

Cambridge Law Review (2020) Vol V, Issue i, 1–11

*Freedom of the High Seas and Extent of Coastal State Jurisdiction: Reflections on the *Norstar* Case*

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I. INTRODUCTION AND FACTUAL BACKGROUND

On 10 April 2019, the International Tribunal for the Law of the Sea (Tribunal) delivered its judgment on the merits in a case opposing Italy and Panama.¹ The Tribunal decided by a majority of 15 against 7 that Italy had violated Article 87(1) of the 1982 Law of the Sea Convention (Convention) by breaching Panama's freedom of navigation on the high seas. The sizeable dissent strongly disagreed with the Tribunal's interpretation.

Panama lodged an Application on 16 November 2015² under Article 287 of the Convention, arguing that there was a dispute with Italy on the interpretation and application of the Convention in connection with the arrest and detention by Italy of the M/V 'Norstar' (*Norstar*), an oil tanker of Panamanian nationality, owned and operated by Norwegian companies and chartered out to a Maltese company. On 25 September 1998, while the ship was moored in Palma de Mallorca, it was seized by the Spanish authorities at the request of an Italian Public Prosecutor under applicable judicial assistance mechanisms.³ The Prosecutor had issued a Decree of Seizure (Decree) in August, wherein he ordered the seizure of the

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¹ International Tribunal for the Law of the Sea, *The M/V "NORSTAR" Case (Panama v Italy)*, Judgment of 10 April 2019. Both Italy and Panama chose a judge *ad hoc*. Vice-President Attard had been prevented from sitting on the bench.

² International Tribunal for the Law of the Sea, *Motor Vessel (mv) Norstar – Republic of Panama v The Italian Republic: Application of the Republic of Panama*, 16 November 2015.

³ The 1959 *European Convention on Mutual Assistance in Criminal Matters* and the 1985 *Convention Implementing the Schengen Agreement*.

Norstar and the oil transported aboard as *corpus delicti* for alleged criminal offences committed by eight individuals,⁴ of criminal association aimed at smuggling oil and tax fraud. The Prosecutor indicated that the *Norstar* had been selling mineral oils purchased in Italy exempt from taxes (as ship's stores) and then sold beyond the Italian territorial sea to Italian and other EU yachts (offshore bunkering), which subsequently re-introduced the products into the Italian customs territory. The *Norstar*'s use of the adjacent high seas was "found to be exclusively aimed at affecting Italy's [...] financial interests".⁵ Subsequently, in March 2003, the Court of Savona acquitted seven of the eight indicted persons and ordered the restitution of the vessel to its owner who did not, however, take possession of it. It was sold at public auction in Spain in 2015.

II. APPLICABILITY OF ARTICLE 87: JURISDICTION OF THE TRIBUNAL AND SCOPE OF THE DISPUTE

Faced with objections to jurisdiction and admissibility filed on 11 March 2016,⁶ the Tribunal rendered a judgment on 4 November 2016, the first of its kind in the Tribunal's history.⁷ It had to address Italy's contention that Panama's

⁴ This included Silvio Rossi, the owner of Rossmare International S.A.S, an Italian bunker trading company, the captain of the *Norstar*, and the president and managing director of the company owning the *Norstar*.

⁵ Decree of Seizure number 1155/97/21 R.N.R, dated 11 August 1998 (International Tribunal for the Law of the Sea, *The M/V "Norstar" Case, Memorial of the Republic of Panama, Annex 3* (11 April 2017)) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/case_no_25_merits/25_Memorial_Annexes_public.pdf> (accessed 1 January 2020).

