for harms caused by the operations of their subsidiaries. For now, however, the *Vedanta* judgment opens up avenues for victims of corporate human rights abuses by clarifying two important issues in English law: parent companies can assume a duty of care for the impacts of their subsidiaries by issuing group-wide policies; and when evaluating whether a claimant can access "substantial justice" in another fora, English courts can and should consider whether the claimants can financially access appropriate legal counsel.

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UN Convention on the Law of the Sea—jurisdiction of the International Tribunal for the Law of the Sea—existence of a "dispute"—indispensable third parties' freedom of navigation—flag state jurisdiction—good faith and abuse of rights—calculation of compensation

THE MV "NORSTAR" CASE (PANAMA V. ITALY). ITLOS Case No. 25. Preliminary Objections. *At* https://www.itlos.org.
International Tribunal for the Law of the Sea, November 4, 2016.

In the *MV "Norstar" Case* (*Norstar Case*), the International Tribunal for the Law of the Sea (ITLOS) produced two reasoned decisions. In the first, the Tribunal established jurisdiction over the relevant dispute and the admissibility of Panama's claims.[1] In the second, it found that Italy had violated Panama's right to freedom of navigation on the high seas.[2] In the latter decision, the Tribunal relied on an expansive understanding of flag state jurisdiction—prompting a vociferous joint dissent by seven of its twenty-three judges.[3] The majority's understanding of the jurisdictional exclusivity of the flag state as extending to prescriptive as well as enforcement jurisdiction is a significant expansion of flag state rights—and will have a corresponding impact on the way that shipping is regulated internationally.

Between 1994 and 1998, the MV *Norstar* (*Norstar*)—a Panamanian-flagged oil tanker—was engaged in the supply of gasoil to mega yachts off the coasts of Italy, France, and Spain. On September 25, 1998, it was arrested by the Spanish authorities following an August 11, 1998 request for mutual assistance by the public prosecutor of the Court of Savona in Italy, based, in turn, on a Decree of Seizure of the same date. The arrest occurred while the *Norstar* was anchored in the bay of Palma de Mallorca—Spanish internal waters.

At the point of its arrest, the only thing Panamanian about the *Norstar* was the flag it sailed under. It was owned by a Norwegian shipping company and chartered by a Maltese shipping company. The "bunkering" activity (i.e., the supply of fuel to seagoing vessels) in which it was engaged was at the direction of an Italian company and took place in the Mediterranean.

[1] M/V "Norstar" Case (Pan. v. It.), ITLOS Case No. 25, Preliminary Objections Judgment of Nov. 4, 2016 (hereinafter Prelim. Obj.).

[2] M/V "Norstar" Case (Pan. v. It.), ITLOS Case No. 25, Judgment of Apr. 10, 2019, 58 ILM 673 (2019) (hereinafter Judgment).

[3] Twenty-one permanent judges plus 2 *ad hoc*.

The charge against the *Norstar* was that it was involved in an excise scam. More specifically, it was said to be in the business of buying tax-exempt fuel in Italy and selling it to a yacht-owning clientele in international waters. The individuals involved—including the *Norstar*'s captain—were charged by the public prosecutor. All were later acquitted, with the Italian court ordering that the *Norstar* be released. However, the owner's failure to take possession resulted in the vessel being auctioned off by the Spanish port authorities.

From the foregoing, one might be forgiven for considering the *Norstar* an inconsequential ship, caught up in a slightly grubby scheme selling cheap yacht fuel to people who could probably afford to pay full price. That was until, on November 16, 2015, nearly two decades after the *Norstar* was arrested, Panama commenced proceedings against Italy before ITLOS claiming that, in procuring the arrest of the *Norstar*, Italy had violated Panama's rights under various provisions of the UN Convention on the Law of the Sea (UNCLOS).[4]

Italy responded to the commencement of proceedings by objecting to the jurisdiction of the Tribunal (Prelim. Obj., para. 61) and the admissibility of Panama's claims (Prelim. Obj., para. 222). The Tribunal affirmed its competence in both respects, but reduced substantially the scope of Panama's claim.

