Respondent:

Dr. Sergei Voitovich, Mr. Dmitri Grischenko, Mr. Dmitri Shemelin, and Mr. Sava
Poliakov of *Grischenko & Partners*

35. The following witnesses were examined in person before the Tribunal:

[...]

36. A number of witnesses were also examined via video link from the World Bank
offices in Kyiv, Ukraine, in the presence of counsel for both parties:

[...]

37. At the end of the hearing, the Parties confirmed that they were satisfied with the
conduct of the proceedings.¹

38. The Tribunal proposed that the parties provide corrections to the transcript by
3 June 2011, and the parties informed the President of the Tribunal that they had agreed to make
their submissions on costs by 31 August 2011.

39. The parties submitted Post-Hearing Briefs simultaneously on 30 June 2011.

J. Submissions on Costs and Fees

40. On 31 August 2011, the parties provided their respective Statements of Costs.

41. Claimants sought reimbursement of EUR 910,333.47 in costs of legal
representation and EUR 1,131,496.53 in other costs (including honoraria paid to experts), as well
as reimbursement of their advance payment to ICSID of USD 425,000 for the costs of arbitration

¹ See Tr. 1135:23 – 1136:14.

and any further advance payments that might need to be made, to the extent that these payments are not refunded.

42. Respondent claimed USD 669,144.71 in costs of legal representation and USD 642,727.75 in other costs (including honoraria paid to experts).

43. The Tribunal shall address the claims for costs after examining the facts and merits of the dispute.

II. FACTS OF THE DISPUTE

A. Overview

[...]

B. The Parties

49. As noted, Respondent in this dispute is Ukraine. [X], which played a very prominent role in the events giving rise to this dispute, is a Ukrainian state education institute.

50. The Tribunal shall refer to Claimants collectively as the “Inmaris Companies.”

The Inmaris Companies include the following:

Inmaris Perestroika Sailing Maritime Services GmbH (“IPS”), a German limited liability company owned by individual shareholders, including [...].³

Windjammer Beteiligungsgesellschaft mbH & Co. KG (“WKG”), a German limited partnership (Kommanditgesellschaft) represented by a single general partner (“GP”), and with 29 individuals as limited partners (“LPs”).⁴ Claimants explain that IPS was the general partner of WKG until 2001, and later resumed that role in 2008. In the interim period between 2001 and 2008, IWS (see below) was the general partner of WKG.⁵

³ Excerpt of the Commercial Register of the Hamburg Local Court, 12 February 2009 (Exhibit C-7).

⁴ See Excerpt of the Commercial Register of the Lübeck Local Court, 11 February 2009 (Exhibit C-8).

⁵ See Claimants’ Counter-Memorial on Jurisdiction, 23 March 2001 (“Claimants’ Counter-Memorial on Jurisdiction”) at para. 21; Excerpt of the Commercial Register of the Lübeck Local Court, 11 February 2009 (Exhibit C-8) (identifying IPS as current general partner of WKG, noting that the last update to registration was 8 May 2008); Letter from WKG to [X], 22 December 2001 (Exhibit C-9) (notifying change of “Complementary shareholder” of WKG from IPS to IWS).

Inmaris Windjammer Chartering GmbH i.L (“IWC”), a German limited liability company which, as of February 2009, had two shareholders: WKG (49 percent) and IWS (51 percent).⁶ IWC was put under insolvency administration and went into liquidation proceedings on 30 November 2006; Dr. Sven-Holger Undritz, the Insolvency Administrator, appeared on behalf of IWC as Claimant in this proceeding.⁷

Inmaris Windjammer Sailing GmbH i.L (“IWS”), a German limited liability company owned by individual shareholders, including [...].⁸ IWS was also put under insolvency administration and went into liquidation proceedings on 30 November 2006; Dr. Sven-Holger Undritz, the Insolvency Administrator, appears on behalf of IWS as Claimant in this proceeding.⁹

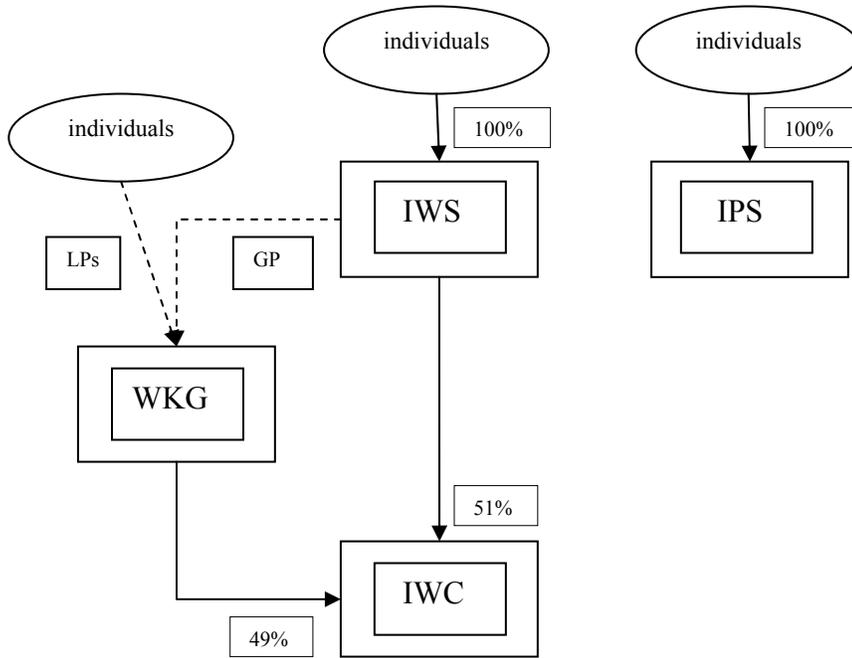
51. The corporate relationships of the Inmaris Companies as of April 2006, when the dispute came to a head, are illustrated in the diagram below:

⁶ See Excerpt of the Commercial Register of the Hamburg Local Court, 19 February 2009 (Exhibit C-10). Inasmuch as IWS was not formed until August 2001, see Excerpt of the Commercial Register of the Hamburg Local Court, 12 February 2009 (Exhibit C-11), the 51 percent share held by IWS as of February 2009 was necessarily held by another entity prior to August 2001. However, the Excerpt from the Commercial Register for IWC appears to indicate that IWS held that stake in IWC as of October 2002 (*i.e.* well in advance of April 2006).

⁷ Excerpt of the Commercial Register of the Hamburg Local Court, 19 February 2009 (Exhibit C-10). For convenience, the Tribunal in this Decision will refer to IWC, even though Dr. Sven-Holger Undritz is formally the Claimant on IWC’s behalf.

⁸ Excerpt of the Commercial Register of the Hamburg Local Court, 12 February 2009 (Exhibit C-11).

⁹ Excerpt of the Commercial Register of the Hamburg Local Court, 12 February 2009 (Exhibit C-11). For convenience, the Tribunal in this Decision will refer to IWS, even though Dr. Sven-Holger Undritz is formally the Claimant on IWS’s behalf.



C. The Contracts

52. In this section, the Tribunal will examine the contractual relationships between [X] and the Inmaris companies, starting with the 1991 General Contract, then the 1996 Basic Contract, and, finally, the 1999 Bareboat Charter and related contracts. The Tribunal will then examine the contractual arrangements among the various Inmaris Companies.

1. The 1991 General Contract

[...]

