BENEDICT'S MARITIME BULLETIN

The Quarterly Bulletin of Benedict on Admiralty

Vol. 18, No. 4 • Fourth Quarter 2020

Joshua S. Force, Editor-in-Chief
Robert J. Zapf, Managing Editor

Inside This issue

Bankruptcy: The Winners, the Losers, and the Collateral Damage

By Lawrence Rutkowski and Robert J. Gayda*

Shipping bankruptcies give rise to unique legal and practical issues given the transitory nature of the principal assets – ships – the typically foreign domicile of shipping companies, and the awkward intersection of bankruptcy and admiralty law. Our intent is to focus on a limited range of issues and to bring that focus primarily from the perspective of creditors of a shipping company in a Chapter 11 proceeding.

The key issue we address is the risk that a charter (in maritime nomenclature) or lease (in land-based terminology) might be recharacterized as a financing transaction in a bankruptcy, thereby upending the expectations of the parties to that contract and potentially weakening the "owner's" position. This issue is not a new one, but it is one that has taken on new urgency given the growing popularity of sale and leaseback transactions in ship finance and the uncertainties in the shipping markets in a COVID-19 world.

---

* Lawrence Rutkowski is a partner in the Transportation Finance Group of Seward and Kissel LLP. As a long time practitioner in marine finance Larry has been involved in some way with almost every major maritime restructuring or liquidation from the bulk carrier fleet in the 1980s to today's crisis in the offshore industry. Robert J. Gayda is a partner in the Corporate Restructuring & Bankruptcy Group of Seward and Kissel LLP. Bob has extensive experience advising maritime and offshore companies and lenders in a number of recent out-of-court restructurings and in-court bankruptcy proceedings. This paper was originally presented at the Spring 2020 meeting of The Maritime Law Association – Committee on Maritime Insolvency & Bankruptcy. It is republished here with permission.

(Continued on page 158)

A NOTE ON CITATION:
The correct citation form for this publication is:
18 Benedict's Mar. Bull. [155] (Fourth Quarter 2020)

Managing Editor's Introductory Note

We begin this edition with an article by Lawrence Rutkowski and Robert J. Gayda on issues pertaining to charters in bankruptcy situations. Larry and Robert discuss the awkward intersection of bankruptcy and admiralty law, and "the risk that a charter (in maritime nomenclature) or lease (in land-based terminology) might be recharacterized as a financing transaction in a bankruptcy, thereby upending the expectations of the parties to that contract and potentially weakening the 'owner's' position." Given the growing popularity of sale and leaseback transactions in ship finance, they conclude that "[h]ow a lease or charter is structured and how the lessor/owner behaves pre- and post-petition will go a long way to determine whether such owner/lessor ends up a "winner" or "loser" in bankruptcy."

Our next article in this edition, by Kirby Aarsheim, looks again at the issue of maritime liens and fishing permits, but goes beyond to discuss the difference between the treatment given to fishing permits in the maritime lien context, on the one hand, and, on the other hand, whether the value of the permit should be considered in determining the amount of security that must be posted in a limitation of liability action. Kirby gives a very clear analysis of the difference in the two concepts, and concludes "where fishing permits are appurtenances subject to maritime liens but not appurtenances to be included in the limitation fund – the goals of encouraging investment and protecting the interests of fishing vessel owners are achieved."

In this edition's "Window on Washington" column, Bryant Gardner points out the difficulties of obtaining passage of very important legislation in the current political climate. He discusses the difficulties facing the National Defense Authorization Act for FY 2021, the Water Infrastructure Bill, and the Coast Guard Authorization Act, legislation that is crucial to maritime industry and commerce but which faces unprecedented difficulties in obtaining sufficient bipartisan support to achieve passage. As Bryant points out "[o]nly time will tell if the partisan paralysis will begin to thaw."

We are very pleased to follow with two articles by Colin T. Kelly and Ilana G. Smirin in our "Future Proctors" section.

Colin gives a very detailed analysis of the decision by the International Tribunal for the Law of the Sea in the M/V NORSTAR (Panama v. Italy) Case, addressing issues of freedom of the high seas and claimed interference with this important principle arising out of an arrest of a vessel in territorial waters. Colin reviews the historical development of the concept of free high seas navigation and describes its current place in the international law of the sea, and then gives a keen analysis of the decision and its potential impact on established principles of the freedom of high seas navigation, the international community, and ITLOS itself.

Ilana gives us a close look at autonomous shipping and its potential impact on world trade. She discusses the gaping hole in the uniformity and enforcement of regulations for autonomous shipping, and analyzes how the International Maritime Organization intends to address it. She points out that historically, technology always precedes the development of the law, and warns that "[i]f the IMO falls too far behind technological developments, the IMO's ability to encourage compliance with their regulations could be severely limited."

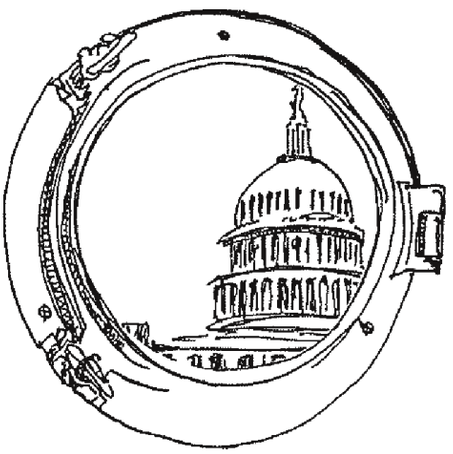
Last but not least, we conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law.

We urge our readers who may have summer associates or interns from law schools working for them to encourage them to submit articles for publication in our Future Proctors section.

As always, we hope you find this edition interesting and informative, and ask you to consider contributing an article or note for publication to educate, enlighten, and entertain us.

Robert J. Zapf

Window on Washington



Lame Duck on the Wing

Bryant E. Gardner*

Heading into autumn of 2020, Congress is nearly frozen in partisan paralysis. Although mid-terms handed the Democrats control of the House, the Senate—with its staggered 6-year terms — remains too closely divided to achieve 60-member majorities needed to make headway, despite nominal Republican control, and veto threats from the White House hang thick like Spanish moss in the swamp. Returning from summer recess, the Senate took up another virus relief bill but failed to pass a watered-down alternative to that offered by the House. Even bills to fund the government are on life support. The House passed 10 of the 12 regular spending bills in July, but with Senate appropriators deadlocked, a stopgap continuing resolution looks more likely in the near term. Heading into elections, Democrats have less and less incentive to compromise on big policy measures, to the extent they believe they may gain greater control of the Senate or take the White House in elections.

Two bills with legs in the twilight of the 116th Congress are the National Defense Authorization Act for FY 2021 ("NDAA")—which sets national security policy, including maritime programs—and the Water Infrastructure Bill—which will improve ports and waterways. Washington has enacted an NDAA for 59 consecutive years, but the road to 60 could be rocky. The President has tweeted his intention to veto both the House and Senate versions of the NDAA on the grounds that they would require renaming military assets honoring Confederates; the White House put out a list of lengthy objections to other provisions, including limits on the diversion of Defense construction funds to projects like the border wall, and another allowing D.C. to control its National Guard. Despite the Administration's objections, legislators generally have fewer significant disagreements than they did during debate of last year's measure.

Historically, the Coast Guard Authorization Act is the other major piece of maritime legislation that passes Congress in most years. Passage of a Coast Guard Act in 2020 also remains in question. Taking a novel approach, House leadership appended the Coast Guard Act bill to the NDAA in hopes of riding its coattails to the President's desk.[1] The Senate has not adopted a similar approach and it remains to be seen how this is-

* Bryant E. Gardner is a Partner at Winston & Strawn, LLP, Washington, D.C. B.A., summa cum laude 1996, Tulane University of Louisiana; J.D. cum laude 2000, Tulane Law School.

[1] The Elijah E. Cummings Coast Guard Authorization Act of 2020 is Division H of the House National Defense Authorization Act. The House's independent Coast Guard Authorization Act previously reported out of committee July 23, 2019, is H.R. 3409. The Senate Coast Guard Authorization Act, which is not included in the Senate NDAA, is S. 227 and was reported out of committee in September 2019.

sue will be handled in conference, as of this writing. Although the water infrastructure bill has been relatively free from controversy and the committee is pressing ahead, it could still fall apart if Democrats believe they can push through additional priorities in the new Congress.

Tanker Security Fleet

The House NDAA renews the chamber's 2019 proposal to establish a 10-vessel "Tanker Security Fleet."[2] The program would be modeled after the existing Maritime Security Program ("MSP").[3] Under the tanker program, owners of self-propelled, militarily useful tank vessels documented under U.S. law would be eligible to receive a $6 million per vessel annual stipend in exchange for commitments to make such vessels available to the U.S. Government at pre-negotiated rates in times of war and national emergency. The programs aim to ensure access to the global logistics networks maintained by commercial operators, and the availability of U.S. controlled sealift capacity without the expense of maintaining mothballed grey-hull assets. The Secretary of Transportation, U.S. Maritime Administration, would be responsible for selection of program participants, in consultation with the Department of Defense, U.S. Transportation Command ("TRANSCOM").

The size of the stipend remains a topic of discussion. Whereas dry cargo MSP vessels can remain in commercial operation and offset higher U.S. operating and manning costs through a mix of commercial and U.S. Government impelled cargoes, tanker markets operate differently, often carrying single-owner cargo loads at one-way rates to or from the United States, which many operators argue will require additional stipend amounts closer to $10 million per vessel in order to establish commercial viability and attract participants.

