Freedom of Navigation Following the *M/V "Norstar" Case*

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Case commented on: The International Tribunal for the Law of the Sea, Judgement in the M/V "Norstar" Case Between Panama and Italy, 10 April 2019.

Introduction

The International Tribunal for the Law of the Sea (ITLOS) delivered its Judgement in the M/V "Norstar" Case (Panama v. Italy) on 10 April 2019: *The M/V "Norstar" Case (Panama v. Italy) Judgement*. The Tribunal found that Italy violated Article 87(1) of the United Nations Convention on the Law of the Sea (UNCLOS), but did not violate Article 300 of UNCLOS. Article 87(2) of UNCLOS was found to be inapplicable (*"Norstar" Judgement*, para 469).

The factual background in brief is that the M/V "Norstar" was an oil tanker flying the Panamanian flag. According to Italy, an investigation into the activities of M/V "Norstar" and the "bunkering brokers" registered in Italy (Rossmare International S.A.S.) "revealed 'that the M/V Norstar was involved in the business of selling the fuel purchased in Italy in exemption of tax duties to a clientele of Italian and other EU leisure boats in the international waters [high seas] off the coasts of the Italian city of Sanremo'" (*"Norstar" Judgement*, paras 69-70). Italy initiated criminal proceedings against the individuals involved and also issued a decree of seizure against the M/V "Norstar" as the *corpus delicti* of the alleged crimes. Spain enforced the decree of seizure when the M/V "Norstar" was within Spanish internal waters (*"Norstar" Judgement*, paras 70-75). An Italian court eventually ordered that the M/V "Norstar" be released and returned to its owners following the acquittal of the persons involved; but M/V Norstar's owners never took possession and the vessel was auctioned off by the Spanish port authority (*"Norstar" Judgement*, paras 80-86).

This post analyses the doctrinal contributions of the *"Norstar" Judgement* to both freedom of navigation (Article 87(1)(a) of UNCLOS) and exclusive flag state jurisdiction (Article 92(1) of UNCLOS). The post concludes with a brief discussion as to if and why the Tribunal may wish to clarify its position on these issues in any forthcoming *M/T "San Padre Pio" Case (Switzerland v. Nigeria), Order*.

The Good: Clarifying the Freedom of Navigation

As the facts underlying the *"Norstar" Case* are rather complicated the remainder of this post focuses on those facts pertinent to the legal debates under discussion (*"Norstar" Judgement*, paras 69-86; summarised, ITLOS/Press 279). Essentially, the Panamanian M/V "Norstar" was involved in both territorial and extraterritorial conduct that the Tribunal found to be essential elements for the Italian decree of seizure and its execution:

> (1) Marine gasoil was purchased exempt from taxes in Italian port and boarded on the M/V "Norstar";
>
> (2) The M/V "Norstar" bunkered mega yachts outside the territorial sea of Italy;
>
> (3) The mega yachts returned to Italian port without declaring the possession of the product.

> The Tribunal observes that, while the first and third elements may have taken place in the territory of Italy, the second element occurred outside the territorial sea of Italy, that is, on the high seas. (*"Norstar" Judgement*, para 166)

The majority interpreted Italy's exercise of prescriptive jurisdiction to "concern both alleged crimes committed in the territory of Italy and bunkering activities conducted by the M/V "Norstar" on the high seas" (*"Norstar" Judgement*, paras 177 and 186). Following previous case law (*M/V "Virginia G", Judgement*, para 223), the high seas bunkering of leisure vessels by the M/V "Norstar" would fall within the freedom of navigation (*"Norstar" Judgement*, para 219). But, given that the eventual enforcement action occurred within internal waters, where there is no freedom of navigation (*"Norstar" Judgement*, para 221; *M/V "Louisa", Judgement*, para 109; *"ARA Libertad", Order of 15 December 2012*, para 61), the question for the Tribunal was whether extraterritorial non-flag state prescription could in and of itself breach the freedom of navigation?