2. The 1996 Basic Contract

[...]

a. Division of Costs and Revenues Under the Basic Contract

[...]

(i) The Acts

[...]

(a) Respondent's Position with Respect to the Acts

[...]

(b) Claimants' Position with Respect to the Acts

[...]

(c) Tribunal's Findings with Respect to the Acts

[...]

(ii) Allocation of Revenues Under the Basic Contract

[...]

(a) Claimants' Position with Respect to the Allocation of Revenues Under the Basic Contract

[...]

(b) Respondent's Position with Respect to the Allocation of Revenues under the Basic Contract

[...]

(c) Tribunal's Findings with Respect to the Allocation of Revenues Under the Basic Contract

[...]

(iii) Allocation of Costs Under the Basic Contract

[...]

(a) Wintertime Costs

(1) Claimants' Position with Respect to Wintertime Costs Under the Basic Contract

[...]

(2) Respondent’s Position with Respect to Wintertime Costs Under the Basic Contract

[...]

(3) Tribunal’s Findings with Respect to Wintertime Costs Under the Basic Contract

[...]

(b) Payment of Operational Costs Under the Basic Contract

[...]

(1) Respondent’s Position Regarding the Payment of Operational Costs Under the Basic Contract

[...]

(2) Claimants’ Position Regarding the Payment of Operational Costs Under the Basic Contract

[...]

(3) Tribunal’s Finding Regarding the Payment of Operational Costs Under the Basic Contract

[...]

b. Commission Fee

[...]

c. Whether the Basic Contract Established a “Joint Activity”

[...]

(i) Whether the Basic Contract Is Governed by Ukrainian Law

(a) Respondent's Position on Whether the Basic Contract Is Governed by Ukrainian Law

[...]

(b) Claimants' Position on Whether the Basic Contract Is Governed by Ukrainian Law

[...]

(c) Tribunal's Findings on Whether the Basic Contract Is Governed by Ukrainian Law

[...]

(ii) Whether the Basic Contract Established a Joint Activity Under Ukrainian Law

[...]

(a) Respondent's Position on Whether the Basic Contract Established a Joint Activity Under Ukrainian Law

[...]

(b) Claimant's Position on Whether the Basic Contract Established a Joint Activity Under Ukrainian Law

[...]

(c) The Tribunal's Finding on Whether the Basic Contract Established a Joint Activity Under Ukrainian Law

[...]

3. Bareboat Charter and Related Contracts

[...]

a. Contracts Between [X] and the Inmaris Companies

(i) Four-Party Agreement

[...]

(ii) The Crewing Contract

[...]

(iii) The Donation Contract

[...]

(iv) The Trustee Contract

[...]

(v) The Bareboat Charter

[...]

b. Intra-Inmaris Company Contracts

[...]

c. Costs and Payments Under the Bareboat Charter and Related Contracts

[...]

(i) Payments Under the Bareboat Charter and Related Contracts

[...]

(a) Donation Contract and Charter Payment

(1) The Parties' Positions

[...]

(2) The Tribunal's Findings

[...]

(b) Additional Charter Hire

[...]

(c) 1,500 Euro Payment for Prolongation of Charter

[...]

(ii) Allocation of Costs Under the Bareboat Charter and Related Contracts

[...]

(a) Relevance of the Acts

[...]

(b) Whether Respondent Was Responsible for Costs Under the Crewing Contract

[...]

D. Operation of the Arrangement Between 2000 and April 2006

[...]

E. Justification for the Telegram

[...]

1. Respondent's Position

[...]

2. Claimants' Position

[...]

3. Tribunal's Position

[...]

F. Events After the Issuance of the Telegram

[...]

G. Additional Factual Findings

[...]

1. Nature of Investment

[...]

2. Duration of Contractual Relationship

a. Claimants' Position

[...]

b. Respondent's Position

[...]

c. Tribunal's Findings

[...]

III. MERITS

229. The Tribunal will now turn to the merits of Claimants' claims. Claimants allege that Ukraine's actions denied Claimants fair and equitable treatment under Article 2(1) of the BIT, amounted to arbitrary and capricious behavior in violation of Article 2(3) of the BIT, expropriated Claimants' investment without payment of compensation in violation of Article 4(2) of the BIT, and amounted to an impermissible intervention in the Khersones project in violation of paragraph 4 of the Additional Protocol to the BIT.

230. The Tribunal will first begin with an examination of Respondent's argument that the relevant acts giving rise to this dispute were not attributable to Ukraine. The Tribunal will then examine each of Claimants' claims in turn.

A. Attribution

1. Respondent's Position

[...]

2. Claimants' Position

[...]

3. Tribunal's Findings

234. Claimants complain of a series of acts that they believe are attributable to Respondent. As discussed in further detail below in the discussion of Claimants' individual claims, in the Tribunal's view, the critical event that gave rise to this dispute is the instruction by the Ministry not to let the ship leave the territorial waters of Ukraine. The acts preceding the event do not, in the Tribunal's view, rise to the level of a breach of the BIT. Moreover, [X] appears to have been consistently in support of the continuation of the project and took substantial measures prior to April 2006 to facilitate an amicable resolution to the dispute that began to arise in 2005.²²² For these reasons, whether the acts of [X] are attributable to Ukraine is not the relevant question, and the Tribunal need not address that point.

235. The critical issue is whether the April 2006 instruction preventing the ship from leaving the territorial waters of Ukraine (an instruction that undisputedly came from the Ministry of Agricultural Policy and not [X]), and the sustained refusal to allow the ship to leave Ukraine over the course of the following year, is attributable to the State.

236. The Tribunal finds that such instruction was clearly an act of the State. The instruction was given by the Ministry of Agricultural Policy, which is an organ of the State. The Ministry then conveyed similar instructions to the port authorities and border guards – also state or quasi-state entities.²²³ Based on the facts on the record, it is reasonable to conclude that these instructions were the sole reason why the ship did not leave port. There can be no doubt that such instructions were issued by the State. There has been some suggestion that the ship's

²²² See, e.g., [...] Witness Statement at para. 25.

²²³ Letter from [...] to [X], 14 April 2006 (Exhibit C-94).

captain, [...], might have been more persistent in moving the Khersones out of Kerch on the day in question, because it was not entirely clear that sailing had actually been prohibited by the authorities. But it is clear from the relevant documentation and testimony that the Khersones almost certainly would have been kept in port whatever efforts [...] had undertaken. Moreover, it is understandable that he (and his employers at Inmaris) would have been cautious in those circumstances.²²⁴

237. On this basis, the Tribunal finds that the travel ban was attributable to the State. This does not, of course, answer the question of whether that act was in breach of the BIT. The Tribunal now turns to that issue.

B. Fair and Equitable Treatment

238. Article 2(1) of the BIT states: “Each Contracting Party shall in its territory promote as far as possible investments by nationals or companies of the other Contracting Party and admit such investments in accordance with its respective laws. It shall in any case accord investments fair and equitable treatment.” Claimants assert that Respondent’s behavior immediately prior to, during, and after the alleged arrest of the ship amounted to a denial of fair and equitable treatment. Respondent denies the claim.

1. Claimants’ Position

[...]

2. Respondent’s Position

[...]

²²⁴ See, e.g., Tr. 574 – 575. In response to a question from the Tribunal asking why he did “not order [his] agent to get the necessary permissions, despite the telegram,” [...] responded, “But it is impossible. If the Minister forbade the port authorities to give use clearance to leave the port, nobody is going to follow any of my orders, instructions. To give an order to the agent to get any permissions, it is impossible to do that in our country when the Minister has forbidden it.”