There remain some discussions among stakeholders as to whether the program should include some kind of tie-breaker award preference for "Section 2" citizen owners who meet the U.S. ownership and control rules that govern U.S. ownership tests under the Jones Act cabotage law. Currently, vessels engaged in the international trades, including those enrolled in the MSP, need only be documented with a registry endorsement, allowing foreign carriers robust participation provided they do so through U.S. subsidiaries. Some participants oppose attempts to introduce additional U.S. citizen preferences to these national defense sealift programs. On the other hand, Jones Act operators and Section 2 operators in the foreign trades have written Congress expressing support for such a preference in the tanker program.

There is no tanker program in the Senate bill, and so, as of this writing, it remains to be seen whether the Senate will accept the proposal, having rejected it last year. However, there are signals that the Senate may be increasingly receptive to some kind of tanker sealift program, in part because TRANSCOM has become more supportive of the proposal as a means to address the widely acknowledged deficiency in liquid bulk U.S.-flag capability to support the defense mission.

Jones Act Waiver Changes

The Jones Act cabotage law can be waived by the Federal Government in very limited circumstances governed by statute.[4] Although the waiver requires that doing so is "necessary in the interest of national defense," the process has been applied over time to accommodate hurricane relief, Strategic Petroleum Reserve shipments, and other situations including the DEEPWATER HORIZON and EXXON VALDEZ incidents, sparking concern of a "camel's nose under the tent" among Jones Act stakeholders.[5] Accordingly, these stakeholders have moved to tighten the process over time and curb perceived abuses. Section 3504 of the House NDAA bill would make several tweaks to the waiver process.

Under current law, there are two avenues to waiver. First, if the waiver is requested by the Department of Defense ("DOD"), then Homeland Security grants the waiver automatically. Second, in all other cases, waiver requires a finding by MARAD that there are no suitable Jones Act vessels available, that MARAD identify actions that could be taken to remedy that condition, that MARAD publish its determination on the MARAD website (so that Jones Act stakeholders can man the battle stations), and notify Congress. The House bill would require that a DOD request be necessary not just "in the interest of national defense" but also "to address an immediate adverse effect on military operations." Additionally, the measure would limit non-DOD waivers to ten days, extendable for an additional 10 days by MARAD, and further limit to 45 days the aggregate duration of all waivers and extensions of waivers with respect to one set of events.

---

2 William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, § 3511, 116th Cong., Aug. 5, 2020.

3 46 U.S.C. Ch. 531.

4 46 U.S.C. § 501.

5 *See generally* Constantine G. Papavizas & Brooke F. Shapiro, Jones Act Administrative Waivers, 42 Tul. Mar. L.J. 317 (2018), *available at* https://www.winston.com/images/content/1/5/v2/156258/Jones-Act-Waivers-Article.pdf.

Ready Reserve Force Recapitalization

The U.S. Maritime Administration ("MARAD") maintains 46 grey-hulled national defense sealift vessels in layup status for use during any initial sealift "surge" requirement, called the "Ready Reserve Force". These vessels—35 ro/ro, 2 heavy lift, 6 crane ships, 1 tanker and 2 aviation repair vessels—are strategically positioned in Tacoma, San Francisco, Los Angeles / Long Beach, San Diego, Beaumont, New Orleans, Charleston, the Virginia tidewater, Baltimore, and Philadelphia.[6] American vessel operators contract to crew and maintain these vessels with civilian mariners, although the vessels are U.S.-government owned.

The fleet needs recapitalization, pitting U.S. shipyard interests against budgeteers eager to save money by outsourcing construction to foreign yards, mostly in the Far East. In partial compromise, the Congress granted MARAD authority to procure up to seven foreign-built vessels at reasonable cost, provided that any conversion or modernization of the vessel occurs in a U.S. shipyard.[7] Preference is awarded to vessels that participated in the MSP, but MARAD cannot purchase more than two foreign-built vessels under the provision without certifying to Congress it has initiated an acquisition strategy for not less than 10 U.S.-built vessels. The House NDAA would up MARAD's purchase authority to nine foreign-built vessels, and up to four without certifying a U.S.-build strategy.[8] The Senate bill would leave the authorized number of foreign-built vessel purchases at seven and remove the requirement that MARAD certify to a 10-vessel build program before exceeding two foreign-build purchases.[9]

Cargo Preference

Under current federal law, U.S. Government-impelled cargoes must be shipped 100% U.S.-flag for Export-Import Bank and Defense Department shipments, and 50% for civilian agency shipments.[10] The House NDAA would rewrite the governing Military Cargo Preference Act of 1904.[11] The Committee report states that the provision would "increase compliance with military cargo preference requirements."[12] Under current law, military cargo preference shipments move at rates which "may not be higher than charges made for transporting goods for private persons," often measured by reference to carriers' published tariffs. The proposal adds a requirement that such rates be "at a fair and reasonable rate for commercial vessels of the United States," which mechanism has long been in place for civilian cargoes and involves a cost-plus rate determination by the MARAD. Additionally, the proposal permits waiver of the preference where vessels are not available at such fair and reasonable rates, but requires reporting such waivers to Congress. The Senate bill does not include a comparable provision.

Furthermore, the House bill requires a Government Accountability Office ("GAO") examination of cargo preference enforcement.[13] Industry stakeholders have long believed that there are significant pools of untapped preference cargo which are not moving in U.S. bottoms, especially cargo moved by lower-tier subcontractors on large projects and military contracts. The GAO report would aim to look at such leakage and other instances of non-compliance. The proposal further directs the GAO to capture instances in which shipper agencies ship foreign-flag and then refuse to acknowledge such shipments as shipped foreign for purposes of determining compliance with the minimum U.S.-flag carriage requirements. The GAO would also assess internal training and compliance controls used by the various shipper agencies and the enforcement activities undertaken by MARAD since it obtained muscular new statutory authority in 2008, including the power to assess fines and require catch-up cargoes not otherwise subject to the flag requirement.

Financial Aid and Relief Programs

The House bill would establish a new emergency relief program aimed at creating greater resiliency in the maritime transportation system.[14] Under a state of emergency or public health emergency, MARAD would have broad authority to make grants and enter into contracts to facilitate emergency response, including construction and repair projects, maritime transportation system operations, personal protective equipment ("PPE"), sanitization, workforce retention, cleaning and sanitization, debt service payments, and emergency response. Eligible entities would include both public and private entities engaged in vessel construction, transportation by water, or support activities for transportation by water. Although the provision would still require appropria-

---

6 U.S. Maritime Administration, https://www.maritime.dot.gov/sites/marad.dot.gov/files/docs/national-defense/office-ship-operations/rrf/2701/rrf-outport-12-22-2017.pdf

7 10 U.S.C. § 2218.

8 H.R. 6395 § 1022.

9 National Defense Authorization Act for Fiscal Year 2021, S. 4049, § 1021, 116th Cong., July 23, 2020.

10 10 U.S.C. § 2631, 46 U.S.C. §§ 55304 & 55305.

11 H.R. 6395 § 1024

12 H. Rep. 116-142 at 195, July 9, 2020.

13 H.R. 6395 § 11104. This is within the Coast Guard Authorization Act section of the NDAA, Division H.

14 H.R. 6395 § 3505.

tions, it would provide MARAD with flexible powers to support the maritime industry in a wide variety of possible local or national emergencies, including PPE support during the current pandemic, which is explicitly defined as an emergency sufficient to trigger funding availability.

A separate provision of the House proposal would establish a MARAD-administered loan program to help fund the education of merchant mariners, including those working to receive a Standards of Training, Certification, and Watchkeeping (STCW) endorsement.[15] Loans would be allocated on the basis of need and could be used to fund training at federal, state, commercial, and nonprofit training institutions, with no more than 50% of funds going to the state maritime academies. Undergraduate students at the U.S. Merchant Marine Academy would not be eligible. The measure also direct MARAD to formulate and publish a plan to recruit, train, and retain mariners within one year for the five-year period following publication, and provides MARAD with grants authority to facilitate the plan.

Coast Guard Title: Shipping and Maritime Provisions

The Coast Guard Division of the House NDAA includes a variety of initiatives relevant to the maritime industry. Both the House measure and the earlier Senate Coast Guard bill[16] would make electronic charts equivalent to paper charts for purposes of meeting existing legal requirements,[17] and require the use of engine cut-off switch links on certain recreational vessels.[18] The House version would exempt additional classes of persons working onboard vessels from the requirement to hold merchant mariner's credentials, including oil spill response, marine firefighting, commercial diving, salvage, diving support, and industrial vessel workers not associated with the navigation of the vessel, to sunset in two years.[19] Both chambers also include a provision which would permit towing vessels to transit beyond the boundary line in certain limited situations to fulfill the vessel's duties without being subject to additional requirements.[20]

Under current law, notices of claims of lien filed on a vessel abstract expire after three years; the House bill would require the Coast Guard to annotate the abstract (or continuous synopsis record) of the vessel accordingly.[21]

Consistent with the longstanding concerns about U.S. icebreaking capability, the House and Senate bills each contain authorization of additional Coast Guard icebreaking capability and add new authority to procure icebreaking capability for the Great Lakes equivalent to the USCGC MACKINAW.[22]

Both chambers would also clarify the subrogation rights of insurers or other indemnifiers providing fund compensation under the Oil Pollution Act,[23] establish a new oil pollution research and development program to better understand the impacts of marine oil pollution,[24] and require limited indemnity provisions in standby oil spill response contracts funded through the Oil Spill Liability Trust Fund.[25]