The Tribunal explicitly confirmed that Article 87 of UNCLOS, which provides a non-exhaustive statement of the high seas freedoms, is applicable when an element of extraterritorial prescriptive jurisdiction arises:

> In the view of the Tribunal, it does not matter whether or not a chilling effect is produced. Regardless of such effect, *any act which subjects activities of a foreign ship on the high seas to the jurisdiction of States other than the flag State constitutes a breach of the freedom of navigation, save in exceptional cases expressly provided for in the Convention or in other international treaties*. Thus Italy's application of its criminal and customs laws to bunkering activities of the M/V "Norstar" on the high seas could in itself, regardless of any chilling effect, constitute a breach of the freedom of navigation under article 87 of the Convention. (*"Norstar" Judgement*, para 224; emphasis added, see further para 225)

This is a welcome contribution and builds on the well-established case law to the effect that, unless an exception applies, non-flag state enforcement on the high seas or in the exclusive economic zone (EEZ) may breach the high seas freedoms (*S.S. "Lotus"*, at 25; *M/V "Saiga" (No. 2), Judgement*, paras 149-150; *The Arctic Sunrise Arbitration, Award (Merits)*, paras 332-333). The author of this post, among others, has previously suggested that the exercise of extraterritorial prescriptive jurisdiction over the conduct of foreign vessels on the high seas or in the EEZ, *without a valid legal basis,* would violate Article 87 of UNCLOS (Honniball, 2019, *Extraterritorial Port State Measures*, at 159-179). The flag state need not wait for enforcement of the law to occur before objecting or raising compulsory third-party dispute settlement under UNCLOS. This conclusion was previously only implicit in the case law (*M/V "Virginia G", Judgement*, paras 220-222), but it has been raised in previous state practice (Roach and Smith, 2012, *Excessive Maritime Claims*, at 377-412) and disputes (*Fisheries Jurisdiction, Judgement*, para 10(A)). This conclusion also follows from the application of the ordinary rules of treaty interpretation whereby the freedoms of the high seas are an interrelated but distinct principle to that of exclusive flag state jurisdiction. As the latter is a 'component' of the freedoms (below), Article 87 of UNCLOS is implicitly broader so as to not be superfluous (International Law Commission, 1966, 'Draft Articles on the Law of Treaties with commentaries', at 219). Indeed, interpreting Article 87 of UNCLOS as protecting vessels from non-flag state prescription without legal basis was also accepted in the *"Norstar" Judgement, Joint Dissenting Opinion* (paras 14-17).

However, at a doctrinal level the wording of the *"Norstar" Judgement*, para 224 (quoted above) is unfortunate. Exceptions which would not constitute a breach of Article 87 of UNCLOS are said to include those "exceptional cases expressly provided for in the Convention or in other

international treaties". Significant and widespread practice includes laws applying to conduct on the high seas or in the EEZ on the basis of customary law principles of prescriptive jurisdiction (Ryngaert, 2015, *Jurisdiction in International Law*; e.g. fisheries crimes, Vrancken, 2019, 'State jurisdiction to investigate and try fisheries crime at sea'). Indeed, as highlighted by the *"Norstar" Judgement, Joint Dissenting Opinion* (para 19) there is no legal basis to suggest that customary jurisdiction is limited by Article 87 of UNCLOS.

The dissenting judges take some solace in the Judgement's reference to "lawful activities" when the Joint Dissenting Opinion discusses the prohibitive effect of Article 87 of UNCLOS:

> This would seem to suggest that a non-flag State is not excluded from extending, in conformity with international law, its prescriptive jurisdiction to the unlawful activities of foreign vessels or of persons on the high seas. *"Norstar" Judgement, Joint Dissenting Opinion*, para 20)

However, strictly speaking the Judgement was discussing the exclusive flag state jurisdiction principle when referring to "lawful activities" (*"Norstar" Judgement*, para 225). The Tribunal was at that point not setting out the limits of Article 87 of UNCLOS but rather rejecting the Italian argument that Article 87 of UNCLOS only concerns acts resulting in physical interference with navigation or a "chilling effect" on navigation (*"Norstar" Judgement*, paras 222-225). It may therefore be better to widely interpret the references to customary law in the *Preamble* and Article 293(1) of UNCLOS as affirming that, when compatible with UNCLOS, customary prescriptive state jurisdiction remains "justified by the Convention" (*"Norstar" Judgement*, para 225). Of course, given that the Italian argumentation centred on applying customary prescriptive jurisdiction that has not been codified in UNCLOS or another treaty, it is all the more surprising that the Tribunal did not explicitly refer to customary law.

