Declaration of Judge Kittichaisaree

1. I have voted in favour of the present Judgment because I concur with the Tribunal's reasons concerning the principal issues raised by the Parties to the present dispute. Nevertheless, I deem it appropriate to express my view on two crucial international legal issues left untouched by the Tribunal. The first concerns the enforcement jurisdiction of the port State against a foreign vessel in the context of this case. The second relates to the obligation to promptly notify the flag State after the arrest or detention of a vessel flying its flag.

Enforcement jurisdiction of the port State against a foreign vessel

2. One undisputed fact is that Italy deliberately waited until the *M/V "Norstar"* was in a Spanish port before it requested Spain to execute the Decree of Seizure issued by Italy. Spain complied with Italy's request despite the fact that the *M/V "Norstar"* had not committed, and was not committing, an offence against Spanish law and Panama, the flag State, was not party to the Schengen Agreement of 14 June 1985 or the 1959 Strasbourg Convention binding on Italy and Spain.

3. Italy submits in its Counter-Memorial that when the Decree of Seizure against the *M/V "Norstar"* was issued and its Request for execution transmitted to the Spanish Authorities, as well as when the Decree of Seizure was enforced, the vessel was in Spanish internal waters and, therefore, did not enjoy the right to freedom of navigation under article 87, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea[1] ("the Convention"). Italy also contends that, according to the case law of this Tribunal, the freedom of navigation enshrined in article 87, paragraph 1, cannot be interpreted to mean that a vessel is protected against coastal States' measures that prevent it from leaving a port in order to gain access to the high seas.[2] Italy reiterated this position during the oral hearing on the merits of this case.[3]

1 Para. 75 of Italy's Counter-Memorial.
2 Ibid, para. 97.
3 ITLOS/PV.18/C25/6, p. 23, ll. 42–47 and p. 24.

4. Under the Convention, ports situated within internal waters are subject to the sovereignty of the coastal State.[4] This rule of customary international law is affirmed by the International Court of Justice ("ICJ") in *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), *Merits*, holding that ports lying within internal waters are subject to the sovereignty of the coastal State, and, as such, the coastal State may regulate access to its ports.[5]

5. Although there is no provision under the Convention specifically limiting the sovereignty of a State over its internal waters and its jurisdiction therein in a way similar, for example, to articles 2, paragraph 3, article 21, article 27, article 28, article 56, paragraph 2, and article 97, paragraph 3, of the Convention as regards the jurisdiction of the coastal State in other maritime zones, the port State may not have unlimited jurisdiction over vessels flying the flag of another State owing to other applicable rules of international law, including customary international law and applicable treaties.

6. In this respect, a number of international legal scholars are of the view that the port State merely has the right of denial of access to its port rather than a right to exercise enforcement jurisdiction by prosecuting and penalizing violations that do not have an effect in the territory of the port State since that right still pertains to the flag State.[6] The only exception is, arguably, where the port State is authorized by internationally agreed rules binding on itself and the flag State of the foreign vessel visiting its port to take enforcement measures against the vessel.[7]

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4 Articles 2, paragraph 1, article 8, paragraph 1, and article 11 of the Convention.

5 ICJ Reports 1986, p. 14, at p. 111, para. 213.

6 See, e.g., R. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Leiden: Martinus Nijhoff 2004), pp. 335–7; D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press 2009), pp. 2, 276–7; Arron N. Honniball, "The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States?" (2016) 31 *Int'l J Marine & Coastal Law* 499, 524–9. According to Ted L. McDorman, "Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention" (1997) 28 *Journal of Maritime Law & Commerce* 305, at 313: "[A]ctivities of vessels on the high seas are governed exclusively by the law of the vessel's flag. *Prima facie*, arrival of a foreign vessel in port does not alter this situation."

7 Bevan Marten, "Port State Jurisdiction, International Conventions, and Extraterritoriality: An Expansive Interpretation" in Henrik Ringbom (ed.), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Leiden/Boston: Brill 2015) pp. 103–139, at pp. 109–112, 124–5, 131–2.