3. Tribunal's Findings

a. Scope of the Fair and Equitable Treatment Standard

263. As noted, the parties disagree as to the basic content of the fair and equitable treatment standard. Respondent contends that the standard requires nothing more than treatment in accordance with the international minimum standard of treatment required by customary international law. In support of its position, Respondent cites several decisions under the investment chapter of the NAFTA as well as a few additional cases that have equated “fair and equitable treatment” with the customary international law standard. In contrast, Claimants assert that the fair and equitable treatment standard is an autonomous standard that is not limited to customary international law. As a practical matter, the main difference between the two views articulated by Respondent and Claimants is that, under Respondent’s proposed standard, only gross unfairness or actions that shock one’s sense of legal propriety would run afoul of Article 2(1), while, under Claimants’ proposed standard, government conduct need only be unfair and not necessarily “gross” or “shocking.”

264. The Tribunal recognizes that several NAFTA decisions have concluded that “fair and equitable treatment” requires nothing more than the treatment required by customary international law. However, the three parties to the NAFTA – the United States, Canada, and Mexico – issued a binding interpretation of the relevant provision in NAFTA that requires that it be interpreted in that fashion. There is no such agreement between Ukraine and Germany with respect to the interpretation of Article 2(1) of the BIT. The Tribunal also recognizes that a few non-NAFTA cases have concluded that fair and equitable treatment is limited to customary international law, but the Tribunal must respectfully disagree with those decisions.

265. There is nothing in the BIT that limits Article 2(1) to the standard required by customary international law. In the absence of such a statement, the Tribunal interprets the language as written, *i.e.*, the government is obligated to accord fair and equitable treatment to foreign investments, and therefore there is no need to establish that the government's actions were in breach of customary international law in order to establish a breach of Article 2(1). Any government act that is unfair or inequitable with respect to a covered investment breaches that obligation. A government act could be unfair or inequitable if it is in breach of specific commitments, if it is undertaken for political reasons or other improper motives, if the investor is not treated in an objective, even-handed, unbiased, and transparent way, or for other reasons.

266. Respondent also asserts that the fair and equitable treatment standard is limited to *investments* and does not apply to investors. While the language of Article 2(1) nominally applies to investments, the distinction Respondent seeks to draw has no practical import. If Respondent denied fair and equitable treatment to Claimants' investment (*i.e.*, their participation in the contractual arrangements), then it also denied fair and equitable treatment to Claimants themselves insofar as they are owners of the investment. The primary act of which Claimants complain – the travel ban – could be cast as a denial of fair and equitable treatment of Claimants' investment, *i.e.*, the entire operation of the project and the exercise of Claimants' contractual rights, or of Claimants themselves, *i.e.*, they were prejudiced to the extent that their investment was unfairly undermined. There is no practical difference.

b. Tribunal's Findings with Respect to the Alleged Breach of the Fair and Equitable Treatment Standard

267. The Tribunal will now turn to the specific claims Claimants have raised. The Tribunal will deal first with claims arising out of events prior to the travel ban. The Tribunal will then address the travel ban specifically.

268. Apart from the travel ban, Claimants point to several other actions of [X], the Ministry, and other government officials or bodies as evidence that Respondent breached Ukraine's fair and equitable treatment obligation. The Tribunal shall not repeat the explanation of each of these actions events, but, in summary, Claimants believe that Respondent failed to act openly and transparently in its interactions with Claimants, arbitrarily questioned the legality of the Bareboat Charter and other contractual arrangements, made unreasonable and baseless demands with respect to the production of information, and engaged in other behavior that, Claimants assert, was inconsistent with the contracts and the parties' course of dealing. For the reasons explained below, the Tribunal concludes that by these actions Respondent did not breach its obligation to accord fair and equitable treatment.

269. A party to a contract has a right at any time to request information from the other party and to review (and even revise) its views regarding the advisability and legality of a particular contractual arrangement. This does not mean that the party can take matters into its own hands and seek to unilaterally abrogate an agreement, amend its terms, or coerce the other party into taking actions it otherwise would not. However, apart from the travel ban, the actions of Respondent do not reach this level.

270. As is apparent from the factual discussion above, the contractual arrangements between Claimants and [X] were far from clear. They contained many apparent internal inconsistencies, that require significant interpretive effort to decipher. The Acts, which are the primary evidence of the parties' behavior leading up to the Bareboat Charter, were ambiguous at best, and, during the course of the arbitration, the parties could not even provide a clear position as to which party was responsible for generating the Acts or the methodology used to create them. Furthermore, the contracts had clear and glaring omissions, including failing to provide

any explicit rules on the division of revenues or allocation of profits under the Basic Contract, and failing to indicate clearly which party was responsible for the winter costs under the Bareboat Charter. In light of these difficulties, the Tribunal can find no fault in Respondent questioning the structure and nature of the contractual arrangements.

271. The Tribunal also agrees with Respondent's view that the contractual arrangements with Claimants did not *guarantee* that Claimants would earn a reasonable return on the operation of the vessel. Certainly, no specific rate of return was guaranteed, as evidenced by the fluctuating financial performance of the ship over the term of the contracts. To the extent there were such expectations of future revenues and profits, they must have been rooted in the historical performance of the ship and the expectations of the future development of the market.

272. Furthermore, the Tribunal does not find that, prior to the travel ban, Respondent acted in bad faith or otherwise denied Claimants due process. There were many discussions between Claimants and Respondent regarding the contracts, and Claimants had ample opportunity to present their side of the issue. The fact that Respondent disagreed with Claimants and, in Claimants' view, did not take proper consideration of Claimants' arguments does not prove a breach of the BIT. Even the fact that Respondent's views may have changed regarding the legality of the contracts does not prove that Respondent acted improperly. Views change with time, and such evolution is not surprising given the length of the contractual arrangement and the infirmities in the drafting of the contracts as noted above.

273. However, the travel ban was of an entirely different nature than the other acts of which Claimants complain. While it is perfectly appropriate for a party to question a contractual arrangement and seek to modify its terms, it must do so within the confines of the law and through proper channels. It is not permissible for a party simply to take matters into its own

hands and unilaterally prevent performance of a contract, particularly through the exercise of government authority, which is precisely what occurred in this case. By instructing [X], as well as the port and border authorities, not to let the ship leave port, Respondent stepped over the line. It was no longer seeking to renegotiate the agreement but was instead unilaterally and forcefully abrogating the arrangement or attempting to coerce a renegotiation. It did not seek reformation through proper legal channels by, *e.g.*, instructing [X] to bring a breach of contract claim in local courts. Instead, it used its governmental authority to prevent the ship from sailing, and then followed up the instruction to [X] with similar instructions to the port and border authorities.

274. As noted, Respondent argued at length that the telegram and ensuing travel ban did not result in a legal “arrest” of the ship. The fact remains, however, that for all practical purposes the ship could not sail, and such ban was imposed upon the instruction of the government. Regardless of whether the action constituted a formal “arrest,” the practical effect was the same.

275. In light of the above, the Tribunal concludes that the instruction from the Ministry preventing the ship from leaving the territorial waters of Ukraine, and the ban that remained in effect for the ensuing year, amounted to a denial of fair and equitable treatment in violation of Article 2(1) of the BIT.