Italy first claimed that no dispute existed between it and Panama. When Panama approached Italy to resolve the dispute in August 2001, it did so through a private lawyer. Italy argued that said lawyer represented the interests of the *Norstar*'s owners, not the Panamanian state. The Tribunal rejected this argument. The lawyer's mandate had been confirmed by Panama in an August 31, 2004 Note *Verbale* from the Panamanian Foreign Ministry to the Italian Embassy in Panama (Prelim. Obj., para. 90). From that point onward, Italy was on notice that there was a dispute between it and Panama concerning the *Norstar* (Prelim. Obj., paras. 97–103).

Italy then argued that the provisions of UNCLOS that Panama relied on were inapplicable to the case at bar[5] (Prelim. Obj., para. 106). The Tribunal agreed with Italy that certain provisions of UNCLOS relied on by Panama were irrelevant (Prelim. Obj., paras. 113–25). Panama's claim was narrowed to two provisions of UNCLOS: Article 87, concerning freedom of the high seas (Prelim. Obj., para. 122); and Article 300, concerning Italy's obligation of good faith (Prelim. Obj., para. 132).

The Tribunal then addressed three objections by Italy to its jurisdiction *ratione personae*. Italy first claimed that it was not the proper respondent, since the issuance of the Decree of Seizure was not per se an internationally wrongful act but merely conduct preparatory to an internationally wrongful act—the seizure and detention of the *Norstar* (Prelim. Obj., paras. 138–41). Italy thus sought to implicate Spain for acting on the public prosecutor's request—a position compounded by Italy's second objection that Spain's acts could not be attributed to it under Article 6 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)[6] (Prelim. Obj., paras. 141–42).

[4] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 396 (*entered into force* Nov. 16, 1994).

[5] Further: Oil Platforms (Iran v. US), Preliminary Objections, 1996 ICJ Rep. 803, paras. 4–5 (Dec. 12) (Higgins, J.).

[6] Concerning organs of one state placed at the disposal of another state, see JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 103–05 (2002).

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The Tribunal rejected this argument, holding that the Decree of Seizure formed part of a program of judicial cooperation between Italy and Spain and that "without the Decree of Seizure, there would have been no arrest" (Prelim. Obj., para. 165). It further held that the case before it, "which involves the action of more than one State, fits into a situation of aid or assistance of a State in the alleged commission of an internationally wrongful act by another State" (Prelim. Obj., para. 166). Thus, the Tribunal appeared to invoke ARSIWA Article 16 concerning complicity, implying that Italy was responsible for Spain's allegedly internationally wrongful act—or vice versa[7] (Prelim. Obj., para 167).

The Tribunal then addressed a further objection *ratione personae* by Italy, based on the indispensable third party principle. In the *Monetary Gold* case, the International Court of Justice (ICJ) said:

> Where . . . the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it.[8]

On this basis, Italy argued that the Decree of Seizure was insufficient to effect the arrest of the *Norstar*, and that any pronouncement by the Tribunal on the legality of that arrest would necessarily implicate Spain. As Spain was not before the Tribunal, the Tribunal was not competent to make any finding on the *Norstar*'s seizure (Prelim. Obj., para. 145). But the Tribunal disagreed, pointing to the qualification of *Monetary Gold* identified in the *Phosphate Lands* case (Prelim. Obj., para. 157), namely that even where a third state's interests are engaged, an international tribunal may still adjudicate on the dispute, provided that "the legal interests of the third state that may possibly be affected do not form the very subject-matter of the decision that is applied for."[9] Put another way, by ring-fencing the Decree of Seizure as the basis of the claim, the Tribunal purported to exclude Spain's responsibility for the *Norstar*'s arrest (Prelim. Obj. para., 173).