⁶ International Tribunal for the Law of the Sea, *The M/V "Norstar" Case, Written Preliminary Objections Under Article 294, Paragraph 3 of the United Convention of the Law of the Sea* (10 March 2016) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Preliminary_Objections/Italy/The_MV_Norstar_case_Preliminary_Objections_Italy.pdf> (accessed 1 January 2020). Followed by International Tribunal for the Law of the Sea, *The M/V Norstar Case, The Republic of Panama v The Italian Republic, Observations and Submissions of the Republic of Panama to the Preliminary Objections of the Italian Republic* ('Observations', 5 May 2016) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Preliminary_Objections/Panama/OBSERVATIONS_AND_SUBMISSIONS_OF_THE_REPUBLIC_OF_PANAMA_TO_THE_PRELIMINARY_OBJECTIONS_OF_THE_ITALIAN_REPUBLIC.pdf> (accessed 1 January 2020). For a reply, see International Tribunal for the Law of the Sea, *The M/V Norstar Case, The Republic of Panama v The Italian Republic, Written Observations and Submissions of the Republic of Italy in Reply to Observations and Submissions of the Republic of Panama* ('Reply to Observations', 8 July 2016) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Preliminary_Objections/Italy/Written_Observations_and_Submissions_of_Italy_of_8_July_2016/01_Norstar_Italy_Preliminary_Objections_Reply_8th_July_2016.pdf> (accessed 1 January 2020).

⁷ International Tribunal for the Law of the Sea, *The M/V "NORSTAR" Case (Panama v Italy)* (Preliminary Objections), Judgment of 4 November 2016.

claim had no “adequate link” with the Convention, in particular Articles 87 and 300, which Panama argued Italy had violated.⁸ In doing so, Italy had relied on the Tribunal’s ruling in the M/V ‘*Louisa*’ (*Louisa*) case.⁹ The Tribunal examined the link between the Decree and the request for its execution against the *Norstar* for its “activities on the high seas” and Panama’s rights under the Convention.¹⁰ Without discussing the *Louisa* case in this context, the Tribunal found that the Decree and the request for its execution “may be viewed as an infringement” of Panama’s rights under Article 87 and therefore that provision was “relevant to” the case. The Tribunal concluded that the dispute concerned the interpretation or application of the Convention, namely, Articles 87 and 300.¹¹ Such determination is final and binding. The Tribunal dismissed all the other Italian objections to jurisdiction and admissibility, by a majority of 21 to one and 20 to two, respectively.¹²

Concerning the former, Italy notably argued that it was the wrong respondent and that Spain alone arrested and detained the vessel (arguing along the lines of the *Monetary Gold* case and the ‘indispensable party’ situation).¹³ Yet, the Tribunal noted that Spain merely provided assistance to Italy under the 1959 Strasbourg Convention: Italy had taken the Decree and made the request for its enforcement and these were central to the arrest of the vessel, over which Italy had legal control during its detention. In short, Spain’s legal interests did not form

⁸ Reply to Observations (n 6) [30]. The other provisions invoked by Panama (Articles 33, 58, 73, 111, and 226) were either subsequently abandoned or declared inapplicable by the Tribunal. Panama, in its written pleadings, had also argued that Italy had violated human rights but did not include such claims in its final submissions and were thus not considered by the Tribunal. See *Norstar* (n 1) [146]; Rules of the Tribunal (ITLOS/8, 17 March 2009) Article 75(2).

⁹ *M/V ‘Louisa’ (Saint Vincent and the Grenadines v Spain)* (Judgment) ITLOS Reports 2013, 35, [109]: “Article 87 cannot be interpreted in such a way as to grant the M/V ‘Louisa’ a right to leave the port and gain access to the high seas notwithstanding its detention in the context of legal proceedings against it”. Article 87(1) in substance says that the high seas are open to all States and the freedom of the high seas comprises, *inter alia*, freedom of navigation. Under Article 87(2), high seas freedoms shall be exercised with due regard for the interests of other States.

¹⁰ *Norstar* 2016 Judgment (n 7) [111].

¹¹ *ibid* [122], [132]–[133]. Under Article 300, the exercise of rights and obligations in the Convention must be fulfilled in good faith and without abuse of right. As Article 300 cannot be invoked on its own, the Tribunal found that “the question arises as to whether Italy has fulfilled in good faith” its obligations under Article 87 (*ibid* [132]).

¹² The Tribunal consisted of 20 members only, following the death of Judge Cachapuz de Medeiros in September.