7. Article 218, under Part XII (Protection and Preservation of the Marine Environment), is the only provision of the Convention that specifically addresses enforcement by the port State against a foreign vessel visiting its port. Article 218 reads in its pertinent part:

> Article 218 Enforcement by port States
>
> 1. When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State *in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference*.
> 2. No proceedings pursuant to paragraph 1 shall be instituted in respect of a discharge violation in the internal waters, territorial sea or exclusive economic zone of another State unless requested by that State, the flag State, or a State damaged or threatened by the discharge violation, or unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or exclusive economic zone of the State instituting the proceedings.
> 3. When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State shall, as far as practicable, comply with requests from any State for investigation of a discharge violation referred to in paragraph 1, believed to have occurred in, caused, or threatened damage to the internal waters, territorial sea or exclusive economic zone of the requesting State. It shall likewise, as far as practicable, comply with requests from the flag State for investigation of such a violation, irrespective of where the violation occurred.
> (Emphasis added)

8. Independently of the visiting foreign vessel's violation of applicable international rules and standards established through the competent international organization or general diplomatic conference, "… in some rare circumstances, a State might be able to rely on the effects doctrine or the protective/security principle as a basis for extraterritorial jurisdiction, perhaps in

relation to pollution events or security issues respectively."[8] However, the facts of the present case do not show how Spain could rely on the effects doctrine or the protective/security principle to exercise enforcement jurisdiction against the *M/V "Norstar"*, particularly since the vessel had not committed and was not committing any offence against Spanish law.

9. The 2009 Port State Measures Agreement to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing ("PSMA") of the Food and Agriculture Organization of the United Nations ("FAO") does not go as far as permitting the port State to take enforcement measures against foreign vessels without the consent of the flag State.

10. Articles 7, 8, and 9 of the PSMA require each Party to designate ports to which a vessel may request entry pursuant to the PSMA, determine whether the vessel has engaged in illegal, unreported, and unregulated fishing ("IUU") fishing or fishing-related activities in support of such fishing, and then decide whether to authorize or deny entry of the vessel into its port exclusively for the purpose of inspecting it and taking other appropriate actions in conformity with international law which are at least as effective as denial of port entry in preventing, deterring and eliminating IUU fishing and fishing-related activities in support of such fishing. Where there is sufficient proof that a vessel that is in the port of a party to the PSMA for any reason has engaged in IUU fishing or fishing-related activities in support of such fishing, the party shall deny such vessel the use of its ports for landing, transhipping, packaging, and processing fish and for other port services including, inter alia, refuelling and resupplying, maintenance and dry-docking.

11. Where a vessel has entered one of its ports, article 11 of the PSMA obliges a party to deny – pursuant to its laws and regulations and consistent with international law, including the PSMA – the vessel the use of the aforesaid port services if the party finds, inter alia, that the vessel does not have a valid and applicable authorization to engage in fishing or fishing-related activities

8 Ibid, p. 125. On the effects doctrine, see *Case of the S.S. Lotus* (*France* v. *Turkey*) 1927 PCIJ Rep. Series A/ No. 10 at p. 23. An oft-cited case in support of the protective/security principle is the English House of Lords' Judgment in *Joyce v. DPP* [1946] AC 347.

required by its flag State or a coastal State in respect of areas under the national jurisdiction of that State; the party receives clear evidence that the fish on board was taken in contravention of applicable requirements of a coastal State in respect of areas under the national jurisdiction of that State; the flag State does not confirm within a reasonable period of time, at the request of the port State, that the fish on board was taken in accordance with applicable requirements of a relevant regional fisheries management organization; or the party has reasonable grounds to believe that the vessel was otherwise engaged in IUU fishing or fishing-related activities in support of such fishing.

12. Article 20 of the PSMA obligates the *flag State* party to the 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Species Fish Stocks ("FSA") to require vessels entitled to fly its flag to cooperate with the port State in inspections carried out pursuant to the PSMA. Where, following port State inspection, a *flag State* party to the FSA receives an inspection report indicating that there are clear grounds to believe that a vessel entitled to fly its flag has engaged in IUU fishing or fishing-related activities in support of such fishing, it shall immediately and fully investigate the matter and shall, upon sufficient evidence, *take enforcement action* without delay in accordance with its laws and regulations and report the outcome to other parties to the FSA, relevant port States and, as appropriate, other relevant States, regional fisheries management organizations, and the FAO on actions it has taken in this regard.

13. Owing to the insistence of the European Union, China, Japan, the Republic of Korea, and Poland during the drafting of the FSA, article 23 of the FSA deliberately avoids using the term "port State enforcement" or reference to the power of the port State to detain or prosecute the vessel.[9] Phrased differently, the port State may only resort to the right of denial of access to its port and its port services rather than a right to exercise its enforcement jurisdiction against the vessel.[10]

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9 Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries*, pp. 77–78.