Water Resources Legislation

The House and Senate committees of jurisdiction passed their water resources development bills in July and May 2020, respectively, and appear headed toward a successful compromise which would result in new harbors and waterways maintenance and improvements.[26]

The $17 billion Senate bill includes provisions which Sen. Dan Sullivan (R-AK) characterized as the first steps towards a "system" of deep-draft arctic ports, including Nome, observing "[e]ven the Chinese have a plan on the Arctic and yet in America, an arctic nation, we have no strategic arctic port that can handle any serious shipping. … Our first draft will support U.S. Navy and Coast Guard assets and provide vital economic support for communities in Western Alaska."[27]

---

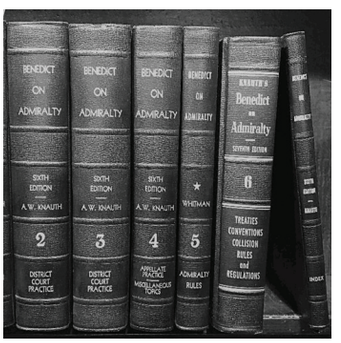
15 H.R. 6395 § 3507.
16 S. 2297, 116th Cong, July 25, 2019.
17 H.R. 6395 § 10101; S. 2297 § 301.
18 H.R. 6395 § 10206; S. 2297 § 414.
19 H.R. 6395 § 10203.
20 H.R. 6395 § 11102; S. 2297 § 406.
21 H.R. 6395 § 10303.
22 H.R. 6395 §§ 8006, 8007, 8008 & 8011; S. 2297 §§ 105 & 235.
23 H.R. 6395 § 10102; S. 2297 § 413.
24 H.R. 6395 § 10104; S. 2297 § 429.
25 H.R. 6395 § 10105; S. 2297 § 421.
26 H.R. 7575, 116th Cong., July 29, 2020, S. 3591, 116th Cong., May 4, 2020.
27 Caroline Tanner, Congressional Quarterly, Senate Water Bills Advanced by Public Works Committee (May 6, 2020). *See also* S. 3591 § 1206 (directing expedited completion of the decision document for the project for navigation, Arctic Deep Draft Port, Nome, Alaska).

The Harbor Maintenance Trust Fund ("HMT") was established in 1986 to fund port dredging through a tax on imported cargoes; however, the funding has long been bottled up in offset of other discretionary funding priorities. House Transportation and Infrastructure Chairman Peter DeFazio (D-OR) would release $10 billion from the Trust Fund to begin to address the $40 billion backlog in critical projects through provisions in the House bill. The bill would also increase support for inland waterways, providing a 65% federal general fund cost share for the next seven years, instead of the current 50%, and making the cost share permanent for any construction project that receives funding during that period. The Senate bill would make the 65% general fund / 35% Inland Waterway Trust Fund share permanent.

Moving Forward

Only time will tell if the partisan paralysis will begin to thaw, but the NDAA and the Water Infrastructure Bill are likely contenders to break the current logjam. The pandemic has continued to change the way America, and our Government, do business. Should the democrats seize control of the Senate and capture the White House, it is reasonable to anticipate the demise of the Senate filibuster and a return to a more active legislative branch, with fresh new initiatives originating from Congress aided by a President with a longer legislative tenure than any other in history. These dynamics could very well come together, propelled by an American public fed-up with dysfunction, to make for a very different 117th Congress.

Future Proctors



A Novel Interpretation of the Freedom of High Seas Navigation: ITLOS Broadens the Application of UNCLOS Article 87 in the M/V NORSTAR (Panama v. Italy) Case

By Colin T. Kelly*

I. Introduction

The M/V NORSTAR was moored in a bay of the island of Mallorca when Spanish authorities seized the vessel as evidence of a crime.[1] The seizure followed upon a request from Italian authorities based in Savona, Italy.[2] Between 1994 and 1998, the Panamanian-flagged oil tanker M/V NORSTAR had been purchasing gasoil in Italy and then supplying this fuel to mega yachts in the international waters of the western Mediterranean in order to evade Italian tax duties.[3] More than twenty years later, the International Tribunal for the Law of the Sea (ITLOS) issued a judgement in the dispute that arose between Panama and Italy following the seizure of the M/V NORSTAR and awarded compensation to Panama for the loss of the tanker.[4] This decision was reached through a 15-7 vote finding that the seizure and detainment of the M/V NORSTAR by Italy, via Spain, had violated Article 87(1) of the United Nations Convention on the Law of the Sea (UNCLOS), which guarantees the freedom of high seas navigation.[5] This judgement constitutes the first direct ruling by an international tribunal on the principle of freedom of navigation in international waters.[6]

The intention of this comment is to show that ITLOS's judgment in the M/V NORSTAR Case was incorrect and involved an overly broad interpretation of key provisions of UNCLOS.

Starting with Part II, this Comment will review the historical development of the concept of free high seas navigation and describe its current place in the international law of the sea.

Part III will discuss the M/V NORSTAR Case in detail, including the facts, judgment, award, and the joint dissent.

Part IV of this Comment will show how the judgment reached by ITLOS is inconsistent with the established

---

* Colin T. Kelly is a J.D. Candidate, 2021, Tulane University Law School.

1 M/V "NORSTAR" (Panama v. Italy), Case No. 25, Judgment of April 10, 2019, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Judgment/C25_Judgment_10.04.pdf [hereinafter NORSTAR], at para. 75. The seizure took place on September 25, 1998.

2 *Id.*, at para. 74-75.

3 *Id.*, at para. 69-70.

4 *Id.*, at para. 469. The judgment was issued on April 10, 2019.

5 *Id.*; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force November 16, 1994) [hereinafter UNCLOS].

6 Richard Collins, *Introductory Note to the NORSTARM/V NORSTAR Case (Panama v. Italy) (ITLOS)*, 58 Int'l Legal Materials 673, 673 (2019).

principles of the freedom of high seas navigation, especially those embodied in UNCLOS Articles 87 and 92.

Part V will discuss some potential ramifications of this novel decision for Italy, the international community, and ITLOS itself.

Part VI will conclude by reiterating that the seizure and detainment of a vessel at anchor for offshore bunkering of smuggled gasoil cannot be construed as violating that vessel's right to freely navigate the high seas. This decision will have potentially far-reaching consequences for the international law of the sea. It would be prudent to re-evaluate ITLOS's reasoning process before any adverse repercussions are felt.

II. Development of the Law of Free High Seas Navigation

A. Early Sources for the Freedom of the Seas

The law of the sea is inseparably linked to international law and has developed in tandem with it.[7] As independent States with individual territory emerged from the empires of the ancient world, the relations between these States evolved into international law.[8] This law relied partly on Roman law canons for its early development.[9] The same may be said for the early concepts of the law of the sea.[10] Roman law established the principle that the sea is free and open to all humanity.[11] The philosophers and jurists of ancient Rome, in contrast to earlier concepts promoting the idea of maritime dominion, laid the foundation for later generations to build up a law protecting the freedom of the high seas.[12]

Despite this Roman influence, claims of maritime appropriation continued throughout the middle ages. The Papal Bull of Pope Alexander VI, for example, divided the entire known world, including sea territory, into Spanish and Portuguese dominion.[13] But in 1608 Hugo Grotius, a Dutch jurist and scholar, made the most important early contribution to the controversy surrounding control over the oceans.[14] In *Mare Liberum*, Grotius observed that the sea was not susceptible to appropriation because "that which cannot be occupied, or which has never been occupied, cannot be the property of any one, because all property has arisen from occupation."[15] Relying on scriptural and classical sources, he argued that the sea, like the air, cannot be occupied or possessed because of its limitlessness, and therefore it is open to the use of all people both for navigation and commercial activity.[16] At the heart of Grotius' argument for the freedom of the seas is the guarantee of the freedom of movement for commercial shipping.[17]

Grotius' application of natural law, rather than the "voluntary law of nations," towards promoting the free seas theory was not without its detractors.[18] Most notably,

---

7 R.R. Churchill & A.V. Lowe, The Law of the Sea, at 3 (3d ed. 1999).

8 *Id.*

9 *Id.*

10 Pitman B. Potter, The Freedom of the Seas in History, Law and Politics, at 27 (1924) ("The oft-quoted dictum of the Emperor Antoninus: 'I am indeed the lord of the world, but the law is lord of the sea,' may be taken as a fine Roman statement of the principle of maritime freedom.").

11 Donald R. Rothwell & Tim Stephens, The International Law of the Sea 2 (2d ed. 2016) (citing Philip C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction, at 4 n.3 (rprt.1970) (1927)) ("Roman Law did pass on to posterity the concept of the 'freedom of the seas' which concept exerted profound influence upon the development of international law").

12 *Id.*; see also *Id.* at 26 (quoting Cicero, De Officiis, I, 51) ("This, then, is the most comprehensive bond which unites together men as men and all to all; and under it the common right to all things that nature has produced for the common use of man is to be maintained, with the understanding that, while everything assigned as private property by the statutes and by civil law shall be so held as provided by those laws, everything else shall be regarded in the light indicated by the Greek proverb: 'Amongst friends all things in common.'").

13 *Id.*

14 *Id.* at 3.

15 Hugo Grotius, The Freedom of the Seas or the Right which Belongs to the Dutch to Take Part in the East Indian Trade 26 (Oxford Univ. Press 1916) (trans. 1633) (". . . . *eas res quae occupari non possunt, aut occupari numquam sunt, nullius proprias esse posse; quia omnis proprietas ab occupatione coeperit*.").

16 *Id.* at 27 ("…*commune est omnium Maris Elementum, infinitum scilicet ita, ut possideri non queat, et omnium usibus accomodatum: sive navigationem respicimus, sive etiam piscaturum*.").