The Tribunal then addressed Italy's remaining objections. It held that Panama had engaged in a sufficient exchange of views to satisfy UNCLOS Article 283 (concerning negotiations before a claim can be brought) and that Italy's refusal to respond to Panama's communications rendered any extended exchange futile (Prelim. Obj., paras. 215–17). It rejected Italy's objection that the claim was not properly Panamanian on the basis that the "ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State"[10] (Prelim. Obj., paras. 299–332). It held that Panama's claim was not barred under UNCLOS Article 295 by the shipowners' failure to exhaust local remedies (Prelim. Obj., paras. 260–71). And it also held that the doctrines of

[7] *Id.* at 148–51.

[8] Monetary Gold Removed from Rome in 1943 (It. v. Fr., UK & U.S.), Preliminary Question, 1954 ICJ Rep. 19, 33 (June 15). *See also* East Timor (Port. v. Austl.), Judgment, 1995 ICJ Rep. 90, para. 29 (June 30).

[9] Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, 1992 ICJ Rep. 240, para. 54 (June 26).

[10] M/V "SAIGA" (No. 2) (St. Vincent v. Guinea), Judgment, 1999 ITLOS Rep. 10, para. 106 (July 1); M/V "Virginia G" Case (Pan./Guinea-Bissau), Judgment, 2014 ITLOS Rep. 4, para. 126 (Apr. 14). *See further* Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, 1960 ICJ Rep. 150, 167–71 (June 8).

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acquiescence, estoppel, and extinctive prescription did not preclude Panama's claim (Prelim. Obj., paras. 300–14).

As noted, following the Tribunal's pruning of Panama's case, the merits of the proceedings were confined to assessing whether the issuance of the Decree of Seizure violated the *Norstar*'s freedom of navigation. The first merits question for the Tribunal was geographical, i.e., whether the Decree of Seizure was aimed at conduct occurring on the territory of Italy, the high seas, or both (Judgment, para. 153). Italy argued that the bunkering that prompted the Decree of Seizure was only part of the puzzle. Specifically, the bunkering was the "*corpus delicti* of an alleged series of crimes consisting essentially of smuggling and tax evasion" taking place in Italy itself, rendering the consequent seizure of the *Norstar* a "strictly territorial" act (Judgment, paras. 162, 166). The Tribunal disagreed, finding that "the bunkering activities . . . constitute[d] not only an integral part, but also a central element, of the activities targeted by the Decree of Seizure and its execution" (Judgment, para. 186).

The next question was whether Italy's actions constituted an unjustified interference with the *Norstar*'s freedom of navigation. Again, the Tribunal answered this affirmatively. First, it confirmed that bunkering constituted part of the freedom of navigation[11] (Judgment, para. 219). Second, it held that in seeking to regulate the behavior of a Panamanian-flagged vessel on the high seas via the Decree of Seizure, Italy had violated UNCLOS Article 87(1)(a).

Here, the Tribunal relied on the *Lotus* decision (Judgment, para. 216), where the Permanent Court of International Justice (PCIJ) stated that in "the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them."[12] The Tribunal linked this *dictum* to UNCLOS Article 92, concerning the exclusive jurisdiction of the flag state over its fleet when on the high seas (Judgment, paras. 217–18). To Italy's obvious retort—that the Decree of Seizure did not take effect until the *Norstar* was seized in Spain's internal waters—the Tribunal responded that it considered the flag state jurisdiction guaranteed by UNCLOS Article 92 to apply to *prescriptive* as well as *enforcement* jurisdiction (Judgment, para. 225). This cut Italy's argument off at the knees (Judgment, para. 226):

> Contrary to Italy's argument, even when enforcement is carried out in internal waters, article 87 may still be applicable and be breached if a State extends its criminal and customs laws extraterritorially to activities of foreign ships on the high seas and criminalizes them. This is precisely what Italy did in the present case. The Tribunal, therefore, finds that . . . Italy, by extending its criminal and customs laws to the high seas, by issuing the Decree of Seizure, and by requesting the Spanish authorities to execute it—which they subsequently did—breached the freedom of navigation which Panama . . . enjoyed under that provision.