10 Ibid, pp. 335–7.

14. In the present dispute, at the request of Italy pursuant to the Schengen Agreement of 14 June 1985, Spain, in its capacity as a port State, exercised enforcement jurisdiction over a ship flying the flag of Panama. Pursuant to article 1, paragraph 1, of the 1959 Strasbourg Convention, "[t]he Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party." However, while the offences in question were alleged by Italy to have been committed within Italy's jurisdiction, they were not alleged to have been committed within the jurisdiction of Spain, the port State that took enforcement measures against the vessel.

15. In its letter rogatory, Italy asked Spain to "1) Immediately enforce the following Decree of Seizure, issued by [the Court of Savona], of the motor vessel *NORSTAR*, as the prosecuted case concerns *facts punishable under the law of both States* and aimed at affecting the economic interests of the European Union [of which Spain is a Member State]."[11] This might have reassured Spain that Italy's request fulfilled the condition of double criminality for the purpose of mutual legal assistance in criminal matters to be rendered by Spain to Italy. Nonetheless, the fact remains that: (a) Italy sought the arrest of the *M/V "Norstar"* for the alleged crimes of smuggling and tax fraud committed under the criminal and customs laws of Italy, as identified in the Decree of Seizure number 1155/67/21, dated 11 August 1998; and (b) no offence had been or was being committed against Spain, the port State requested by Italy to exercise its enforcement jurisdiction against the *M/V "Norstar"*.[12]

16. Spain is not a party to the present dispute before the Tribunal, and the Tribunal has held in its Judgment on the Preliminary Objections that Spain was not an indispensable party since it was Italy that caused Spain to take the measures to the detriment of Panama.[13] Consequently, in paragraph 221 of today's Judgment, the Tribunal has been careful in its response to Italy's submission as reproduced in paragraph 3 of this Declaration of mine. According to the Tribunal, since a State exercises sovereignty in its internal waters, "[f]oreign ships have no right of navigation therein unless conferred by the [1982] Convention or other rules of international law", and "[t]o interpret the

11 Emphasis added.

12 See, e.g., paras. 39 and 44 of Italy's Counter-Memorials.

13 Judgment on the Preliminary Objections, paras. 162–5, 166–9, 173–5.

freedom of navigation as encompassing the right to leave port and gain access to the high seas would be inconsistent with the legal regime of internal waters". The Tribunal, "therefore, cannot accept Panama's claim that the freedom of navigation under article 87 of the [1982] Convention includes a right to 'sail towards the high seas' and that a vessel enjoys such freedom even in port of the coastal State". The Tribunal then reasons, in paragraph 226:

> Italy's central argument in this case is that, since the Decree of Seizure was enforced not on the high seas but in internal waters, article 87 of the Convention is not applicable, let alone breached. The Tribunal does not find this argument convincing. The Tribunal acknowledges that the locus of enforcement matters in assessing the applicability or breach of article 87. It does not follow, however, that the locus of enforcement is the sole criterion in this regard. *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 article 87, paragraph 1, of the Convention is applicable in the present case and 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, as the flag State of the* M/V "Norstar"*, enjoyed under that provision*. (Emphasis added)

It should be noted that the Tribunal's focus is on the freedom of navigation under article 87, and not on the legality or otherwise of the exercise of enforcement jurisdiction by Spain, the port State in the present case, *vis-à-vis* a vessel flying the flag of Panama, which is party to neither the 1959 Strasbourg Convention nor the Schengen Agreement of 14 June 1985. Moreover, nowhere in this Judgment does the Tribunal state categorically that foreign ships are subject to complete jurisdiction, both prescriptive and enforcement, of the port State.

17. Panama maintains that Italy breached article 300 of the Convention with regard to article 87 thereof because Italy waited until the *M/V "Norstar"* was in a foreign port in order to arrest it. In paragraph 258 of this Judgment,

the Tribunal summarily rejects Panama's claim. According to the Tribunal, Panama has failed to prove lack of good faith on the part of Italy in this regard, and that the arrest of the *M/V "Norstar"* in a Spanish port "cannot *per se* be considered a breach of good faith under article 300 of the Convention". I go along with this conclusion by the Tribunal for two main, related reasons. First, holding Italy in breach of article 300 would not make any difference to the final outcome of the case, including on the amount of compensation for the loss of the *M/V "Norstar"*. Second, the carefully chosen phrase "*per se*" ensures that a breach of article 300 has to be considered in its overall context and a single act or conduct may not be decisive *per se*.