C. Arbitrary Action

276. Article 2(3) of the BIT states, “No Contracting Party should in any way impede the management, maintenance, use or enjoyment of investments in its territory by nationals or companies of the other Contracting Party by means of arbitrary or discriminatory measures.” Claimants argue that Respondent’s actions were arbitrary and capricious and, therefore, in

violation of Article 2(3). Respondent denies the assertion. The Tribunal examines the parties' arguments below.

1. Claimants' Position

[...]

2. Respondent's Position

[...]

3. Tribunal's Findings

282. The Tribunal finds that the Ministry's instruction preventing the ship from leaving the territorial waters of Ukraine was an arbitrary measure that impeded the management, maintenance, use or enjoyment of Claimants' investment and, therefore, was a breach of Article 2(3) of the BIT. As noted above, the instruction imposing the travel ban had no basis in the contract, and Respondent failed to follow any proper legal channels in seeking reformation of the contract, if indeed that was Respondent's primary concern, or in challenging the legality of the contract or Claimants' performance. Instead, Respondent's actions constituted a unilateral exercise of sovereign authority in ordering [X] to prevent the ship from traveling in April 2006 and for a year thereafter, including through direct communications to the port authorities and border guards. These actions prevented the operation of the project envisioned in the contracts and, thereby, deprived Claimants of the use of their investment.

283. However, for the same reasons discussed above in the context of Claimants' fair and equitable treatment claims, the Tribunal does not believe that Respondent's other actions of which Claimants complain (apart from the travel ban), including its dealings with Claimants prior to the imposition of the travel ban, were arbitrary. There is nothing arbitrary about a party to a contract raising questions regarding the propriety or advisability of the agreement and

seeking improved terms, provided that such actions do not amount to coercion. The Ministry's actions prior to the issuance of the telegram were the actions of a partner operating in an environment where the parties' rights and obligations as set forth in the underlying legal instruments were ambiguous and the contractual terms were deficient in several crucial respects.

D. Expropriation

284. Article 4(2) of the BIT states that “[i]nvestments by nationals or companies of either Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for the public benefit and against compensation.” Claimants assert that Respondent's actions expropriated their contractual rights. Respondent denies the claims.

1. Claimants' Position

[...]

2. Respondent's Position

[...]

3. Tribunal's Findings

300. As described above, the Tribunal finds that the telegram instructing [X] not to let the ship leave the territorial waters of Ukraine, and the continuation of the travel ban for the ensuing year, was a sovereign act taken by Respondent. That act deprived Claimants of access to and control over the essential asset for its investment, *i.e.*, the ship, and thus of Claimants' contractual rights to use that asset. While Respondent asserts that any deprivation was merely temporary because the travel ban was lifted after one year, the damage to the investment had by that time been done. An entire sailing season was cancelled, and Claimants' business suffered substantial harm such that they could not reasonably have been expected to resume operations as

if nothing had happened. Indeed, at that stage, two of the Claimants were in insolvency proceedings, and, even if those entities had remained solvent, it is not reasonable to assume that customers would be willing to work with them in light of these events.

301. Whether the actions of Respondent amounted to a direct expropriation or a measure tantamount to expropriation is not critical to the Tribunal's finding. Certainly, the withholding of a key asset could be viewed as an effective seizure of Claimant's right to use that asset. Title to the ship was, however, never vested in Claimants. At a minimum, the travel ban amounted to an indirect expropriation in that it destroyed the value of Claimants' contractual rights and such diminution in value (due to the lasting damage to Claimants' business) was, for all intents and purposes, permanent. Therefore, the Tribunal concludes that Respondent's actions amounted to expropriation or a measure tantamount to expropriation, which was not accompanied by any compensation, in violation of Article 4(2) of the BIT.

302. The Tribunal rejects Respondent's argument that it was necessary for Claimants to bring their dispute to local courts before making an expropriation claim in this arbitration. In the very case Respondent cites to support its position (*Generation Ukraine*), the tribunal found that "[t]here is, of course, no formal obligation upon the Claimant to exhaust local remedies before resorting to ICSID arbitration pursuant to the BIT."³³² This is precisely the point – nowhere does the treaty suggest that exhaustion of local remedies is a pre-requisite (either procedurally or substantively).

303. The Tribunal also rejects Claimants' assertion that the travel ban was not taken for a public purpose. There is no evidence that Ukraine's actions were politically motivated, or due to corruption, a desire for personal gain, or a personal vendetta. In fact, there is no evidence

³³² *Generation Ukraine*, Award at para. 20.33.

that it was motivated by anything other than protecting the government's interests. The Ministry believed that the government was entitled to a share of the profits, and it was seeking to protect the public fisc. In addition, the Ministry appeared to believe that the travel ban was necessary to prevent the ship from being arrested abroad. Whether that belief was well founded is not relevant to the question of whether Ukraine's actions were for a public purpose. The Tribunal is convinced that the Ministry's actions were genuinely motivated by an intent to protect the public interest. As the Tribunal has explained, the remedy the Ministry chose was inappropriate, but that does not mean that its motivation was illegitimate. In other words, while the Ministry may have believed it was acting in the public interest, its actions in pursuit of that interest were nevertheless disproportionate and arbitrary.

304. At the same time, however, the Tribunal notes that improper motive or intent is not a prerequisite to a finding of expropriation. As the tribunal concluded in *Vivendi II*:

While intent will weigh in favour of showing a measure to be expropriatory, it is not a requirement, because the *effect* of the measure on the investor, not the state's intent, is the critical factor. As Professor Christie explained in his famous article in the British Yearbook of International Law more than 40 years ago, a state may expropriate property where it interferes with it even though the state expressly disclaims such intention. Indeed, international tribunals, jurists and scholars have consistently appreciated that states may accomplish expropriations in ways other than by formal decree; often in ways that may seek to cloak expropriative conduct with a veneer of legitimacy.³³³

305. In other words, once a measure has been found to be expropriatory, a State must pay compensation, even if the measure is taken for a public purpose. Whether a government act is taken for a public purpose does not change the fact that compensation is owed.

³³³ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, at para. 7.5.20, citations omitted.

E. Paragraph 4 of the Additional Protocol of the BIT

306. Paragraph 4 of the Additional Protocol to the BIT states, “[w]ith regard to Article 4 . . . [a] claim for compensation shall also exist in case of an intervention in the enterprise, which is an object of the investment, through state measures and its economic substance is impaired substantially thereby.” Article 4 of the BIT includes, among other things, the guarantee of fair and equitable treatment and protection against uncompensated expropriation.

1. Claimants’ Position

[...]

2. Respondent’s Position

[...]

3. Tribunal’s Findings

309. Paragraph 4 of the Additional Protocol to the BIT is prefaced with the overarching statement that it is “[w]ith regard to Article 4” of the BIT. Consequently, the Tribunal does not believe that paragraph 4 creates an additional, free-standing obligation, but rather, that it merely interprets the basic obligations already present in Article 4 of the BIT. In light of the Tribunal’s findings that Respondent’s actions breached Article 4, a separate discussion of paragraph 4 of the Additional Protocol would add nothing to, and certainly would not change, the Tribunal’s conclusions with respect to Respondent’s compliance with Article 4. There is, therefore, no need to resolve the parties’ differences in the translation and interpretation of paragraph 4 of the Additional Protocol.