17 Hans Jürgen Stöcker, Die >>Freiheit der Meere<< und die Dritte Seerechtskonferenz der Vereinten Nationen. Anmerkungen aus der Sicht der deutschen Handelsschiffahrt, Recht Über. *See* Festschrift für Rolf Stödter 317 (1979) ("*Die Verkehrsfreiheit der Handelsschiffahrt ist historisch das Kernstueck des von Grotius in der 1609 erschienen Schrift über das* >>Mare liberum<< *entwickelten Prinzips der* >>Freiheit der Meere<<.").

18 Churchill & Lowe, *supra* n. 7, at 4.

the English jurist and scholar John Selden published a response to *Mare Liberum* in his *Mare Clausum* of 1635. This work attempted to establish the right of the English crown to assert control over the sea areas around Britain but also sought to reassert the principal that national dominion over the seas in general was valid.[19] Much longer and wider-ranging than Grotius' treatise, Selden's work was not without its merits.[20] The Englishman's pedantic viewpoint, however, did not align with the "growing spirit of freedom throughout the world."[21] Ultimately, the forward-looking spirit of Grotius and his ideal of the freedom of the seas prevailed.[22]

B. Modern Concepts

These early foundations for the law of the sea have been continually modified.[23] Gradually the natural law tradition gave way to theories based on consensual government, and positivism gained prominence in the realm of international law.[24] In the eighteenth century, writers such as Wolff and Vattel began to place customary law on an equal footing with natural law.[25] The positivist school placed greater importance on actual State practice, States' voluntarily assumed obligations, customary international law, and treaties rather than on the natural law theories of the ancients.[26] Nevertheless, the notion that the sea, as something unpossessable and common to all, is not subject to law continued into the twentieth century, along with the attendant principle of freedom of navigation.[27]

This conception of the high seas long held a central place in State practice and customary international law.[28] Although the concept of high seas freedoms remained deeply embedded in the western legal consciousness, beginning in the nineteenth century, the high seas themselves began gradually to contract geographically as a result of increased feasibility of access and the growth of territorial sea claims.[29] This has resulted in a greater need for regulation and "an increase in global concerns over oceans management in areas beyond national jurisdiction."[30]

1. Attempts at Codification of the Law of the High Seas

As suggested in article 38 of the Statute of the International Court of Justice, the sources of international law are embodied in international conventions, customary international law, general principles of international law, judicial decisions, and the writings of publicists.[31] Attempts to codify the rules of international law pertaining to the sea in general from these sources have been multifold.[32] As early as 1873, organizations such as the International Law Association, the Institute of International Law, Harvard Law School, and the American Law Institute have produced reports and proposed regulations on ocean-related topics such as territorial waters, marine pollution, deep sea bed resources, piracy, and Port State jurisdiction.[33] By the early twentieth century, a number of multilateral treaties had been enacted, which were important steps towards the establishment of the modern high seas regime.[34] These included conventions designed to improve international efforts to ensure the safety of life at sea following the sinking of the *Titanic* and the 1931 International Convention for the Regulation of Whaling.[35]

In total, there have been four official intergovernmental attempts at codifying the law of the sea and high

---

19 Rothwell & Stephens, *supra* n. 11, at 3.

20 Potter, *supra* n. 10, at 64 ("But as argument attempting to prove the legal validity of maritime dominion or maritime liberty in the period prior to 1650, Selden's work is incomparably superior to that of Grotius…").

21 Rothwell & Stephens, *supra* n. 11, at 3 (citing Thomas Wemyss Fulton, The Sovereignty of the Sea, at 370 n. 3 (1911)).

22 *Id.*; *see also* Potter, *supra* n. 10, at 64 (". . . . Selden was fighting against the tendency of historical international developments, while Grotius was fighting the battle of the future.").

23 Churchill & Lowe, *supra* n. 7, at 5.

24 *Id.*; see Lexico, https://www.lexico.com/en/definition/positivism (last visited April 1, 2020) (defining positivism as "[t]he theory that laws are to be understood as social rules, valid because they are enacted by authority or derive logically from existing decisions, and that ideal or moral considerations (e.g., that a rule is unjust) should not limit the scope or operation of the law.").

25 *Id.*

26 *Id.*

27 Stöcker, *supra* n. 17, at 318 ("*Der Gedanke, daß eine Sache, die nicht aufgebraucht werden könne, frei von Rechten sei und dem Gemeingebrauch dienen müsse, hat die Vekehrsfreiheit dauerhaft und wirkungsvoll bis in das 20. Jahrhundert getragen*.").

28 Rothwell & Stephens, *supra* note 11, at 154.

29 *Id.* at 154-155; Stöcker, *supra* note 17, at 318 ("*Die vermehrte und intensivere Nutzung des Meersraums ließ wesentliche Voraussetzungen – die Unerschöpflichkeit des Meeresressourcen und die Unmögligkeit einer einzelnen Nation, sich bestimmter Meersgebiete zu bemächtigen und ihre alleinige Nutzung für sich durchzusetzen – an Gültigkeit verlieren*.")

30 Rothwell & Stephens, *supra* n. 11, at 154-55.

31 Churchill & Lowe, *supra* n. 7, at 5-13; Statute of the International Court of Justice, April 18, 1946, 33 UNTS 993, art. 38.

32 *Id.* at 13.

33 *Id.* at 13-14.

34 Rothwell & Stephens, *supra* n. 11, at 160.

35 *Id.*

seas regulation.[36] The first was the League of Nations in 1924, which made a preliminary effort to select and prepare topics for codification.[37] When the League of Nations was replaced by the United Nations in 1945, the International Law Commission was established and began preparation of draft articles concerning the high seas and territorial waters.[38] The majority of its draft was devoted to the high seas and included topics such as navigation, fishing, and submarine cables and pipelines.[39] This material laid the foundation for the work of the first United Nations Conference on the Law of the Sea (UNCLOS I) in Geneva in 1958, which adopted four conventions: the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas; the Convention on the Continental Shelf, and the Convention on Fishing and Conservation of the Living Resources of the High Seas.[40] The Convention on the High Seas entered into force well before the other three conventions and with little contention, reflecting that customary international law concerning the high seas was already well established at this point.[41] Two years later a second conference, UNCLOS II, convened to focus on the issues of the breadth of the territorial sea and fishery limits.[42] This conference produced no consensus, and state practice concerning the law of the sea continued to develop through the 1960s.[43] In 1967, however, the United Nations General Assembly established the Sea Bed Committee to investigate issues concerning the deep sea bed, as advancing technology made sea bed resource extraction increasingly feasible.[44] Although many nations were hesitant to revisit the recently codified law of the high seas, it was apparent that deep sea bed resource exploitation would require a re-examination of the national jurisdictional limits of the high seas.[45] Additionally, many newly independent States, which were not part of the 1958 Conventions, were in favor of reviewing the earlier law of the sea, as concern was growing generally over the problems of over-fishing and marine pollution.[46] Finally, these factors combined with "the recognition that the various parts of the law of the sea were inextricably inter-related" and should be reviewed as a whole.[47] In 1970, therefore, the General Assembly resolved to convene a United Nations conference to create a comprehensive Law of the Sea Convention.[48]

2. 1982 United Nations Convention on the Law of the Sea

The third United Nations Convention on the Law of the Sea (UNCLOS III) took place over nine years from 1973 to 1982.[49] The Law of the Sea Convention produced by UNCLOS III came into force in 1994 and "remains one of the most comprehensive international law-making instruments of its time."[50] It embodies "a truly comprehensive regime for the law of the sea"[51] and, in Part VII, lays out the rules pertaining to the high seas. Article 86, the first article of Part VII, makes clear that the high seas consist of "all parts of the sea" that are not included within the EEZ, territorial sea, the internal waters of a coastal state or the archipelagic waters of an archipelagic state.[52] In turn, Article 89 states that the high seas are not subject to the sovereignty of any State,[53] which reflects the current position of customary international law.[54] This principle, gainsaying the ability of States to assert sovereignty on the high seas and limiting the exercise of jurisdiction to certain practices, leads to the proposition that "no State has the right to prevent ships of other States from using the high seas for any 'lawful purpose.'"[55]

3. Principle of the Freedom of the High Seas Navigation, Art. 87(1)

Among the lawful uses of the high seas are those embodied in Article 87(1), which provides a non-exhaus-

36 Churchill & Lowe, *supra* n. 7, at 14.
37 *Id.*
38 *Id.* at 15.
39 Rothwell & Stephens, *supra* n. 11, at 161.
40 Churchill & Lowe, *supra* n. 7, at 15.
41 Rothwell & Stephens, *supra* n. 11, at 162.
42 *Id.* at 9.
43 *Id.* at 9-10.
44 Churchill & Lowe, *supra* n. 7, at 15-16.
45 *Id.* at 16.
46 *Id.*
47 *Id.*
48 *Id.*
49 Rothwell & Stephens, *supra* n. 11, at 12.
50 *Id.* at 14.
51 *Id.*
52 *Id.* at 164; UNCLOS, *supra* n. 5, art. 86.
53 UNCLOS, *supra* n. 5, art. 89.
54 Rothwell & Stephens, *supra* n. 11, at 164.
55 Churchill and Lowe, *supra* n. 7, at 166.

tive list of six high seas freedoms.[56] Commentators note that "the listing of the freedom of navigation as the first freedom is iconic," and the fact that this freedom required no further explanation suggests the solidity of the concept in state practice and customary international law.[57] Accordingly, there are very few instances where a ship navigating on the high seas may be interfered with. These include the right of visit allowed to certain vessels and the prohibition of particular acts such as piracy and traffic in narcotic drugs.[58] However, the "freedom of the high seas is not absolute."[59] Article 87(2) requires that States and vessels must use the seas "with due regard for the interest of other States in their exercise of the freedom of the high seas."[60] Later articles of UNCLOS elaborate on how violations of the "due regard" clause may be enforced.