¹³ *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States of America)* (Preliminary Question) [1954] ICJ Rep 33.

the “very subject matter”¹⁴ of the dispute and, as such, the prior determination of Spain’s obligations was not required. The Tribunal later clarified that the scope of its jurisdiction extended to the arrest and detention of the *Norstar* by Italy, as was apparent in the Application, not just the Decree and the request for its execution, as argued by Italy.¹⁵

Among the objections to admissibility, Italy claimed, in particular, that the case was preponderantly one of diplomatic protection, and the alleged victims were not Panamanian nationals nor that they had exhausted the local remedies available in Italy. Following its case law, the Tribunal held that a ship is to be treated as a unit linked to the flag State; it also ruled, following the *Saiga (No.2)* and *Virginia G* cases, that local remedies need not be exhausted under Article 295 of the Convention when the rights allegedly violated are rights that belong to the flag State.¹⁶

Judge *ad hoc* Treves disagreed with the Tribunal. For him, the standard it adopted to establish its jurisdiction *ratione materiae* “could perhaps be utilized in provisional measures proceedings” (*prima facie* test of jurisdiction) and it should have satisfied itself more rigorously that it had jurisdiction. The claim was not about the interpretation of the Convention, but Italy’s right to adjudicate suspected crimes.¹⁷ One may indeed regret that the Tribunal did not use firmer language, but international case law on the matter is not entirely firm either. The test of relevance¹⁸ is not foreign to the ICJ’s case law.¹⁹ The ICJ has also accepted that a claim may be based on a treaty if the argument is of a “sufficiently plausible character”.²⁰ It has been claimed that there must be at least a reasonable and not artificial connection between the dispute and the treaty on which it is based.²¹

¹⁴ *Norstar* 2016 Judgment (n 7) [162]–[174]. On the legal position of a third State as a “necessary prerequisite”, see *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Preliminary Objections, Diss. Op. Crawford) [2016] ICJ Rep 1106 [32]. Since Spain assisted Italy, it may have been internationally responsible under Article 16 of the ILC Draft on State Responsibility, but that was not the object of the Application.

¹⁵ *Norstar* (n 1) [117]–[122]. See, for example, International Tribunal for the Law of the Sea, *The M/V Norstar Case, The Republic of Panama v The Italian Republic, Rejoinder of Italy* (‘Rejoinder’, 13 June 2018) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/case_no_25_merits/IT_Rejoinder_VOL_1_13Jun18.pdf> (accessed 1 January 2020) [44].

¹⁶ On these two cases, see the comments by BH Oxman and V Cogliati-Bantz in (2000) 94 AJIL 140 and (2014) 108 AJIL 769 respectively.

¹⁷ Dissenting Opinion of Judge Ad Hoc Treves, appended to the *Norstar* 2016 Judgment (n 7) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Preliminary_Objections/Judgment/C_25_J_041116_doTreves.pdf> (accessed 1 January 2020) [12]–[13], [15].

¹⁸ *Norstar* 2016 Judgment (n 7) [122].

¹⁹ *Interhandel Case (Switzerland v United States)* (Preliminary Objections) [1959] ICJ Rep 24.

²⁰ *Ambatielos Case (Greece v United Kingdom)* (Merits) [1953] ICJ Reports 18.

²¹ MG García-Revilla, *Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea* (Brill 2015) 40.

The Tribunal itself required that the link between the facts and the provisions of the Convention be established, and that these “can sustain the claim” of the Applicant.²² The test in provisional measures proceedings under the Convention is that of *prima facie* jurisdiction (Article 290), and the court or tribunal “need not definitively satisfy itself that [it] has jurisdiction over the dispute submitted to it”.²³

III. APPLICATION OF ARTICLE 87: THE SCOPE OF ITALY’S INTERFERENCE WITH PANAMA’S FREEDOM OF NAVIGATION

A finding of subject-matter jurisdiction under Article 87 does not necessarily lead to a breach of Article 87 on the merits. The Tribunal spent a considerable amount of time in the Judgment determining whether Article 87(1) may be applicable, and then whether it was applicable, before establishing whether it was breached.²⁴ Yet, in the 2016 Judgment, Article 87 was deemed “relevant”, hence, applicable. At the merits stage, the Tribunal seems to have followed Italy’s logic that Article 87 may still be declared irrelevant.²⁵ Had there been doubts on the relevance of Article 87, it may perhaps have been prudent to join the relevant preliminary objection to the merits, on the basis that it did not possess an exclusively preliminary character.²⁶ At the merits stage, the question ought not be whether Article 87 was applicable, but how the Decree and its enforcement infringed, if at all, Panama’s rights. The Tribunal revisiting in detail the applicability of Article 87 seems a consequence of the rather low threshold adopted in 2016, and reveals a struggle also apparent at the ICJ “between the idea that it is enough for the Court to find provisionally that the case for jurisdiction has been made, and the alternative

²² *Norstar* 2016 Judgment (n 7) [110]; *Louisa* (n 9) [99].