The Bad: Extending Exclusive Flag State Jurisdiction

Article 92(1) of UNCLOS and Article 6(1) of the *Convention on the High Seas* codified the customary law principle of exclusive flag state jurisdiction whereby:

> Ships 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.

Panama's final submission in the "*Norstar" Case* did not refer to Article 92 of UNCLOS and therefore whether a violation occurred was neither part of Panama's claim nor the Tribunal's jurisdiction (*"Norstar" Judgement*, paras 135-138). The Tribunal however rightly considered Article 92 of UNCLOS and its exclusive flag state jurisdiction principle as part of the applicable law in the context of interpreting and applying Article 87. This is because "exclusive flag State jurisdiction is an inherent component of the freedom of navigation under article 87" (*"Norstar" Judgement*, paras 216-218 and 225). That conclusion is in line with Article 293(1) of UNCLOS on applicable law and the well-established nexus between Articles 92 and 87 (Guilfoyle, 'Article 92', para 4, in Proelß (ed), 2017, *The United Nations Convention on the Law of the Sea: A Commentary*).

As the jurisdiction of the Tribunal concerned Article 87 of UNCLOS one would expect the Tribunal to adopt a rather consistent, uncontroversial and clear interpretation of exclusive flag state jurisdiction. This is because the Tribunal may have recourse to Article 92 of UNCLOS as applicable law, but this does not extend the Tribunal's jurisdiction into the interpretation and application of Article 92 of UNCLOS itself (*"Norstar" Judgement*, paras 136-138). However, despite

a lively debate in the literature and international jurisprudence as to whether the exclusive jurisdiction of the flag state applies beyond enforcement jurisdiction (Honniball, 2016, 'The Exclusive Jurisdiction of Flag States'), the Tribunal extended Article 92 to prescriptive jurisdiction and simply stated:

> This principle 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*. (*"Norstar" Judgement*, para 225; emphasis added).

The *"Norstar" Judgement, Declaration of Judge Kelly* (at 2) compliments the Tribunal on 'clarifying' the scope and meaning of, among others, the exclusive flag state jurisdiction principle. The author of this post would respectfully disagree on the simple basis that the majority provided no reasoning to reinforce this expansive interpretation of Article 92 of UNCLOS which has no support in the jurisprudence, state practice, or subsequent treaty law. Indeed, the minority of literature suggesting the flag state exclusivity principle also includes prescriptive jurisdiction suffers from the same lack of evidence and reasoning (Honniball, 2016, 'The Exclusive Jurisdiction of Flag States', at 508). Differences of opinion are to be encouraged and are often the most interesting to engage with. Yet, absent the Tribunal's reasoning any future engagement on the topic will be limited to guessing at the Tribunal's analytical process. The failure to provide reasons further muddies the waters of exclusive flag state jurisdiction.

For example, the single precedent cited by the Tribunal (*"Norstar" Judgement*, para 216) did indeed suggest that "[i]n virtue of the principle of the freedom of the sea, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them" (*S.S. "Lotus", Judgement*, at 25). And yet, in that very judgement the Permanent Court of International Justice went on to state that "it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas" (at 25). The Tribunal did not engage with this caveat in the Court's judgment.

Furthermore, extraterritorial extensions of prescriptive jurisdiction by non-flag states is widely supported by practice. In fisheries law various port state laws comparable to the USA's Lacey Act apply objective territorial jurisdiction which necessarily incorporates the extraterritorial conduct of foreign vessels as an underlying element. Beyond extensive port state practice (Honniball, 2019, *Extraterritorial Port State Measures*, at 195-325) one may add practice based on the wholly extraterritorial nexus of active personality jurisdiction. This principle allows the state of nationality to regulate the conduct of its nationals aboard foreign vessels on the high seas. While persons are part of the 'unit' linked to a flag state's rights (*M/V "Virginia G", Judgement*, paras 126-127), numerous regional fisheries management organisations promote prescriptive jurisdiction over nationals - including when the activities are lawful under the law of the flag state or UNCLOS. Examples include Article 23(5) of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and the conservation and management measures of the Southern Indian Ocean Fisheries Agreement (CMM 2018/06, paras 30-32), the Commission for the Conservation of Antarctic Marine Living Resources (CM 10-08 (2017)) and the South Pacific Regional Fisheries Management Organisation (CMM 04-2019, paras 25-28).