4. Principle of Exclusive Flag State Jurisdiction, Art. 92(1)

UNCLOS codifies the principle of exclusive flag state jurisdiction, which maintains that the State granting a vessel the right to use its flag has exclusive jurisdiction over that vessel.[61] This is made explicit by Article 92(1), which states that "[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas."[62] This exclusive jurisdiction encompasses both legislative and enforcement jurisdiction and, moreover, applies to all persons on board a vessel flying a State's flag regardless of their individual nationality.[63]

Historically, the principle of exclusive flag state jurisdiction was often supported by the theory of the ship's territoriality.[64] This conception views a ship as a "floating island" or "detached part of the territory" of its flag State.[65] This view, however, is not realistic because in practice ships are subject to the right of visit on the high seas by foreign enforcement vessels and fall under the territorial sovereignty of coastal States when they enter those States' territorial seas and internal waters.[66] Exclusive flag State jurisdiction, therefore, is better explained as a "corollary of the freedom of the high seas and the requirement of the submission of the high seas to law."[67] Its purpose is to protect the freedom of activity on the high seas while ensuring compliance with the national and international laws concerning that activity.[68] It is both logical and practical for flag States to take the lead in upholding the rule of law on the high seas since no national jurisdiction or central governing body holds sway there.[69]

As alluded to above, the principle of exclusive flag state jurisdiction is subject to two major exceptions, namely the right of visit and the right of hot pursuit. The right of visit, which applies only to private ships and not to military vessels or government ships with a non-commercial purpose, is set forth in Article 110(1) of the UNCLOS. This article "seeks to reinforce an international order on the high seas" by allowing warships to board vessels on the high seas that are reasonably suspected

---

[56] Rothwell & Stephens, *supra* n. 11, at 164; UNCLOS, *supra* n. 5, art. 87(1):

> Article 87
> Freedom of the high seas
> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:
> (a) freedom of navigation;
> (b) freedom of overflight;
> (c) freedom to lay submarine cables and pipelines, subject to Part VI;
> (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
> (e) freedom of fishing, subject to the conditions laid down in section 2;
> (f) freedom of scientific research, subject to Parts VI and XIII.

[57] Rothwell & Stephens, *supra* n. 11, at 164.

[58] *Id.* at 165.

[59] Yoshifumi Tanaka, The International Law of the Sea 156 (2012).

[60] UNCLOS, *supra* n. 5, art. 87(2).

[61] Tanaka, *supra* n. 59, at 157.

[62] UNCLOS, *supra* n. 5, art. 97(1).

[63] Tanaka, *supra* n. 59, at 157; *see also* M/V SAIGA (No. 2) Case (1999), 38 ILM 1347, para. 106 ("[T]he ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.").

[64] Tanaka, *supra* n. 59, at 157.

[65] *Id.* (citing The Case of the SS LOTUS, PCIJ 1928 Series A/10, p. 25).

[66] *Id.* (citing Dissenting opinion by Lord Finlay, the Case of the SS LOTUS, PCIJ Series A, No. 10, p. 53).

[67] *Id.*; see Gidel Le droit international public de la mer 225 (reprt. 1981) (1932-34) ("*Le caractère de juridicité de la haute me rest pratiquement une notion indispensable.*"); see also Gidel at 230 ("*Pratiquement, la nationalité du navire est le moyen technique d'organiser la >>juridicité<< de la haute mer.*").

[68] *Id.* at 158.

[69] *Id.*

of engaging in certain activities such as piracy or slave trading.[70]

The other exception, hot pursuit, is embodied in Article 111, which allows coastal states to pursue vessels believed to have violated the state's laws and regulations as long as the pursuit begins within the coastal state's internal waters, archipelagic waters, territorial sea, contiguous zone, and in certain circumstances within the exclusive economic zone and continental shelf.[71] Hot pursuit, however, although well established as a state practice before UNCLOS,[72] is subject to a number of constraints, such as continuousness, non-interruption, and halting at the territorial sea of foreign coastal states.[73] Right of visit, therefore, permits enforcement action to be taken against vessels engaged in certain kinds of activity while navigating on the high seas, but the right of hot pursuit allows for the pursuit unto the high seas of vessels suspected of having violated laws within a coastal state's national jurisdiction.[74]

In addition to the two major exceptions of right of visit and hot pursuit, exclusive flag State jurisdiction is tempered in three other situations, wherein non-flag States are given leeway to regulate the high seas activity of foreign vessels.[75] These include specific treaties, such as those regulating illicit traffic in narcotics, self-defense, and counter-migration efforts.[76] The major and minor exceptions to exclusivity are narrow and leave a broad responsibility to flag states, which are left to regulate all the other high seas activities of their flagged vessels.

III. M/V NORSTAR Judgment

A. Facts

It is helpful to keep in mind the history of high seas regulation and the current state of international law pertaining to the high seas when looking at the facts of the NORSTAR Case. The M/V NORSTAR was a Panamanian-flagged oil tanker that was owned by Intermarine & Co. AS ("Intermarine"), a company registered in Norway.[77] The vessel was chartered to a Maltese company, Nor Maritime Bunker, and between 1994 and 1998 was engaged in bunkering mega yachts with gasoil in the international waters of the Mediterranean Sea.[78] Rossmare International S.A.S ("Rossmare"), an Italian-registered company, acted as broker for the vessel and directed this bunkering activity.[79]

Italian fiscal police commenced an investigation into Rossmare and the M/V NORSTAR concerning the bunkering and concluded that the vessel was purchasing gasoil in Italy and selling it to European leisure boats in avoidance of tax duties.[80] Thereafter, the police began criminal proceedings against the president of Intermarine, the captain of the M/V NORSTAR, the owner of Rossmare, and five other individuals.[81] On August 11, 1998 the Public Prosecutor at the Court of Savona, Italy issued a Decree of Seizure calling for the M/V NORSTAR and the oil products on board to be seized as *corpus delicti*.[82] The Decree alleged that Rossmare was selling oil "in a continuous and widespread fashion" that it had purchased under tax exemption as ship's stores from warehouses in Livorno, Italy and Barcelona, Spain and that it evaded customs duties and taxes and committed tax fraud by selling this fuel oil to EU vessels.[83] The decree also alleged that the M/V NORSTAR was supplying this gasoil to mega yachts "exclusively moored at EU ports" and that, therefore, it knew that the oil would be used at a destination inconsistent with the one the tax exemption was intended for.[84]

---

70 *Id.* at 164-65; UNCLOS, *supra* n. 5, art. 110(1):
> Article 110
> Right of visit
> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
> (a) the ship is engaged in piracy;
> (b) the ship is engaged in the slave trade;
> (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
> (d) the ship is without nationality; or
> (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

71 Rothwell & Stephens, *supra* n. 11, at 176; UNCLOS, *supra* n. 5, art. 111.

72 *Id.* at 176; *see also* O'Connell, 2 The International Law of the Sea, 1076 n.35 (1982) ("The right of a State to pursue foreign ships on the high seas which have offended its laws within its national jurisdiction was well-established in the nineteenth century, although the derivation of the right is obscure.").

73 Rothwell & Stephens, *supra* n. 11, at 176; UNCLOS, *supra* n. 5, art. 111.

74 *Id.* at 176.

75 Tanaka, *supra* n. 59, at 173.

76 *Id.*

77 *NORSTAR*, at para. 69.

78 *Id.*

79 *Id.*

80 *Id.* at para. 70.

81 *Id.*

82 *Id.* at para. 71.

83 *Id.* at para. 72.

84 *Id.* at para. 73.

On the same day, August 11, 1998, the Office of the Prosecutor at the Court of Savona sent a request for assistance, in accordance with relevant EU conventions, to the Office of the Public Prosecutor of the Court of Palma de Mallorca to enforce the seizure decree.[85] Thereupon, the Spanish authorities seized the M/V NORSTAR on September 25, 1998 as the vessel was "moored in the bay of La Palma," which is within the territorial waters of Spain.[86] Throughout 1999 requests were made by the shipowner for release of the vessel, while Italian authorities gave notice through their embassy in Norway that release would be possible upon payment of bail or guarantee of 250 million lire.[87] On January 20, 2000, the Public Prosecutor issued indictments against the eight individuals involved in the bunkering activity.[88]

On March 14, 2003, however, the Court of Savona acquitted all of the accused, stating that "whoever organizes the supply of fuel offshore…does not commit any offence even though he/she is aware that the diesel fuel is used by leisure boaters sailing for the Italian [coasts]."[89] Subsequently, the Court of Savona ordered the revocation of the seizure of the M/V NORSTAR and a return to its owner and requested that the Court of Palma de Mallorca carry this release order into effect.[90] Later that month, the Court of Savona informed Intermarine of the release order and of the thirty day withdrawal deadline to avoid a judge-ordered sale of the vessel.[91] The parties disagree as to whether effective notice was given to the shipowner concerning the release of the vessel, but the shipowner did not take the vessel back into possession.[92] Following an unsuccessful appeal by the Public Prosecutor in Savona and exchanges between Spain and Italy concerning the fate of the unclaimed M/V NORSTAR, the Port Authority of the Balearic Islands sold the vessel at public auction to a waste management company which removed it from port for conversion into scrap.[93]