²³ *The M/T ‘San Padre Pio’ (Switzerland v Nigeria)* (Provisional Measures, Order of 6 July 2019) [45]. A finding of *prima facie* jurisdiction *ratione materiae* in no way prejudices the later question of the jurisdiction to deal with the merits of the case, as the Tribunal found in the *Louisa* case.

²⁴ *Norstar* (n 1) [153]–[230].

²⁵ Public Sitting held on Wednesday 12 September 2018 at 10 am at the International Tribunal for the Law of the Sea, Hamburg, *The M/V Norstar Case (Panama v Italy)*, ITLOS/PV.18/C25/5/Rev.1 (12 September 2018) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/merits_verbatim_records/Revised/ITLOS_PV18_C25_5_Rev.1_E.pdf> (accessed 1 January 2020) 12.

²⁶ Rules of the Tribunal, Article 97(6). This had been suggested by Judges Wolfrum and Attard in their Joint Separate Opinion, appended to the *Norstar* 2016 Judgment (n 7) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Preliminary_Objections/Judgment/C25_J_041116_sepap_RWDA_rev.pdf> (accessed 1 January 2020) [3]. Like Judge Treves (n 17), they considered that the Tribunal’s standard establishing jurisdiction was not sufficient.

view that the Court must have grounds sufficient to determine definitively at the jurisdictional phase that it has jurisdiction”.²⁷

On that basis, the Tribunal proceeded to analyse the activities of the *Norstar* more closely: if the only alleged crimes were committed in Italian territory, Article 87 would not be applicable, as was the situation in the *Louisa* case.²⁸ Considerable time was spent in the written and oral pleadings to establish the geographical scope of the *Norstar*’s activities. While Panama argued that the Decree targeted the vessel’s high seas bunkering activities, for Italy the vessel had been instrumental in committing crimes in Italian territory. Italy relied on Article 6 of its criminal code, where a crime is deemed to have been committed in the territory if its consequence arises therein.²⁹ The selling of fuel on the high seas was, therefore, an essential element of an alleged “criminal plan”.³⁰ After perusing the procedural history of the case, the Tribunal had no difficulty concluding that the Decree concerned activities both within Italian territory and on the high seas and, hence, that Article 87 “may be applicable”.³¹ It was, therefore, not directly relevant that the Court of Savona had revoked the seizure of the *Norstar* notably on the basis that the supply of fuel offshore was not an offence, nor was its reintroduction in Italy, unless the fuel was unloaded or consumed within the customs line.³² What was directly relevant was whether the Decree was in breach of Article 87 regardless of its compatibility with Italian law.³³ The issue in contention was only Article 87(1), since Article 87(2), although now also part of Panama’s claim but not expressly addressed by the parties at the preliminary objections stage, was easily declared inapplicable by the Tribunal.³⁴

This called for a substantive interpretation of Article 87(1) which the Tribunal curiously first articulated as a question of applicability, having just found that the provision “may be” applicable.³⁵ The crux of Italy’s argument was that Article 87(1) first and foremost protects a vessel navigating on the high seas against

²⁷ *Oil Platforms (Islamic Republic of Iran v United States)* (Preliminary Objection, Sep. Op. Higgins) [1996] ICJ Rep 849 [9].

²⁸ *Norstar* (n 1) [153]; *Louisa* (n 9) [109], [113] (referring to the violation of Spanish laws in Spanish territory).

²⁹ *Norstar* (n 1) [154]–[165]. This is usually referred to as the objective territorial principle or effects doctrine.

³⁰ International Tribunal for the Law of the Sea, *The M/V Norstar Case, The Republic of Panama v The Italian Republic, Counter-Memorial of Italy* (‘Counter-Memorial’, 11 October 2017) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/case_no_25_merits/The_MV_Norstar_case_-_Italy_s_Counter-Memorial.pdf> (accessed 1 January 2020) [134].