IV. DAMAGES

310. Claimants assert that they are entitled to compensation for damages to the Inmaris Companies resulting from Respondent's actions, including, most significantly, the telegram instructing [X] not to let the ship leave the territorial waters of Ukraine. Respondent denies that its actions were the cause of any damage to Claimants and, in any event, contests the amount of damages claimed.

311. We address below each of Claimants' heads of claim and Respondent's arguments with respect to such claims. The Tribunal's findings follow thereafter.

A. Claimants' Position

[...]

1. Damages Incurred as a Result of the Travel Ban

[...]

a. Insolvency Claims

[...]

b. Insolvency Costs

[...]

c. Customs Fine

[...]

d. "Frustrated Expenses"

[...]

e. Repayment of Loans

[...]

2. Lost Profits and Terminal Value

[...]

3. Moral Damages

[...]

4. Interest

[...]

B. Respondent's Position

1. Causation

[...]

2. Damages

[...]

a. Insolvency Costs and Claims

[...]

b. Customs Liability

[...]

c. Frustrated Investments

[...]

d. Loan Repayment

[...]

e. Lost Profits and Terminal Value

[...]

f. Moral Damages

[...]

g. Interest Rates

[...]

C. Tribunal's Findings

1. Causation

381. As stated in Article 31(1) of the ILC Articles on State Responsibility, “[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.” Respondent has presented arguments that its acts did not cause the harm in question under a standard that considers either whether the acts were a “proximate” cause of the harm or whether the harm was a “foreseeable” result of the acts. The Tribunal finds that the action taken by Respondent in ordering that the ship not leave the territorial waters of Ukraine caused the harm to Claimants under either standard discussed by Respondent. As a direct result of that instruction, Claimants had to cancel the 2006 sailing season. It is irrelevant that there was some uncertainty about the duration of the travel ban in the first few days after the ban was issued, or that Claimants continued to try to do business for some time in the hope that the ban would be lifted. The ban was wrongful and should never have been imposed. As it remained in place beyond the start of the 2006 season, Claimants did what was necessary to cancel the bookings. The ban remained in force for a year, and, at that point, the damage to Claimants became irreversible.

382. In addition, the cancellation of the sailing season, which was a direct result of the telegram, led to Claimants’ insolvency and the other damages discussed in further detail below. While Respondent has argued that its actions did not cause Claimants’ insolvency, or that Claimants initiated insolvency proceedings prematurely, it is clear to the Tribunal that Claimants had little choice in taking the action they did. The indefinite postponement or cancellation of the sailing season had immediate effects on Claimants’ business, and they had to take urgent steps to address their outstanding debt obligations.

2. Damages Claims

a. Insolvency Claims

383. As noted, Claimants claim damages of EUR [...] for insolvency claims associated with IWC, and EUR [...] for insolvency claims associated with IWS, both of which include a combination of claims approved by the insolvency administrator, disputed claims, and claims that have not yet been verified.

(i) IWC Insolvency Claims

384. According to [...], the claims against IWC can be divided into the following three categories:⁴⁷⁴

- Approved and included: EUR [...]
- Disputed: EUR [...]
- Filed but not yet verified: EUR [...]

385. These claims total EUR [...]. As noted, this total includes certain erroneous claims, which Claimants do not include in their damages claim. The Tribunal understands that these erroneous claims are included in the “disputed” category above. The Tribunal also notes that there appear to be at least two other claims (IWC Claims 21 and 23), which Claimants did not deduct from their damages claim, but which also appear to be erroneous. The Tribunal notes that [...] himself has also filed a disputed claim in the insolvency proceedings for over EUR [...].

386. The Tribunal sees no basis for awarding damages for claims that are either disputed or unverified. The Tribunal understands Claimants’ argument that these claims may

⁴⁷⁴ [...] Witness Statement at para. 3.1 (Exhibit C-WS-19).

eventually be proven and accepted by the insolvency administrator. However, the Tribunal cannot base its decision on the uncertain possibility that this will come to pass.

387. The Tribunal finds, however, that Claimants are entitled to damages for the approved insolvency claims in the amount of EUR [...]. As these amounts have not yet been paid, the Tribunal does not award any interest for these amounts.

(ii) IWS Insolvency Claims

388. According to Dr. Undritz, the claims against IWC can be divided into the following three categories:⁴⁷⁵

- Approved and included: EUR [...]
- Disputed: EUR [...]
- Filed but not yet verified: EUR [...]

389. These claims total EUR [...]. As noted, this total includes certain erroneous claims, which Claimants do not include in their damages claim. Claimants reduced this figure in their damages claim to account for certain erroneous claims.

390. Dr. Undritz provided two charts with details on the insolvency claims against IWS. The first chart, provided with his original Witness Statement, provides details on the various creditors and the amounts and reasons for the claims, but no indication as to whether the claims are disputed. The second chart, provided with his Additional Witness Statement, however, contains dozens of entries in which *no* information is provided on the creditor or amount of the claim filed but which nevertheless indicate that the claim has been accepted. Consequently, the presentation of these various claims has been made unnecessarily complicated and difficult to follow.

⁴⁷⁵ Undritz Witness Statement at para. 3.2 (Exhibit C-WS-19).

391. In any event, for the same reasons noted above with respect to IWC, the Tribunal sees no basis for awarding damages for claims that are either disputed or not verified. The Tribunal finds, however, that Claimants are entitled to damages for the approved insolvency claims in the amount of **EUR [...]**. Again, as these amounts have not yet been paid, the Tribunal does not award any interest for these amounts.

3. Insolvency Costs

392. As noted, Claimants claim damages for insolvency costs in the amount of EUR [...]. Respondent argues that such costs are speculative. The Tribunal has concluded that Respondent's act caused Claimants' insolvency, and, therefore, Respondent is responsible for compensating Claimants for the resulting harm, including with respect to the payment of insolvency costs.

393. The Tribunal agrees that the costs are speculative given that they have not yet been finally established, but at the same time, it must be recognized that Claimants *will* be required to bear substantial costs, which they would not have borne in the absence of Respondent's wrongful conduct. According to the letter from the Clerk of the insolvency court, "The total costs of the proceedings (court fees, fees for the preliminary insolvency administrator and the insolvency administrator) will, from today's perspective, amount to net nearly Euro [...] and Euro [...]." On this basis, the Tribunal awards Claimants **EUR [...]** to cover the costs of the insolvency proceeding. It does not appear that such amounts have yet been paid (although it is inevitable that they will be). Therefore, it would be inappropriate to award any interest associated with this head of claim.

4. Customs Fine

394. Claimants provide no documentation for their claim for reimbursement for the alleged customs liability of EUR [...]. Their sole evidence consists of a statement made in the affidavit of Claimants' witness, [...]. In his witness statement, [...] provides a string of case numbers that he says are citations to cases registered with the Stralsund customs authorities.⁴⁷⁶ This is not sufficient justification for the claim. Claimants have presented no other documentation regarding the circumstances of the incident, and there is no basis for the Tribunal to decide that [X] or Respondent bears responsibility. Therefore, the Tribunal rejects this damages claim.