Subsequently, in December 2015, the Republic of Panama ("Panama") applied to ITLOS and instituted proceedings against the Italian Republic ("Italy") derived from the dispute "between the two states concerning the interpretation and application of the United Nations Convention on the Law of the Sea … in connection with the arrest and detention by Italy of mv Norstar, an oil tanker registered under the flag of Panama."[94] Panama claimed that Italy violated the right of its vessels to enjoy the freedom of navigation on the high seas, as embodied in UNCLOS and international law, by ordering and maintaining the arrest of the M/V NORSTAR and that in doing so Italy also demonstrated a lack of good faith.[95] In response Italy filed Preliminary Objections the following March disputing the jurisdiction of ITLOS over the matter and the admissibility of the claim.[96] ITLOS issued its judgment on Preliminary Objections in November 2016 finding that Articles 87 and 300[97] of UNCLOS were "relevant to the present case," which finding asserts ITLOS's jurisdiction over the matter and the admissibility of the case.[98] Finally, on April 10, 2019 ITLOS found in favor of Panama, declaring that Italy's seizure of the M/V NORSTAR violated Panama's right

---

85 *Id.* at para. 74.
86 *Id.* at para. 75.
87 *Id.* at para. 76-8.
88 *Id.* at para. 79.
89 *Id.* at para. 80.
90 *Id.* at para. 80-1.
91 *Id.* at para. 82.
92 *Id.* at para. 82-3.
93 *Id.* at para. 84-6.

94 *Id.* at para. 1.

95 *Id.* at para. 63-4; Panama's claim relies on UNCLOS art. 33 (Contiguous zone), art. 73 (Enforcement of laws and regulations of the coastal state), art. 87 (Freedom of the high seas), art. 111 (Right of hot pursuit), art. 226 (Investigation of foreign vessels), and art 300 (Good faith and abuse of rights).

96 *Id.* at para. 17; M/V "NORSTAR" (Panama v. Italy), Case No. 25, Preliminary Objections, Judgment of November 4, 2016, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Preliminary_Objections/C25_jJudgment_04.11.16_orip.pdf.; UNCLOS, *supra* n. 5, art. 294:

> Article 294
> Preliminary proceedings
> 1. A court or tribunal provided for in article 287 to which an application is made in respect of a dispute referred to in article 297 shall determine at the request of a party, or may determine proprio motu, whether the claim constitutes an abuse of legal process or whether prima facie it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is prima facie unfounded, it shall take no further action in the case.
> 2. Upon receipt of the application, the court or tribunal shall immediately notify the other party or parties of the application, and shall fix a reasonable time-limit within which they may request it to make a determination in accordance with paragraph 1.
> 3. Nothing in this article affects the right of any party to a dispute to make preliminary objections in accordance with the applicable rules of procedure

97 UNCLOS, *supra* n. 5, art. 300:

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

98 *NORSTAR*, para. 101-3; *see also* M/V "NORSTAR" (Panama v. Italy), Preliminary Objections, Judgment, ITLOS Rep. 2016, p. 44, at p. 73, para. 122.

to the freedom of the high seas contained in paragraphs 1 and 2 of UNCLOS article 87.[99]

B. Basis of Decision

The main focus of ITLOS's ruling was Article 87(1).[100] As a threshold and determinative question, the Tribunal had to consider whether the seizure of the M/V NORSTAR concerned the vessel's activities on the high seas or crimes allegedly committed in Italian territory or both.[101] Italy argued that the criminal proceedings and seizure of the M/V NORSTAR did not concern the vessel's bunkering activity on the high seas but rather alleged evasion of customs duties, tax evasion and smuggling in Italian territory.[102] The Decree of Seizure, moreover, was not a challenge to high seas activity but was issued because the vessel was the *corpus delicti* of the alleged series of tax evasion and smuggling crimes.[103] Therefore, the scope of Italian legislation, which underlay the Decree the Seizure, was "strictly territorial."[104]

The Tribunal disagreed and pointed to Italy's letter rogatory requesting the seizure of the M/V NORSTAR as evidence.[105] In the letter Italy requested execution of the Decree of Seizure based on three operational elements, namely that the M/V NORSTAR purchased and loaded tax exempt gasoil in an Italian port, the tanker then bunkered megayachts outside Italy's territorial sea, and the megayachts entered Italian ports without declaring the gasoil.[106] Although the first and third elements did not involve extraterritorial activity, the Tribunal observed that the bunkering activity took place beyond the Italian territorial sea and upon the high seas.[107] Ultimately, the Tribunal found that the seizure of the M/V NORSTAR concerned both alleged crimes perpetrated in Italian territory and bunkering activity on the high seas.[108] The high seas bunkering, in the Tribunal's view, formed "not only an integral part, but also a central element, of the activities targeted by the Decree of Seizure and its execution."[109]

As the Tribunal notes, bunkering on the high seas is an activity included under freedom of navigation.[110] Even though Italy did not physically interfere with the M/V NORSTAR on the high seas, the application of Italian criminal and customs laws to the vessel's bunkering activity could produce a "chilling effect" on such activity and, regardless, could constitute a breach of the freedom of navigation.[111] Enforcement in internal waters, such as the arrest of the M/V NORSTAR in the Bay of Mallorca, was still an extraterritorial application of law that violated the principles of UNCLOS Article 87.[112]

Secondly, the Tribunal considered Panama's claim that Italy breached the "due regard" clause contained in UNCLOS Article 87(2).[113] This provision, as noted above, requires States Parties to have due regard for other States while exercising the freedom of the high seas.[114] Because the dispute in this case involved only the M/V NORSTAR's navigation of the high seas and did not concern Italy's usage of high seas freedoms, the Tribunal unanimously found that Article 87(2) was inapplicable to this case.[115]

Finally, the Tribunal assessed Panama's claim that Italy violated the "good faith" clause of Article 300.[116] The claim was based on a broad reading of Article 87 and the contention that Italy, by impeding the right of free navigation of the M/V NORSTAR, did not fulfill its Article 87 duties, which action showed a lack of good faith and invoked Article 300.[117] The Tribunal referenced the prior decision in the M/V LOUISA case, which established that "article 300 of the Convention cannot be invoked on its own," and reiterated that a State Party invoking Article 300 must establish a link between that article and a violation of another part of the Convention.[118] Panama's claim that "a breach of article 87… necessarily entails the breach of article 300" was insufficient.[119] Ultimately, the Tribunal found no violation of Article 300 because its finding, above, that Italy did not

---

99 *Id.* at Para. 469.
100 Collins, *supra* n. 6, at 673.
101 *NORSTAR*, para. 153.
102 *Id.* at para. 160-62.
103 *Id.* at para. 161.
104 *Id.* at para. 164.
105 *Id.* at para. 166.
106 *Id.*
107 *Id.*
108 *Id.* at para. 186.
109 *Id.*
110 *Id.* at para. 219 (citing M/V "VIRGINIA G" (Panama v. Guinea-Bissau), Judgment, ITLOS Rep. 2014, p. 4 at p. 70, para. 223).
111 *Id.* at para. 223-4.
112 *Id.* at para. 226.
113 *Id.* at para. 231.
114 *Id.*; UNCLOS, *supra* n. 5, art. 87(2).
115 *Id.*
116 *Id.* at para. 232.
117 *Id.* at para. 236-7.
118 *Id.* at para. 241 (referencing M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Case No. 18 Judgment of May 28, 2013, Para. 137, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_merits/C18_Judgment_280513.pdf.).
119 *Id.* at para. 243.

violate the due regard principle of Article 87(2) meant there was no contention that Italy committed an abuse of rights under Article 300.[120]

C. Award

Having determined that Italy breached UNCLOS Article 87(1), the Tribunal turned to the assessment of reparations owed to Panama.[121] Citing its prior decision in the M/V "SAIGA" (No. 2) Case, the Tribunal stated that under international law reparations may take many forms, including restitution in kind and compensation.[122] Because restitution of the M/V NORSTAR was no longer possible, the Tribunal proceeded to the calculation of compensation owed by Italy.[123] Finding that only "damage directly caused by the arrest and detention of the M/V 'NORSTAR'"[124] was compensable and that no such damage could have been caused after March 26, 2003,[125] when the shipowner acknowledged receipt of notice that the vessel could be collected, the Tribunal ultimately awarded Panama US $285,000 plus interest for the loss of the tanker.[126] This was far less than the amount of damages requested by Panama, which exceeded US $50 million,[127] and may have reflected a "lack of sympathy for Panama's position" derived from its failure to provide suitable evidence and the lengthy delay it took before initiating proceedings.[128]

D. Dissent of Judges Cot, Pawlak, Yanai, Hoffman, Kolodkin and Lijnzaad and Judge Ad Hoc Treves

The twenty-one judges that make up ITLOS are each nominated by States Parties to UNCLOS and elected to a nine year term by a two-thirds majority.[129] Every three years elections for the positions of one-third of the judges are held at a meeting of States Parties in New York.[130] These judges are "elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea."[131] In the instant case, six of these highly qualified judges, and an additional judge ad hoc, strongly disagreed with the majority's judgment and issued a poignant joint dissent.[132]

The dissenters asserted that Article 87(1) was not applicable to this case, and that even if it was, it was not breached by Italy's actions.[133] The main thrust of their argument is that the proposition that Articles 87 and 92 combine to entirely foreclose the possibility of non-flag States applying their prescriptive criminal jurisdiction to high seas activity is not supported by the text of UNCLOS, its *travaux préparatoires*, other international treaties, customary international law, or the practice of States Parties.[134] The contrary proposition, moreover, is supported by highly regarded scholars of the law of the sea whose research establishes that assertions of prescriptive jurisdiction over unlawful activity on the high seas is not prohibited to non-flag States.[135]