³¹ *Norstar* (n 1) [166]–[186], [187].

³² Counter-Memorial (n 30) [58].

³³ *Norstar* (n 1) [228].

³⁴ *Norstar* (n 1) [231]. Italy’s exercise of its own freedoms of the high seas was not at stake.

³⁵ *ibid* [188].

physical interference, which was not the circumstance of the case.³⁶ This was also the view of the dissenting minority.³⁷ This cannot be correct. While freedoms of the high seas primarily entail freedoms on the high seas, the freedom of the high seas also includes certain rights which are corollaries of it, such as the right for a State to grant its nationality to ships (Article 91) or the right of land-locked States to access the sea (Article 125). The Tribunal's view, inherited from the *Louisa* judgment,³⁸ that the freedom of navigation does not encompass a right to leave port, only makes sense if it means that the freedom of navigation cannot of itself supply a license to leave port regardless of the actions of the coastal State and those of the ship while in port. Unless interpreted in this way, such a view would not, in any event, be compatible with the determination that acts which do not involve interference on the high seas may violate Article 87(1).³⁹ Indeed, Article 92(1) already protects against interference on the high seas by a State other than the flag State, save for exceptions under treaties or the Convention itself (for example, Articles 58(2), 73, 110, 111). While Article 92(1) says nothing about the prescriptive jurisdiction of non-flag States and its enforcement outside of the high seas or exclusive economic zone, it is well-established that an "act committed on the high seas" on a ship may be punishable under the laws of the non-flag State, depending on the jurisdictional basis.⁴⁰ The Tribunal, though, cautiously did not refer to any act committed on the high seas, but to "activities of a foreign ship on the high seas" and then to "lawful activities".⁴¹ Since bunkering on the high seas had been declared to fall under the freedoms in Article 87(1),⁴² only Panama, not Italy, could exercise its jurisdiction in relation to it.⁴³

Only then was the Tribunal able to definitively conclude that Article 87(1) was applicable (it applies to the prescriptive and enforcement jurisdiction of a State against lawful activities carried out on the high seas by a foreign ship) and, hence,

³⁶ Counter-Memorial (n 30) [80], [87].

³⁷ Joint Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin, Lijnzaad, and Judge Ad Hoc Treves, appended to *Norstar* (n 1) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Judgment/C25_DO_joint.pdf> (accessed 1 January 2020) [15].

³⁸ *Norstar* (n 1) [221]; *Louisa* (n 9).

³⁹ *Norstar* (n 1) [223].

⁴⁰ *The Case of the S.S. 'Lotus' (France v Turkey)* PCIJ Rep Series A. No 10, 25, 26 (territorial and objective territorial principles).

⁴¹ *Norstar* (n 1) [224]–[225].

⁴² *ibid* [219] (referring to the *Virginia G*).

⁴³ *ibid* [225]. The Tribunal said that "the principle of exclusive flag State jurisdiction [...] prohibits [...] the extension of [non-flag States'] prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas". However, the Tribunal, sensibly, did not state that only the law of the flag may apply to a ship, and expressly qualified its view by reference to applicable exceptions under the Convention and treaties.

that Italy had breached it by arresting and detaining the ship, although the link between applicability and breach was made remarkably swiftly.⁴⁴

IV. REPARATION: CAUSAL LINK AND COMPENSATION

While the case will undoubtedly be remembered for its interpretation of Article 87(1), it also raised questions of causation and compensation. In its final submissions, Panama claimed compensation for a total amount of nearly \$ 52 million plus nearly € 200,000. Following its established case law, the Tribunal said that only damage directly caused by Italy's wrongful act (the arrest and detention of the *Norstar*) would be compensated.⁴⁵ The causal link was interrupted in March 2003 when the shipowner was notified of the judgment of the Court of Savona that the seizure was revoked.⁴⁶