5. "Frustrated Expenses"

395. As noted, Claimants claim EUR [...] for "frustrated expenses," *i.e.*, the EUR [...] Claimants paid to [X] at the start of the 2005 season and the cost of supplying the ship for the 2006 season.⁴⁷⁷

396. With respect to the EUR [...] payment, Claimants agreed to make the payment as part of the renegotiation with [...] in March 2005.⁴⁷⁸ The payment was at times described as an "irrevocable loan,"⁴⁷⁹ which the Tribunal understands to mean that it was, in fact, akin to a grant rather than a loan, which means that there is no indication that Claimants were entitled to repayment. The fact that the payment was made in the context of an attempted renegotiation of the contract does not change the nature of the payment. Claimants did not have to make the payment, but chose to do so. They could have instead taken the dispute to arbitration in

⁴⁷⁶ Witness Statement of Mr. [...] at para. 8 (Exhibit C-WS-3).

⁴⁷⁷ See Claimants' Memorial at para. 336.

⁴⁷⁸ See Claimants' Memorial at para. 18; *see also* Additional Agreement to the Basic Contract, 1 April 2005 (Exhibit R-28).

⁴⁷⁹ See, *e.g.*, Claimants' Memorial at para. 18; Claimants' Reply at para. 71.

accordance with the terms of the underlying contracts, but did not. While they assert that the payment was made under pressure from Respondent, even if this assertion were true, such pressure did not in itself amount to a breach of any contractual obligation or of any obligation of Respondent under the BIT.

397. With respect to the cost of supplying the ship, Claimants have provided an itemization of such expenses, which total EUR [...].⁴⁸⁰ These expenses appear to be primarily for spare parts. The Tribunal recalls that, under Section II(1)(c) of the Crewing Contract, [X] was responsible for “[p]rovision of necessary stocks, spare parts and lubricating oils.”⁴⁸¹ The Tribunal has already concluded that [X] was to pay for these expenses.

398. Respondent argues that Claimants should sue [X] for return of the supplies or related costs. However, as noted above, Respondent’s actions caused [X]’s failure to pay. Once harm caused by a breach of the Treaty has been proven, the existence of alternative avenues of relief is irrelevant to the quantum of compensation. An entitlement to compensation from Respondent is established as a matter of international law, regardless of whether some other entity may be jointly or severally liable for the same harm within a municipal legal order. Consequently, it was Claimants’ prerogative to seek relief under the BIT rather than through local courts.

399. On this basis, the Tribunal awards Claimants **EUR [...]** plus interest. The Tribunal shall address the rate of interest below.

⁴⁸⁰ Invoices of 2005 and 2006 concerning the expenses incurred for maintenance of the Khersones, 2005-2006 (Exhibit C-166).

⁴⁸¹ Crewing Contract at Section II(1)(c) (Exhibit C-33).

6. Loan Agreement

400. Claimants assert an entitlement to compensation in the amount of EUR [...] for an outstanding loan agreed between [X] and IWS in February 2005, which was never repaid by [X]. The Tribunal concludes that Respondent terminated the relationship with Claimants, and, as a result of that termination, there is no prospect that [X] will repay the loans. On this basis, the Tribunal finds that Claimants are entitled to compensation for a portion of the loan (as discussed below).

401. The Tribunal notes that Claimants' argumentation and the contractual documents themselves are confused on this point. It appears that there were two separate contracts. The first contract, "Addendum No. 1 to the [...]"⁴⁸² purports to identify three specific debts of [X] to IPS "for previous periods up to 31/12/2002." These include: (a) EUR [...] for a "special payment" to [...]; (b) EUR [...] for certain [X] debts to IPS "up to 31/12/2002"; and (c) EUR [...] for an amount paid by "Inmaris" (which the contracts defines as IWS, not IPS) related to underwater inspection of the vessel in the port of Lübeck. These amounts total EUR [...].

402. It is not apparent from the record where these amounts are documented, other than in the *post hoc* document just mentioned. Claimants have provided a document entitled "Additional Account [...]"⁴⁸³ which includes a special payment to [...] matching the amount in Addendum No. 1, but it then lists an amount of EUR [...] (instead of EUR [...] as reported in Addendum No. 1) for the [X] debt to IPS through December 2002, which results in a total of EUR [...]. Additional Account [...] does not mention the debt to IWS regarding the underwater inspection.

⁴⁸² See Addendum to [...], 20 February 2005 (Exhibit C-63).

⁴⁸³ See Additional Account [...] Concerning Debts of [X] to IPS (Exhibit C-60).

403. In addition, “Addendum No. 1 to [...]” refers to a [X] debt of EUR [...] owed to IWS for deck repairs and deck and classification works in 2004. This amount, plus the EUR [...] amount noted above, total EUR [...]. However, the document lists a “Total” of EUR [...].

404. The second contract was provided as Exhibit VI to the first report of Claimants’ damages expert.⁴⁸⁴ This contract between IPS and [X] is dated 20 February 2005, and indicates that [X]’s debt to IPS “in the years 2002 up to 2003” is EUR [...]. In support of this figure, the contract cites “Addendum 1 to [...]” dated 20 February 2005 (the document referred to above). However, the figure EUR [...] does not correspond to any of the figures in Addendum No. 1. Claimants’ damages expert explains that “[a]ctivity in the year 2004 resulted in an increase of EUR [...] in the debt owing by the [X] to Inmaris. This value is specifically referenced in the 20 February 2005 ‘addendum no. 1’”⁴⁸⁵ On this basis, the expert report indicates that the amounts specified in the two contracts should match. However, they do not. As noted, the figures in “Addendum No. 1 [...]” total to EUR [...] (although the document erroneously reports a total of EUR [...]).⁴⁸⁶ Adding the EUR [...] to the EUR [...] identified in the second contract produces the amount Claimants claim, EUR [...].

405. The Tribunal will now turn to Claimants’ argumentation on this point. Claimants argue that “the loans were the contractual consequence of operational costs higher than [X]’s share of revenues. The loan amounts are also based upon old debts having arisen prior to the Bareboat Charter. Claimants had to bear only the *operational* costs”⁴⁸⁷ This is a critical point in Claimants’ argumentation. If, as Claimants argue, the costs giving rise to the loans arose during the period when the Basic Contract was in effect, then it is conceivable that they are costs

⁴⁸⁴ See First [...] Report at Exhibit VI.

⁴⁸⁵ First [...] Report at para. 87.

⁴⁸⁶ See Addendum to [...], 20 February 2005 (Exhibit C-63).

⁴⁸⁷ Claimants’ Reply at para. 262.

that should have been borne by [X], since each party was responsible for a certain portion of costs during that time. However, if the costs arose during the period when the Bareboat Charter was in effect, then Claimants would have been responsible for the costs given that, under the Bareboat Charter, Claimants were responsible for all costs (except winter costs) and retained all revenues. The difficulty the Tribunal faces, however, is that it is not possible to determine when the costs were incurred.

406. The Tribunal has already commented upon Claimants' inconsistent characterizations of the allocation of operational costs between Inmaris and [X] under the Basic Contract. This in itself complicates any analysis of whether the costs specified in the loan contracts are attributable to Claimants or [X]. In addition, Claimants' statement that the loan amounts are based on old debts under the Basic Contract is at best only partially correct. As noted, "Addendum No. 1 to [...]" states that EUR [...] of the loan relates to "debts up to 31/12/2002."⁴⁸⁸ Given that this agreement refers to debts through 2002, there is no way for the Tribunal to determine whether, in fact, the debts were merely carried over from the period when the Basic Contract was in effect, or whether they relate to costs incurred after that period.