The issue of a possible breach of Article 87 was relevant for the determination of whether the Tribunal had jurisdiction, but the relevance of the article is not in itself sufficient proof that Italy breached it and in fact "targeted and criminalized the bunkering activities of the M/V NORSTAR".[136] Italy never criminalized high seas bunkering and only exercised jurisdiction in this case over the crimes of tax evasion and smuggling.[137] The dissenters state that:

> It is widely recognized that a State may extend its prescriptive criminal jurisdiction to conduct beyond its territory when a constituent element of an alleged crime has occurred in its territory or where there is a sufficient connection to it. It may do so, in particular, if the alleged crime, of which the conduct is a part, originated in its territory, or if it was completed in its territory

---

120 *Id.* at para. 307.
121 *Id.* at para. 309.
122 *Id.* at para. 319 (quoting M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Rep. 1999, p. 10, at p. 65, para. 171).
123 *Id.* at para. 320-22.
124 *Id.* at para. 335.
125 *Id.* at paras. 357, 370.
126 *Id.* at para. 462.
127 *Id.* at para. 386.
128 Collins, *supra* n. 6, at 674.
129 General Information, International Tribunal for the Law of the Sea, https://www.itlos.org/general-information/, (last visited April 6, 2020).
130 *Id.*
131 *Id.*
132 M/V "NORSTAR" (Panama v. Italy), Case No. 25, Joint Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin and Lijnzaad and Judge *ad hoc* Treves, April 10, 2019, para. 1, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Judgment/C25_DO_joint.pdf [hereinafter NORSTAR Dissent].
133 *Id.* at para. 13.
134 *Id.* at para. 19.
135 *Id.* at para. 19 (referencing A. Proelss, United Nations Convention on the Law of the Sea. A Commentary 700-01 (1st ed. 2017) and G. Gidel, 1 Le Droit international public de la mer: le temps de paix 261 (reprt. 1981)).
136 *Id.* at para. 27.
137 *Id.* at para. 21.

> and, at least in some cases, when the alleged crime produces harmful effects in the State's territory.[138]

Here, the alleged crime was tax evasion, which began in Italian territory, where the fuel was purchased under false pretenses by the M/V NORSTAR; was completed in Italian territory when the non-declared fuel returned to Italian waters in megayachts; and had harmful financial effects in Italy in the form of unpaid taxes.[139] Therefore, there was sufficient connection between the M/V NORSTAR's activity and the territory of Italy to justify Italy in its exercise of prescriptive criminal jurisdiction in this case.[140]

Moreover, the dissent claims that the question whether Italy exercised "territorial" or "extraterritorial" jurisdiction in this case is irrelevant.[141] It was tax crimes and not high seas activity that was targeted, and the M/V NORSTAR was seized, after it voluntarily entered internal waters, as an instrument and *corpus delicti* of those crimes.[142] Finally, the dissenters close with the argument that prescriptive criminal jurisdiction is appropriate "not when it is justified or allowed by international law . . . . but when it is not prohibited by international law…."[143] In short, Italy's issuance and request of execution of the Decree of Seizure against the M/V NORSTAR was made "in conformity with international law."[144]

IV. The M/V NORSTAR Judgment is Inconsistent with the Freedom of High Seas Navigation

A. Tribunal's Reading of Article 87(1) is too broad

The Tribunal's judgment in this case and application of UNCLOS Article 87 is overly broad and inconsistent. As discussed at length above, this provision of the Convention guarantees the right of freedom of navigation on the high seas.[145] The M/V NORSTAR, however, was seized while at anchor after having voluntarily entered the internal waters of Spain.[146] Common sense suggests that it is highly questionable whether freedom of navigation applies to this case at all. As Italy itself argued, even if we assume *arguendo* that it applied its prescriptive jurisdiction extraterritorially, "without a concrete interference with the freedom of navigation, this conduct would not be in breach of article 87."[147] The seizure of an anchored vessel in internal waters is an infirm basis for a claim invoking high seas rights of free navigation.

The dissent takes a much more reasonable view of the matter, and their view is clearly correct that Article 87 is not applicable to this case. Even two judges from the majority acknowledged in the Preliminary Objections stage, that no enforcement action was taken against the M/V NORSTAR that prevented the free movement of the vessel on the high seas.[148] It was not seized on the high seas, so its movement thereon was not interfered with by Italy. Moreover, there is no basis for the majority's judgment in international law,[149] and its broad application of the freedom of high seas navigation is inconsistent with the historical development of that principle. The Grotian concept that ships are free to navigate in commerce on the high seas because those waters are unpossessable and open to all States would likely not extend its protections to a vessel suspected of criminal activity lying voluntarily in internal waters.

B. Application of Article 92 is Flawed

The Tribunal's judgment also gives a broad reading of Article 92 when it asserts that the exclusive jurisdiction of the flag state is an "inherent component of the freedom of navigation."[150] According to this interpretation, the flag State's exclusive jurisdiction "prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas."[151] This

---

138 *Id.* at para. 31 (citing as examples James Crawford, Brownlie's Principles of Public International Law, at 458-59 (8th ed. 2012); Cedric Ryngaert, Jurisdiction in International Law, at 78-79 (2nd ed. 2015); Christopher Staker, Jurisdiction, International Law, at 297-98 (5th ed. 2018).

139 *Id.* at para. 32.

140 *Id.* at para. 33.

141 *Id.* at para. 34.

142 *Id.* at para. 35.

143 *Id.* at para. 36 (citing "LOTUS", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 19).

144 *Id.*

145 *See* UNCLOS, *supra* n. 5, art. 87.

146 *NORSTAR*, at para. 75.

147 *Id.*, at para. 207; *see also id.* at para. 208 ("According to Italy, article 87 does not concern territoriality or extraterritoriality, but rather 'interference with navigation, as simple as that; and none happened here, in any, including the slightest, form.'").

148 *NORSTAR* Dissent, at para. 15 n. 30 (quoting M/V "NORSTAR" Case (Panama v. Italy), Preliminary Objections, Joint Separate Opinion of Judges Wolfrum and Attard, para. 38) ("[A]rticle 87 protects against enforcement actions undertaken by a State different from the flag State which hinder the freedom of movement of the vessel concerned. In this case such an enforcement action on the high seas did not take place.").

149 *See id.* at para. 19.

150 *NORSTAR*, at para. 225.

151 *Id.*

reasoning, however, is inapposite to the facts of the case because Italy did not extend its prescriptive jurisdiction to *lawful* activities conducted on the high seas but rather to the unlawful activity of tax evasion and smuggling of gasoil. Italy acted within its rights by exercising concurrent prescriptive jurisdiction over activity that violated its criminal law.

Rather than an "inherent component" of the freedom of navigation, exclusive flag state jurisdiction is a corollary to high seas navigation.[152] This jurisdiction plays a "dual role."[153] It guarantees that vessels on the high seas retain freedom of activity, and it ensures that those vessels, through the flag State's responsibility, comply with national and international laws pertaining to their activities.[154] The Tribunal's application here of the exclusive flag state provision in Article 92, therefore, is flawed because the high seas activity of the M/V NORSTAR was not the target of the vessel's arrest and the vessel's compliance with regulations was not at issue. Italy seized the M/V NORSTAR as the *corpus delicti* of the crime of land-based tax fraud.[155]

Additionally, the Tribunal's judgment contradicts the usual approach in international law that recognizes exclusive flag State jurisdiction only in relation to enforcement activity against vessels on the high seas and not in the realm of legislation. The exclusivity of flag state enforcement jurisdiction is itself not actually exclusive. It is subject to many physical exceptions, including the right of visit, hot pursuit, and exceptional measures. Thus, it seems unreasonable for ITLOS to apply exclusivity rigidly to the seizure of the M/V NORSTAR. Moreover, as the following section will show, since the exercise of prescriptive jurisdiction over high seas criminal activity is a custom of the international law of the sea, Italy was also acting within accepted norms by prosecuting a tax evasion scheme that had a high seas element.

C. Judgment is Contrary to Internationally Accepted Norms

As stated above, it is an internationally accepted norm that coastal states have certain limited powers over the activities of vessels on the high seas. One of the leading scholars on the law of the sea, Douglas Guilfolye, has written that "[w]hile no State may extend its sovereignty over the high seas, '[t]he absence of any authority over ships' sailing there 'would lead to chaos.'"[156]

The device of giving nationality to ships and providing for flag State jurisdiction is meant to promote order, but there is a fundamental difference between order achieved through enforcement jurisdiction and that reached through prescriptive jurisdiction. Only the former is given exclusively to the flag State in the realm of high seas activity.[157] For example, States are allowed to prescribe laws to govern the actions of their citizens, and "flag State jurisdiction does not prevent other States from attaching consequences to the conduct of their nationals on the high seas, even when aboard foreign vessels."[158] From prescriptive jurisdiction over citizens' conduct, we can analogize that Italy's application of its criminal code to the smuggling of its tax exempt gasoil was not without the sanction of internationally accepted States practice. The Italian criminal and tax codes at issue are lawful exercises of prescriptive, rather than enforcement, jurisdiction and do not conflict with principles of flag State jurisdiction on the high seas.