The only compensation awarded to Panama was the value of the vessel at the time of its arrest, as estimated by the expert called by Italy to be \$ 285,000 plus interest compounded annually until the date of the Judgment.⁴⁷ The Tribunal ruled that Panama had failed to produce evidence of loss of profits of the shipowner and loss to the charterer,⁴⁸ that the payment of wages, fees and taxes were not contingent on the vessel being arrested, hence, not compensable damages,⁴⁹ and that damages to individuals (such as pain and suffering) were not part of the case, as criminal proceedings would have been carried out even if the *Norstar* had not been arrested.⁵⁰ The issue of causation elicited criticism, Judge Jesus considering that there was a clear causal link between the arrest of the ship and the shipowner's loss of revenues that could have been used to pay the crew salaries.⁵¹

It would have been useful for the Tribunal to explain why loss of revenue and expenses were not substantiated, notably in relation to the length of the charter party and the expectation that it would have been renewed, and to

⁴⁴ *ibid* [226].

⁴⁵ *Norstar* (n 1) [333]–[335] (referring to the *Virginia G* case).

⁴⁶ *ibid* [364]–[370].

⁴⁷ *ibid* [417], [462]. On probative value of testimonies, see *ibid* [99]. The expert had not inspected the vessel and relied on normal estimates, whereas the Panamanian estimation made assumptions for the profitability of the vessel's operations (*ibid* [414]). For Italy, Panama had wrongly applied the *lucrum cessans* for the calculation of the *damnum emergens*, leading to “double recovery” (Rejoinder (n 15) [189]), while the Tribunal considered that Panama had failed to establish the loss of profits anyway (*Norstar* (n 1) [415]).

⁴⁸ *Norstar* (n 1) [432]–[433], [448]–[449].

⁴⁹ *ibid* [436], [443].

⁵⁰ *ibid* [452].

⁵¹ Declaration of Judge Jesus, appended to *Norstar* (n 1) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Judgment/C25_Judgment_10.04_Decl_JLJ.pdf> (accessed 1 January 2020).

distinguish between total lack of evidence and evidence which does not meet the probative value according to a (rather elusive) standard. In addition, while Panama had requested Italy (which had control over the vessel) to supply documents, the Tribunal accepted Italy's view that it would only consider specific requests to supply them.⁵² The Tribunal, no doubt, had little sympathy for an Applicant which instituted proceedings seventeen years after the arrest and hence faced "difficulties in obtaining evidence",⁵³ despite the Tribunal also recognising that it had "not failed to pursue its claim".⁵⁴ Relatedly (although forming a different part of the Judgment), the Tribunal rejected all of Panama's claims concerning Article 300,⁵⁵ notably on the basis that the link with the breach of Article 87 (the only provision under which Article 300 could be invoked)⁵⁶ was not established.⁵⁷ Only the duration of detention was deemed linked to Article 87, since the dispute concerned the arrest and detention of the vessel,⁵⁸ but no breach of Article 300 was found as the release was ordered in 2003.⁵⁹ But since the breach of Article 87(1) resulted from an act of the Italian State, it is puzzling that Italy's behaviour, laws and procedures and the way they were exercised, were not also linked to the breach of Article 87.⁶⁰

Interestingly, the Tribunal considered that the possibility offered in March 1999 by the Italian Public Prosecutor to the shipowner to release the vessel on bond could not interrupt the causal link, since the wrongful act had not ceased; yet, the refusal to post the required bond could impact on the assessment of damages.⁶¹ The curious result is that, while the violations at stake were all direct violations of Panama's rights that did not require exhaustion of local remedies,⁶² failure to mitigate damages seems to be a duty of the shipowner who in any event was

⁵² Norstar (n 1) [96].

⁵³ *ibid* [97].

⁵⁴ Norstar 2016 Judgment (n 7) [313].

⁵⁵ Among which lack of communication and withholding of information.

⁵⁶ Norstar 2016 Judgment (n 7) [132].

⁵⁷ Norstar (n 1) [265], [271], [275], [281].

⁵⁸ *ibid* [117]–[122].

⁵⁹ *ibid* [288]–[289].

⁶⁰ Separate Opinion of Judge Lucky, appended to Norstar (n 1) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Judgment/C25_SO_Lucky.pdf> (accessed 1 January 2020) [158]–[163].

⁶¹ Norstar (n 1) [78], [363], [383].