Despite this finding of liability, Italy emerged the ultimate victor. The Tribunal firmly rejected Panama's argument that the Decree of Seizure breached UNCLOS Article 87(2); as that provision required Italy to have due regard to the rights of other flag states when

[11] *See further Virginia G*, *supra* note 10, para. 223.

[12] SS Lotus (Fr. v. Turk.), Judgment, 1927 PCIJ (ser. A) No. 10, at 25 (Sept. 7) (emphasis added). *See further* Douglas Guilfoyle, SS Lotus (France v. Turkey) *(1927)*, *in* LANDMARK CASES IN PUBLIC INTERNATIONAL LAW 89 (Eirik Bjorge & Cameron Miles eds., 2017).

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Italy *itself* was engaged in navigation on the high seas (i.e., through use of state vessels), the public prosecutor's actions could not violate it, as the Decree of Seizure was (self-evidently) not an act of high seas navigation (Judgment, para. 231). The Tribunal also found that Italy had not acted in bad faith in issuing the Decree of Seizure, and so did not breach UNCLOS Article 300 (Judgment, paras. 246–308).

Panama's most significant loss, however, was with regard to compensation. Having asked for USD 10 million (provisionally assessed) in its application (Prelim. Obj., para. 37), Panama's final claim for damages had ballooned to an eye-watering USD 27,009,266.22, combined with a claim of pre-judgment interest in the amount of USD 24,873,091.82 plus certain smaller amounts in EUR (Judgment, para. 310). Applying ARSIWA Article 31,[13] the Tribunal limited the compensation claimed by Panama to that which was "caused" by Italy. And, in the Tribunal's view, Italy had caused very little. Multiple factors converged to reduce Panama's take-home to the vanishing point (Judgment, paras. 365–462). The result was that the compensation ultimately awarded to Panama amounted to a little more than USD 500,000—less than 1 percent of what it had asked for. Adding insult to injury, the Tribunal decreed that each party should bear its own costs (Judgment, para. 468).

* * * *

The pedestrian origins of the *Norstar Case* produced two decisions of considerable legal significance. Two determinations stand out: the Tribunal's treatment of the *Monetary Gold* principle in its preliminary objections decision; and the expanded concept of flag state jurisdiction adopted on the merits.

First, while the Tribunal's reliance on the *Phosphate Lands* exception to the *Monetary Gold* rule was *ex facie* legitimate, the precise modalities of its reasoning were problematic. In the first place, the Tribunal's insistence that it could isolate the question of Italy's liability by focusing on the Decree of Seizure amounted to rewriting Panama's case, which was expressed in terms of the "arrest and detention" of the *Norstar* only (Judgment, para. 1). Whatever spin the Tribunal put on it, the Panamanian case as initially formulated was clearly concerned with Spain's actions—and only by determining whether Spain was liable as an antecedent matter could a determination of Italy's liability be made.[14] Saving Panama's claim, therefore, required a reformulation of its pleaded case. But in so doing, the Tribunal ran afoul of Judge Anzilotti's admonition that the function of an international court or tribunal is not to correct misconceived pleadings and that "a government should bear the consequences of a document for which it is responsible."[15]

In the second, if the Tribunal *was* going to isolate Italy's liability in this manner, then it had an obligation to do so consistently. But the Tribunal made an express finding that Spain and Italy were complicit in procuring the arrest and detention of the *Norstar*, a conclusion as to Spain's liability (Prelim. Obj., para. 166). This finding, moreover, was unnecessary: if the

[13] CRAWFORD, *supra* note 6, at 201–06.

[14] *See, e.g.*, *East Timor*, *supra* note 8, para. 28.