407. There is no indication that the remaining loan sums relate to pre-Bareboat Charter expenses. Indeed, Addendum No. 1 expressly states that the amount of EUR [...] related to expenditures in 2004. During this period, [X] was not earning revenues on the ship's operation, and so, at least with respect to expenses incurred under the Bareboat Charter, Claimants' argument that "the loans were the contractual consequence of operational costs higher than [X]'s share of revenues" is without merit. As explained below, the Tribunal shall award Claimants compensation for this amount, but on other grounds.

⁴⁸⁸ See Addendum to [...], 20 February 2005 (Exhibit C-63).

408. In light of these various infirmities in the documentation and Claimants' argumentation, the Tribunal concludes that there is insufficient evidence to award compensation for most of the loan described in "Addendum No. 1 to [...]." Specifically, the Tribunal cannot award damages for the payment related to [...], the alleged debts related to "performances and deliveries from Inmaris Perestroika Sailing GmbH to [X] up to 31/12/2002," or the expenditure related to the underwater inspection.⁴⁸⁹

409. However the Tribunal finds sufficient evidence to establish an entitlement to compensation for the fourth component listed in Addendum No. 1, expenditures for "deck repairs, and dock and classification works on the [X]'s Khersones sail training vessel for the procurement of classification certificates and additional vessel insurance in 2004."⁴⁹⁰ These expenses totaled EUR [...]. These are the types of activities that the Crewing Contract assigns to [X]. Section II(1)(b) of the Crewing Contract states that [X] is responsible for "[o]rganisation and supervision of docking, repairs, reconstruction works and maintenance of classification."⁴⁹¹ The Tribunal has already concluded in the factual discussion above that [X] is responsible for these costs. Consequently, the Tribunal awards Claimants damages of **EUR [...]**.

410. The Tribunal declines to award any interest for this amount. "Addendum No. 1 to [...]" does not specify any interest rate. Furthermore, while the second contract (provided as Exhibit VI to the first report of Claimants' damages expert) specifies an annual interest rate of 4.5 percent, this contract was between IPS and [X] and does not cover the EUR [...] owed to IWS. The Tribunal recalls that Claimants agreed that any interest on the alleged EUR [...] loan should be offset in the amount of EUR [...] to reflect the First Declaration of Prolongation.

⁴⁸⁹ Addendum to [...], 20 February 2005 (Exhibit C-63).

⁴⁹⁰ Addendum to [...], 20 February 2005 (Exhibit C-63).

⁴⁹¹ [...] Contract at Section II(1)(b) (Exhibit C-33).

Given that the Tribunal is not awarding interest on any amount of the loan, the Tribunal need not address whether an offset to interest is appropriate.

7. Lost Profits and Terminal Value

411. Claimants seek compensation for future lost profits totaling EUR [...] and terminal value of EUR [...]. The Tribunal addresses each of these damages claims below.

a. Lost Profits

412. The Tribunal concludes that Claimants are entitled to compensation for lost profits, as Claimants had a track record of several years in which they earned a profit from the venture.

413. As explained in the factual section above, the Bareboat Charter and related contracts were to remain in force until 31 December 2009, at which point the arrangements would revert to the Basic Contract. As the Tribunal has explained, the Basic Contract would then have remained in effect until 2016, not until 2020, as Claimants contend. The Tribunal's analysis of lost profits is based on this general framework. For the period between April 2006 and 2016, the Tribunal will examine the elements of the lost profits claim in turn: (1) Claimants' expected revenues; (2) Claimants' expected costs; (3) Claimants' expected profit; and (4) the applicable discount rate. The Tribunal shall address the applicable interest rate in the following section.

(i) Expected Revenues

414. Claimants' expert projected future revenues, in part, based upon historical and projected revenue growth in the German cruise liner industry. After considering this testimony, the Tribunal is unable to accept this comparison. The cruise ship industry in Germany is qualitatively different from the Inmaris project, and there is insufficient basis to conclude that

Claimants' business would grow in line with the growth of the cruise liner sector. Cruise ships are larger and the passenger experience is very different from the passenger experience on the Khersones.

415. Claimants' expert also relied heavily for revenue projections upon Claimants' internal business plan. In particular, this plan formed the basis for a sharp increase in turnover in the first few years after 2006 (which, due to the effect of discounting, has a disproportionate effect on the final result). The Tribunal finds the business plan unconvincing because it is speculative and appears to be based on an overly optimistic expectation of growth with little evidentiary basis. The Tribunal will instead look to the project's and Claimants' own historical performance.

416. Schedule 3(a) of the 9 February 2011 report of Claimants' damages expert records Claimants' revenues from the ship in 2003 (EUR [...]), 2004 (EUR [...]), and 2005 (EUR [...]). The average of these amounts is EUR [...]. The Tribunal will use this figure as a baseline. (The Tribunal has excluded from these amounts "Other operating income" from the ship's operation for lack of explanation or evidence as to what this income includes.) Claimants' damages expert also reported revenue figures for the period from 1999-2002,⁴⁹² but the Tribunal does not believe that this period, coming as it did immediately after the reconstruction of the vessel, is indicative of future performance.⁴⁹³

417. The Tribunal shall also assume that revenues grow at an annual rate of 6 percent. This figure is approximately the average of the revenue growth between 2003 and 2005. The Tribunal has excluded 2004, as it appears to be an aberration in that the revenues for that year

⁴⁹² See Third [...] Report at para. 32 (Exhibit C-159).

⁴⁹³ The Tribunal finds it appropriate to use only the 2003-2005 period also because Claimants' damages expert uses that period in his calculations. See Third [...] Report at Schedules 3 and 3(a) (Exhibit C-159).

were higher than normal due to the fact that there was an additional winter season cruise that year.⁴⁹⁴ (The Tribunal has included 2004 revenues in the calculation of average revenues as explained in the preceding paragraph because, in the view of the Tribunal, periodic upticks are to be expected, but they should not be used to distort the average expected growth over several years.)

418. As explained in the Tribunal’s discussion of the facts above, the allocation of this revenue between Claimants and [X] differed based upon which contractual arrangements were in force. From April 2006 through 2009, while the Bareboat Contract was in force, Claimants were entitled to retain all of the revenues collected. During the subsequent period from 2010 to 2016, the Basic Contract operated, entitling Inmaris to only 40 percent of the revenues.

(ii) Expected Costs

419. Schedule 3(a) of the 9 February 2011 report of Claimants’ damages expert records Claimants’ costs for operating the ship in 2003 (EUR [...]), 2004 (EUR [...]), and 2005 (EUR [...]). The average annual cost during this period was EUR [...]. The Tribunal shall use this figure as the base for calculating costs for the period from 2006-2009, and will adjust the cost during this period using an expected growth rate.

420. In calculating the growth rate, the Tribunal has excluded 2004. As noted above, 2004 was aberrational because there was an additional winter cruise that year. The Tribunal will, therefore, exclude 2004 for purposes of calculating the expected growth in costs over time. The average annual growth rate from 2003-2005 (excluding 2004) is 5.6 percent. The Tribunal will apply this cost for each year from 2006-2009, starting with a base cost of EUR [...].

⁴⁹⁴ See Third [...] Report at para. 34 (Exhibit C-159) (explaining that 2004 “is seen to represent a spike in revenue caused by the additional periodic winter season cruise in that year”).