⁶² Text at (n 16).

refused a guarantee from its bank.⁶³ While Italy opined that Article 292 ought to have been used, that provision was not applicable anyway.⁶⁴

V. CONCLUSIONS

This case deals with one of the most fundamental principles of the law of the sea, namely, the freedom of the high seas. Paradoxically, while the freedom of the high seas is presented as a structuring principle, neither its content, nor the limit to its exercise, has received any consensual understanding.⁶⁵ Some recent cases decided whether a particular activity fell within the expressed freedoms under Article 87(1).⁶⁶ The Judgment clarifies that the freedom of navigation does not just protect a ship against non-flag State interference on the high seas (unless interference is expressly allowed by an applicable international rule). This was essentially the Italian position, and that of the seven dissenting judges who supported the prescriptive (and, subsequently, enforcement) jurisdiction of the coastal State with respect to alleged crimes initiated and completed in Italy, following the reasoning in the *Lotus* case.⁶⁷

Both the majority and the minority were correct: the case involved Italy's criminal jurisdiction and the freedom of the high seas. Yet the path taken by the minority might lead to unfortunate consequences: for the dissenting judges, Italy was not targeting or even criminalizing bunkering as such, but investigating the ship as a means to transport and supply fuel as an integral part of the criminal scheme.⁶⁸ Since Article 87 does not prohibit such a course of action, it is allowed under international law.⁶⁹ Yet, it is far from obvious that the *Lotus* dictum could be elevated to a general rule when the Court itself had required States not to

⁶³ Separate Opinion of Judge Lucky (n 60) [28].

⁶⁴ Rejoinder (n 15) [42]. Similar issues are raised by the *Virginia G*, where Article 292 was applicable, but the flag State had not been notified under Article 73(4). See Oxman and Cogliati-Bantz (n 16) 775 and the author's comments in (2014) 53 ILM 1162–1163.

⁶⁵ Vincent Cogliati-Bantz, 'Freedom (?) of the High Seas: Some Preliminary Remarks on a Venerable Old Concept' (2018) 25 Australian J Intl L (forthcoming).

⁶⁶ For example, bunkering and bunkering of fishing vessels in the *Virginia G* or the "right to protest at sea" in *The Arctic Sunrise (Netherlands / Russia)*, Arbitral Award on the Merits of 15 August 2015, [226]–[227].

⁶⁷ *Lotus* (n 40). For the dissenting judges, the alleged crime had been "committed in the State's territory" and, therefore, there was "more than enough connection to Italy". See Joint Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin, Lijnzaad, and Judge Ad Hoc Treves (n 37) [32]–[33].

⁶⁸ Joint Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin, Lijnzaad, and Judge Ad Hoc Treves (n 37) [30].

⁶⁹ *ibid* [36] citing *Lotus* (n 40) 19.

“overstep the limits” placed by international law and also referred to a “special permissive rule” in matters of collision.⁷⁰

The Tribunal’s interpretation of Article 87 supplies a strong barrier against the temptation by coastal States to exercise their jurisdiction over foreign ships for activities performed on the high seas which are a freedom of the high seas, when they are integrated in a chain of activities which the coastal State deems harmful to its interests. The Judgment did not have to deal with the jurisdiction of States over persons for acts committed on the high seas which may be criminal under the laws of that State and over whom the State wishes to exercise jurisdiction under recognised jurisdictional bases.⁷¹ Nor did the Tribunal need to embark on broader analyses of permissible port State jurisdiction over the conduct of foreign ships on the high seas on an extra-territorial (for example, Article 218 of the Convention) or territorial (for example, through the conditions for port entry) basis. Academic literature is replete with restrictive or extensive views on the topic and only Judge Kittichaisaree raised the issue.⁷² Undoubtedly, these questions will arise at some point before the Tribunal.

⁷⁰ *Lotus* (n 40) 19, 21.

⁷¹ The Judgment “does not question Italy’s right to [...] prosecute persons involved in alleged crimes committed in its territory”: *Norstar* (n 1) [212].

⁷² Declaration of Judge Kittichaisaree, appended to *Norstar* (n 1) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Judgment/C25__D_Kittichaisaree.pdf> (accessed 1 January 2020) [2]–[15].