[15] Polish Agrarian Reform and the German Minority (Ger. v. Pol.), Order, 1933 PCIJ (ser. A/B) No. 58, at 182 (July 29) (diss. op., Anzilotti, J.). *See also* Fisheries Jurisdiction (Spain v. Can.), Jurisdiction, 1998 ICJ Rep. 432, para. 29 (Dec. 4) (". . . it is for the Applicant, in its Application, to present to the Court the dispute which it wishes to seise the Court and to set out the claims which it is submitting to it").

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"very subject-matter" of the dispute was the Decree of Seizure, then the enquiry ended there. There was no need for the Tribunal to make additional findings concerning Spain.

In the third, the Tribunal's reliance on *Phosphate Lands* demonstrates the tendency for that decision to produce peculiar outcomes. In that case, the ICJ held that the question of Australia's liability for acts done to Nauru under the relevant League of Nations Mandate could be adjudicated—despite the United Kingdom and New Zealand being party to the same Mandate and performing the same acts. The ICJ explained that, in the *Monetary Gold* case, "the link between . . . the necessary findings regarding Albania's alleged responsibility and . . . the decision requested of the Court regarding the allocation of the gold, was not purely temporal but also logical."[16] As the liability of the three Mandate powers in *Phosphate Lands* was parallel, rather than linked, the liability of Australia could be determined independently.

In the *Norstar Case*, adoption of the *Phosphate Lands* logic led to a merits decision that got very weird, very quickly. The Decree of Seizure, while actionable per se, did not produce any physical effect on the *Norstar*, and thus did not actually impede the vessel's navigation. Only with the involvement of Spain was the ship's navigation curtailed. The Tribunal sidestepped this by treating the Decree of Seizure as an essential precondition for the arrest, but this only ensured that Spain became the proverbial elephant in the room on causation—its actions with respect to the detention of the *Norstar* were the entire foundation of Panama's claim for compensation, but the Tribunal was forced to treat it as an unthinking extension of Italy. Given that Spain had broad discretion to refuse a request mutual assistance under the relevant treaties but chose not to (Prelim. Obj., para. 141), this produced a decision that while technically consistent with prior authority, was markedly inconsistent with reality.

Similar questions also arise with respect to the point for which the *Norstar* Case will probably be remembered best: the Tribunal's determination that flag state exclusivity for the purposes of UNCLOS Article 92 extends to *prescriptive* as well as *enforcement* jurisdiction, and that Italy's actions in "extending its criminal and customs laws to the high seas, by issuing the Decree of Seizure, and by requesting the Spanish authorities to execute it" (Judgment, para. 226) breached UNCLOS Article 87(1)(a). This determination went well beyond received wisdom on the topic, which has been that the exclusivity of flag state jurisdiction is confined to enforcement jurisdiction only.[17] Certainly, this was the implicit premise of the *Lotus* case, where the parties agreed that the only question for the PCIJ was whether the *prosecution* of a French national by Turkey with respect to a high seas collision (an exercise of enforcement jurisdiction) was internationally lawful; the actual *legislation* that allowed that prosecution to take place (the adoption of which was an exercise of prescriptive jurisdiction) was unobjectionable.[18]

[16] *Phosphate Lands*, *supra* note 9 at para. 55.

[17] *See, e.g.*, GILBERT GIDEL, LE DROIT INTERNATIONAL PUBLIC DEL LA MER: LE TEMPS DE PAIX, VOL. I 261 (1932); D. P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA, VOL. II 800–01 (1984); Douglas Guilfoyle, *Article 92—Status of Ships*, *in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY, at 700–01 (Alexander Proelss ed., 2017). *But cf.* R. R. CHURCHILL & A. V. LOWE, THE LAW OF THE SEA 208–209 (3d ed. 1999) (suggesting, without significant intermediate reasoning, that UNCLOS Article 92 prohibits the use of "legislative" jurisdiction by non-flag states over vessels engaged in high seas navigation).

[18] *Lotus*, *supra* note 12, at 12–15.