18. On the whole, the Tribunal is wise in the present Judgment to avoid postulating that a port State has unlimited sovereignty and jurisdiction to take enforcement measures against a foreign vessel voluntarily in its port.

The obligation to promptly notify the flag State

19. Paragraphs 266–271 of this Judgment deal with Panama's submission that it made seven attempts to communicate with Italy concerning the *M/V "Norstar"*, yet all of them were unsuccessful, and that, by intentionally keeping silent when confronted with the claim that article 87 of the 1982 Convention had been breached, Italy acted in a manner contrary to its duty of good faith. For its part, Italy explained it did not respond to Panama's communications because it believed – and Italy accepted this belief was legally wrong since 31 August 2004 – that the requests from Panama were coming from individuals not authorized to represent Panama.[14] It is not clear from the facts presented to the Tribunal by the Parties when, if ever, Italy officially notified Panama as the flag State of the *M/V "Norstar"* of the arrest or detention of this vessel. Panama's Memorial only states that on 24 September 1998, Spain, at the request of Italy, executed the arrest of the vessel while she was in the Bay of Palma, Majorca,[15] and that an application by the vessel's owner for the release of the vessel "was

14 E.g., para. 99 of Italy's Rejoinder.
15 Para. 22 of Panama's Memorial.

refused by Italy, who on 18 January 1999 offered the release thereof against a security …".[16]

20. There are two provisions of the 1982 Convention specifically addressing the duty to promptly notify the flag State of the exercise of jurisdiction over a vessel flying its flag. Article 27, under the heading "Criminal jurisdiction on board a foreign ship" in Section 3 (Innocent Passage in the Territorial Sea) of Part II (Territorial Sea and Contiguous Zone), provides:

> In the cases [where the coastal State exercises criminal jurisdiction on board a foreign ship passing through the territorial sea of that coastal State], the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.

21. Article 73, under the heading "Enforcement of laws and regulations of the coastal State" in Part III (Exclusive Economic Zone), stipulates in paragraph 4: "In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed." The Tribunal has noted in *"Camouco"* (*Panama* v. *France*)*, Prompt Release, Judgment*, that

> there is a connection between paragraphs 2 and 4 of article 73, since absence of prompt notification may have a bearing on the ability of the flag State to invoke article 73, paragraph 2 that arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security, and article 292 on prompt release of vessels and crews in a timely and efficient manner.[17]

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16 Ibid, para. 28. See also para. 44 of the Judgment (Preliminary Objections) and paras. 75 and 76 of the present Judgment. Italy states that the seizure took place on 25 September 1998, whereas Panama states that it took place on 24 September 1998. This discrepancy might have been owing to the time difference – it was 25 September 1998 in Spain, but 24 September 1998 in Panama.

17 *"Camouco"* (*Panama* v. *France*)*, Prompt Release, Judgment, ITLOS Reports 2000*, p. 10 at pp. 29–30, para. 59.

22. Articles 27 and 73, paragraph 4, of the 1982 Convention are not applicable to the situation of the *M/V "Norstar"*, which was already in a Spanish port at the time of its being subject to enforcement measures. A question may be raised as to whether, besides the obligations specifically imposed by articles 27 and 73, paragraph 4, the State taking enforcement measures against a foreign vessel has a general obligation to promptly notify the flag State of the vessel.

23. Since Panama has not specifically raised this issue of prompt notification before the Tribunal, the Tribunal does not address it. As the Tribunal held in the *M/V "Louisa"* case:

> 143. In this context, the Tribunal wishes to draw attention to article 24, paragraph 1, of its Statute. As noted earlier, this provision states, *inter alia*, that when disputes are submitted to the Tribunal, the "subject of the dispute" must be indicated. Similarly, by virtue of article 54, paragraph 1, of the Rules, the application instituting the proceedings must indicate the "subject of the dispute". It follows from the above that, while the subsequent pleadings may elucidate the terms of the application, they must not go beyond the limits of the claim as set out in the application. In short, the dispute brought before the Tribunal by an application cannot be transformed into another dispute which is different in character.[18]

24. It is hoped that the Tribunal will have an opportunity to directly address these two important issues in the future, so that the balance between the rights and obligations of States Parties to the 1982 United Nations Convention on the Law of the Sea can be duly safeguarded.

(*signed*) Kriangsak Kittichaisaree

18 *M/V "Louisa"* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*), *Judgment, ITLOS Reports 2013*, p. 4.