Additionally, the idea of the high seas as a commons supports the theory that all States can there "project their authority to varying extents" and that there is a possibility for States' prescriptive jurisdiction over high seas activity to run concurrently.[159]

We find an example of this proposition in UNCLOS Article 117, which says that States have an obligation to take necessary measures "for their respective nationals" to conserve high seas living resources.[160] A model of this concept is the common practice of coastal States regulating fishing activity beyond their territory and upon the high seas through Regional Fisheries Management Organizations. If States are allowed to exercise control of high seas activity in this realm, it is a small leap to recognize the reasonableness of Italy's extension of its criminal tax and smuggling laws to high seas bunkering activity. This is especially the case considering that Italy did not enforce these laws against the M/V NORSTAR while the vessel was upon the high seas. As Guilfoyle, again, writes, "Absent…treaty law restrictions, any State with an ordinary jurisdictional nexus to conduct on the high seas may assert jurisdiction. The only gen-

---

152 Tanaka, *supra* n. 57, at 157.
153 *Id.* at 153.
154 *Id.*
155 *NORSTAR*, at para. 35.
156 Douglas Guilfoyle, The High Seas, The Oxford Handbook of the Law of the Sea, at 209 (1st ed. 2015).
157 *Id.*
158 *Id.*
159 *Id.*
160 UNCLOS, *supra* n. 5, art. 117.

eral prohibition is upon States exercising *enforcement* jurisdiction over vessels on the high seas."[161]

V. Potential Ramifications

A. Pending Italian Litigation

Italy's line of argument in this case has been described as cautious, and it had reason to be tentative in its proposals.[162] Italy is currently involved in a dispute with India following an incident where two Italian marines shot and killed two Indian fishermen, allegedly mistaking them for pirates, in international waters off the Indian coast.[163] In its Preliminary Measures argument before ITLOS in that case, the ENRICA LEXIE Incident, Italy claims that the arrest of the two marines violated its right to the freedom of navigation on the high seas and its exclusive jurisdiction as the flag State.[164] This is essentially the same argument that Panama offered in the M/V NORSTAR case and to which Italy there objected. The ENRICA LEXIE case will be an opportunity to see whether ITLOS continues to uphold the reasoning of the instant decision. It is ironic that a similar ruling would benefit Italy in the later case, but the rationale and application of Article 87 in that case is likewise inapposite. The principle of the freedom of high seas navigation is not strong enough to overpower the interest of sovereign states to punish those who murder its citizens, even when the death occurs on the high seas.

B. Ability of Coastal States to Enforce Laws and Regulations

If ITLOS continues its rigid and broad application of UNCLOS Articles 87 and 92, the result could be far reaching and seriously hamper the ability of coastal states to enforce domestic law. It is recognized in the current international law of the sea that coastal states have domestic interests that are affected by high seas activity. Fishing is a prime example, where overfishing of highly migratory fish stocks on the high seas can seriously damage the fish stocks available to fishermen within territorial waters. Additionally, marine pollution that takes place on the high seas can travel with currents and tides and eventually have a harmful effect on territorial waters, resources, and coastal lands.

States are given the right and means to protect themselves from harmful high seas activity. States engaged in fishing certain fish stocks are encouraged to create Regional Fisheries Management Organizations to regulate exploitation of those stocks on the high seas.[165] They are able to take measures such as inspecting and confiscating the fishing gear of illegal, unreported, and unregulated ("IUU") fishing vessels.[166] Pollution is also policed domestically through Port State controls, whereby Port States are able to take measures such as requiring unseaworthy vessels in danger of causing pollution to proceed to nearby shipyards for repair.[167] Similarly, UNCLOS "gives port states the ability to take action against vessels for breaches of international pollution standards wherever these breaches take place,"[168] including on the high seas.

These enforcement activities are essential to the health and safety of Coastal States, but ITLOS's judgment in the M/V NORSTAR case calls into question the continued ability of States to exercise these rights. If Coastal States cannot enforce regulations against detrimental activity and are left with no recourse but application to flag States for enforcement of these rules, the environmental consequences would be far reaching. ITLOS would do well to consider these potential after-effects of this judgment before such hinderance is felt by coastal states.

C. Tribunal Selection and the Future of ITLOS

The Tribunal should consider its own future and the damage to credibility that a strange decision such as this could bring about. UNCLOS Article 287 provides for choice of procedure for disputes arising under the Convention.[169] States Parties upon "signing, ratifying or acceding to th[e] Convention or at any time thereafter" are free to elect from among four means of dispute settlement including ITLOS, the International Court of Justice, an arbitration tribunal, or a special arbitration tribunal.[170] This has been called a "cafeteria" style approach to dispute settlement.[171] An unorthodox and unprecedented ruling, such as the M/V NORSTAR judgment, may discourage parties from selecting ITLOS

---

161 *Id.* at 210.

162 *See* Collins, *supra* n. 6, at 675.

163 The "Enrica Lexie" Incident (Italy v. India), Case No. 24, Order of 24 August 2015, Paras. 39, 40, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/24_published_texts/2015_24_Ord_24_Aug_2015-E.pdf.

164 *Id.*

165 UNCLOS, *supra* n. 5, art. 118.

166 *See* Rothwell & Stephens, *supra* n. 11, at 470.

167 UNCLOS, *supra* n. 5, art. 219.

168 Rothwell & Stephens, *supra* n. 11, at 383.

169 UNCLOS, *supra* n. 5, art. 287.

170 *Id.*

171 Rothwell & Stephens, *supra* n. 11, at 483 (citing Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 International and Comparative Law Quarterly 37, 40 (1997)).

to resolve their disputes in the future. Since States are afforded such freedom in selection of tribunals, there is little incentive to risk an unpredictable application of the well-established provisions and concepts embodied in UNCLOS.

It is arguable that this effect is already being felt. There are currently only two cases pending before ITLOS.[172] On the other hand, of the seventeen cases pending before the International Court of Justice currently, four are maritime disputes that could have been submitted to ITLOS.[173] Perhaps States Parties are already suspicious of ITLOS's ability to issue predictable, reasonable judgments. Furthermore, when ITLOS, the tribunal specifically created by UNCLOS for the resolution of disputes arising under the Convention, issues judgments that surprise and confuse the international community, it provides a disincentive to nations, such as the United States, who are not yet parties to the Convention to become members. Will these nations become more reluctant to bind themselves to an agreement that is not susceptible to accurate, predictable interpretation by its own tribunal?

VI. Conclusion

No other international tribunal has issued a direct ruling on the principle of the freedom of navigation in international waters.[174] Unfortunately, it appears that the pioneer judgment got it wrong. ITLOS applied an overly broad interpretation of UNCLOS Article 87 and a too-narrow view of Article 92 to the facts of the M/V NORSTAR Case. No provisions of the Convention itself nor customs of international law supports a conclusion that the seizure of a vessel at anchor in internal water for engaging in an allegedly criminal tax evasion scheme violates that vessel's right to free navigation on the high seas. This judgment has the potential to reverberate through the law of the sea and effect not only the future understanding of UNCLOS but also the credibility of ITLOS, the Tribunal specifically created to interpret the Convention. It would be sensible to re-examine and continue to critique the Tribunal's reasoning here before it is replicated in other judgments. As one commentator has said, it is clear "that the M/V "NORSTAR" case will not be the last word on the thorny topic of the exclusivity of flag state jurisdiction for criminal acts occurring on the high seas."[175] It will hopefully not be the last word on the freedom of high seas navigation either.

[172] List of pending case and current status, International Tribunal for the Law of the Sea, https://www.itlos.org/en/cases/docket/ (last visited April 1, 2020).

[173] Pending cases, International Court of Justice, https://www.icj-cij.org/en/pending-cases (last visited April 1, 2020).

[174] Collins, *supra* n. 6, at 673.

[175] *Id.* at 675.

Contributing Authors to this Issue
Contact Information

Lawrence Rutkowski
Transportation Finance Group
Seward and Kissel LLP, New York, NY
rutkowski@sewkis.com

Robert J. Gayda
Corporate Restructuring & Bankruptcy Group
Seward and Kissel LLP, New York, NY
gayda@sewkis.com

Kirby Aarsheim
Farrell Smith O'Connell, Boston, MA
kaarsheim@fsofirm.com

Colin T. Kelly
J.D. Candidate, 2021
Tulane University Law School

Ilana G. Smirin
J.D. Candidate, 2021
Tulane University Law School

Window on Washington

Bryant E. Gardner
Winston & Strawn LLP
Washington, DC
bgardner@winston.com

SUBSCRIPTION QUESTIONS?

If you have any questions about the status of your subscription, please call your Matthew Bender representative, or call our Customer Service line at 1-800-833-9844.

ATTENTION READERS

Any reader interested in sharing information of interest to the admiralty bar, including notices of upcoming seminars, newsworthy events, ''war stories,'' copies of advisory opinions, or relevant correspondence should direct this information to the Managing Editor, Robert Zapf, rjzapf1@verizon.net, or Cathy Seidenberg, Legal Editor, Cathy.J.Seidenberg@lexisnexis.com.

If you are interested in writing for the BULLETIN, please contact Cathy Seidenberg at Cathy.J.Seidenberg@lexisnexis.com.

The articles in this BULLETIN represent the views of their authors and do not necessarily reflect the views of the Editorial Board or Editorial Staff of this BULLETIN or of LexisNexis Matthew Bender.

BENEDICT'S MARITIME BULLETIN is now available online at Lexis.com and can be found by selecting the "Area of Law – By Topic" tab and then selecting "Admiralty", and is available on Lexis Advance and can be found by "Browse" > "By Practice Area" > "Admiralty & Maritime Law".

HEADING HOME