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The joint dissenting opinion (Joint Diss. Op.) on this issue—by Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin, and Lijnzaad and Judge *ad hoc* Treves—has much force. The dissenters opined that

> nothing in the text of the Convention, its *travaux préparatoires*, in other international treaties, in customary international law, or in the practice of states suggests that article 87 and its corollary article 92 altogether excludes the right of non-flag States to exercise their prescriptive criminal jurisdiction with respect to activities on the high seas." (Joint Diss. Op., para. 19)[19]

Moreover, the dissenters continued, Italy was not actually purporting to exercise its prescriptive jurisdiction with respect to the *Norstar*'s activity on the high seas (Joint Diss. Op., para. 32). Italy's criminal jurisdiction was territorially bounded, and its complaint against the *Norstar* was not against the vessel's bunkering activities per se, but rather its alleged accessorial involvement in a fuel tax scam in Italy. Under international law, a connection of this kind is usually sufficient to justify extraterritorial extension of prescriptive jurisdiction.[20] Thus, "there was more than enough connection [between the *Norstar*'s activity and] Italy to justify under international law the exercise of its prescriptive criminal jurisdiction" (Joint Diss. Op., para. 33). This reasoning is entirely convincing.

Another frustrating aspect of the Tribunal's discussion of prescriptive jurisdiction in the context of UNCLOS Articles 87 and 92 is that it was superfluous. Following refinement of Panama's complaint in the Tribunal's decision on preliminary objections, the Decree of Seizure formed the gravamen of the case against Italy. As a mandatory order issued by a judicial authority, backed by a request for mutual assistance, this was an exercise of Italy's enforcement jurisdiction.[21] There was therefore no need for the Tribunal to go a step further and pronounce on the compatibility of prescriptive jurisdiction with flag state jurisdiction and freedom of navigation. But even then, it is difficult to see what was so objectionable about Italy's conduct. It is not as though the Spanish Navy intercepted the *Norstar* in international waters and towed it into Palma de Mallorca. Rather, Spain arrested the vessel within its own internal waters. This involved no practical interference with the *Norstar*'s freedom of navigation.[22]

Seen in such a light, the Tribunal's position is an extreme one. Under its reading of UNCLOS Articles 87 and 92, *any* exercise of prescriptive or enforcement jurisdiction by a non-flag state that touches, concerns, or in any way seeks to regulate the acts of a vessel on the high seas is a violation of freedom of navigation,[23] even where the actual movement of the

[19] *See also* Prelim. Obj., *supra* note 1, paras. 38–43 (joint sep. op., Wolfrum & Attard, JJ.).

[20] Either under the territorial principle or the protective principle: D. P. O'Connell, International Law, Vol. II 826–28, 829–31 (2d ed. 1970); James Crawford, Brownlie's Principles of Public International Law 442–43, 446 (9th ed. 2019).

[21] Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. Int'l Crim. Just. 735, 736–44 (2004). U.S. practice would likely consider the Decree of Seizure and the corresponding request for assistance from Spain an exercise of adjudicative jurisdiction. Restatement of the Law Fourth: The Foreign Relations Law of the United States, Selected Topics in Treaties, Jurisdiction and Sovereign Immunity § 429 (2018).

[22] M/V "Louisa" Case (St. Vincent v. Spain), Judgment, 2013 ITLOS Rep. 4, para. 109 (May 28).

[23] Subject to the various exceptions set out in UNCLOS itself: Douglas Guilfoyle, *Article 87—Freedom of the High Seas*, *in* United Nations Convention on the Law of the Sea: A Commentary, *supra* note 17, at 681–82.

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ship remains in no way impeded (Judgment, paras. 221–28). This represents a radical expansion of flag state rights and a corresponding reduction in the municipal jurisdiction of every other state. Unless qualified, it will have a significant impact on the way that states regulate international shipping in the future.

In sum, the developments the *Norstar Case* augers are undesirable. With respect to its most important points—on the indispensable third party principle and freedom of navigation—the Tribunal innovated at the expense of practicality, leaving two decisions at odds with the modern reality of international dispute settlement and the law of the sea. Treat with caution.

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