421. As noted, the Tribunal has used 2004 to calculate the base cost, but has excluded 2004 for purposes of calculating the growth rate. This is not inconsistent, as the Tribunal explained above in the discussion of the growth rate applicable to revenues. As the period 2003-2005 is a representative historical period, it is reasonable to conclude that the revenues during this period are representative of Claimants' future performance. However, the spike in revenues in 2004 distorts the growth rates (both for costs and revenues), in that it creates the artificial impression that there was a drastic improvement in the business between 2003 and 2004, and a drastic deterioration in performance between 2004 and 2005.

422. In 2010, the cost structure would have changed as a result of the reactivation of the Basic Contract. Schedule 1 of the Third [...] Report estimates the shared expenses that would have been deducted from Gross I and the Inmaris expenses for the period 2010-2016. The Tribunal has accepted this estimate of expenses.

(iii) Expected Profit

423. The Tribunal has calculated the expected profit by deducting the expected costs from the expected revenues.

(iv) Discount Rate

424. Claimants' damages expert has suggested a discount rate of 10 percent. He did not, however, provide a meaningful justification for this figure and, during the hearing, conceded that while he used outside sources to inform his opinion, he did not apply any specific formula.⁴⁹⁵ Respondent's damages expert suggested a discount rate of 14.95 percent. She identified her sources and provided her formula.⁴⁹⁶ In contrast to the methodology of Claimants' damages expert, the methodology employed by Respondent's damages expert is, at least, an

⁴⁹⁵ See Tr. 537:7 – 538:13.

⁴⁹⁶ Expert Report of [...], 15 December 2010, at para. 40 (Exhibit R-56).

objective methodology rather than mere opinion. The Tribunal will, therefore, apply a 14.95 percent discount rate to calculate the net present value of Claimants' expected profits as of April 2006.

(v) Conclusion Regarding Lost Profits

425. After applying the methodology outlined above, the Tribunal calculates Claimants' damages associated with lost profits, expressed in terms of net present value as of April 2006, to be **EUR [...]**.

b. Terminal Value

426. The Tribunal sees no basis for awarding terminal value to Claimants. There is no basis for assuming that the contractual relationship would continue beyond 2016. Furthermore, there is no basis for assuming that Claimants would be able to enter into a similar arrangement with another ship or, even if they were and that opportunity is now gone, there is no basis for holding Respondent liable for such loss. At a minimum, awarding such damages would be entirely speculative.

427. The Tribunal also feels compelled to note that Claimants' argument that it is entitled to terminal value is at odds with Claimants' argument that the contractual arrangements did not establish a joint activity. Claimants would only have a continuing entitlement to a portion of the project at the end of the contractual term if some of the assets of the project were held jointly with [X]. Claimants denied any such joint ownership in the context of their argument that the contracts did not establish a joint activity.

8. Moral Damages

428. The Tribunal declines Claimants' request for an award of moral damages. This dispute arose out of a genuine misunderstanding between the parties regarding the rights and

obligations under the various contractual arrangements. While, for the reasons described above, Respondent's actions were in violation of the BIT, such actions were not malicious or driven by motives beyond the perceived need to change key components of the economic relationship between Claimants and [X]. The Tribunal has awarded damages that will compensate Claimants for the commercial harm they suffered. The Tribunal does not find that any emotional or other harm Claimants may have suffered is sufficiently serious as to merit an award of additional compensation for moral damages.

9. Interest Rate

429. The Tribunal believes that an award of interest is appropriate to ensure that Claimants are made whole because interest reflects the time value of money. There are, however, exceptions to this finding. The Tribunal has already concluded that no interest should be awarded with respect to the damages associated with the insolvency claims and costs, nor with respect to the EUR [...] outstanding loan obligation.

430. As proposed by Claimants' damages expert, with respect to the remainder of the damages award, the Tribunal awards interest at a rate of five percent, compounded annually, beginning in April 2006. The Tribunal notes that while this rate was proposed by Claimants' expert as the rate appropriate for pre-award interest,⁴⁹⁷ the Tribunal sees no reason to apply a different rate to post-award interest.

V. COUNTERCLAIM

431. Respondent has made a counterclaim for the amount of winter costs it paid during the period when the Bareboat Charter was in effect.

⁴⁹⁷ See Third [...] Report at para. 81 (Exhibit C-159).

432. The Tribunal has jurisdiction to decide Respondent's counterclaim. Article 11 of the BIT confers on the Tribunal jurisdiction over disputes "with regard to investments between either Contracting Party and a national or company of the other Contracting Party."

Respondent's counterclaim is a dispute between it and Claimants "with regard to [Claimants'] investments"; further, it is a component of the larger dispute that Claimants have consented to submit to this arbitration. Therefore, Respondent's counterclaim is within the scope of the Tribunal's jurisdiction. However, as the Tribunal explained above, [X] was responsible for the winter costs, and, therefore, the Tribunal dismisses Respondent's counterclaim on the merits.

VI. COSTS

433. As explained in the procedural background, Claimants sought reimbursement of EUR 910,333.47 in costs of legal representation and EUR 1,131,496.53 in other costs, as well as reimbursement of their advance payment of USD 425,000 for the costs of arbitration and any further advance payments that might need to be made, to the extent that these payments were not refunded.

434. Respondent claimed USD 669,144.71 in costs of legal representation and USD 642,727.75 in other costs.

435. In its letter of 15 September 2011, Respondent commented on Claimants' lack of clarity in describing certain items in their cost submission, specifically: (i) Inmaris' management costs, consisting of the salaries of [...] and [...]; (ii) costs of legal representation by counsel whose participation in these proceedings had not been disclosed; (iii) expert fees paid to an expert whose participation in these proceedings had not been disclosed, and to [...], Inmaris' accountant and auditor, who had participated as a fact witness; and (iv) the cost of bookkeeping services for purposes of the [...] expert reports.

436. While Claimants prevailed in this arbitration, the facts of the dispute and the parties' own contractual relationship were complex and, at times, ambiguous. The Tribunal also notes that, due to the deficiencies in both Parties' presentations, the Tribunal was essentially forced to perform damages calculations *de novo*.

437. In light of these circumstances, the Tribunal declines to award costs to either side, and decides that each party shall bear its own costs and fees.

VII. AWARD

438. On the basis of the foregoing, the Tribunal:

a. finds that Respondent breached its obligation of fair and equitable treatment under Article 2(1) of the BIT;

b. finds the Respondent impeded the management, maintenance, use or enjoyment of Claimants' investment by means of arbitrary or discriminatory measures in breach of Article 2(3) of the BIT;

c. finds that Respondent expropriated Claimants' investment without payment of compensation in breach of Article 4(2) of the BIT;

d. finds that no additional finding is necessary with respect to Claimants' claims under paragraph 4 of the Additional Protocol to the BIT, as the Tribunal has already concluded that Respondent breached its obligations under Article 4 of the BIT;

e. awards Claimants [...] for Claimants' insolvency claims and costs, with no interest;

f. awards Claimants [...] for lost profits and frustrated expenses, plus interest at a rate of five percent compounded annually, beginning on 6 April 2006 until the date of payment;

g. awards Claimants [...] for the outstanding loan, with no interest;

- h. rejects all other claims by the parties; and
- i. decides that each party shall bear its own costs, fees, and other expenses.

Signed

Noah Rubins
Arbitrator
Date: 9 January 2012

Signed

Prof. Bernardo Cremades
Arbitrator
Date: 10 January 2012

Signed

Stanimir A. Alexandrov
President
Date: 12 January 2012