The Unclear: Testing Non-Flag State Prescription

Finally, there is significant debate as to the question of whether the high seas bunkering by M/V "Norstar" was a relevant underlying fact or the target of the Italian law – i.e. was prescriptive jurisdiction even exercised over the high seas bunkering so as to breach the freedom of navigation? The *"Norstar" Judgement, Joint Dissenting Opinion* (paras 22-32) provides a more detailed and therefore more convincing analysis of prescriptive jurisdiction by engaging with the subjective, objective and effects-based variants of territorial jurisdiction.

This post does not take a position as to whether the factual background in the "*Norstar" Case* demonstrates that Italy breached Article 87 of UNCLOS. Instead, it highlights that legal uncertainty arises from the jurisdictional analysis that the Tribunal provides to determine whether a breach of Article 87 of UNCLOS has occurred:

> 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. (*"Norstar" Judgement*, para 226; emphasis added)

Article 87 of UNCLOS is 'applicable' when extraterritorial elements of prescription are established because Article 87 of UNCLOS concerns both the extraterritorial application and extraterritorial enforcement of non-flag state laws (*"Norstar" Judgement*, para 153). However, the Tribunal provides no reasoning to show why this particular extension of Italian law resulted in a 'breach' of Article 87 of UNCLOS. The Tribunal identified a clear distinction between applicability and breaches, "the question as to whether article 87 of the Convention is applicable and, if so, whether Italy breached it" (*"Norstar" Judgement*, para 188). However, the Tribunal applied the exact same reasoning on the extension of Italian law to conclude both Article 87 was applicable and Article 87 was breached (*"Norstar" Judgement*, para 226). The *"Norstar" Judgement* therefore remains unclear on the standard of appreciation required for a breach of Article 87 of UNCLOS. The relevance, applicability or breach of a treaty article are different questions to be answered through different tests (*"Norstar" Judgement, Joint Dissenting Opinion*, paras 14 and 28).

As to a possible breach of Article 87 of UNCLOS, the Tribunal had already established that the Italian practice included both territorial and extraterritorial elements of prescription (para 166 as quoted above). The Tribunal should therefore have weighed the competing interests to analyse whether the territorial elements of conduct provided a sufficient jurisdictional nexus so as to afford prescriptive jurisdiction over the offence in its entirety. Territorial and extraterritorial are not black and white concepts and disputes will often arise in cases where there is overlap and both apply. By noting the law's extraterritorial extension and then failing to enter into an analysis of the sufficiency of any jurisdictional nexus, the Tribunal has come dangerously close to suggesting that any established extraterritorial effect is sufficient to violate Article 87 of UNCLOS. The European Court of Justice has implicitly rejected extraterritorial effects as a suitable test to determine whether an exercise of prescriptive jurisdiction is capable of violating the comparable freedom of overflight (*Air Transport Association of America and Others v Secretary of State for Energy and Climate Change, Judgement*, paras 124-129).

Conclusion

The *"Norstar" Judgement* clarifies that breaches of the freedom of navigation, or indeed any other freedom of the high seas (Article 87 of UNCLOS), may result from non-flag state prescription over the high seas conduct of foreign vessels. The same is true in the EEZ (Articles 56 and 58-59 of UNCLOS). Unfortunately, the Tribunal's discussion of exceptions to this rule fails to refer to jurisdictional rights in customary international law. Furthermore, the Tribunal uses an overly expansive – and unnecessary - interpretation of Article 92 of UNCLOS to support its conclusion. Finally, in applying its interpretation of the freedom of navigation, the Tribunal did not analyse whether the extraterritorial extension of Italy's law was based on a sufficient jurisdictional basis so as to not breach Article 87 of UNCLOS. ITLOS did not therefore apply the distinction it had recognised between an UNCLOS provision applying to a dispute and an UNCLOS provision being breached in the dispute.

Nonetheless, there may be an opportunity for ITLOS itself or an Annex VII Arbitral Tribunal to clarify these matters in future proceedings. On the 21 May 2019 Switzerland instituted proceedings at ITLOS requesting the prescription of provisional measures in a dispute with Nigeria concerning the M/T "San Padre Pio", its crew and its cargo: Case No. 27, *The M/T "San Padre Pio" Case (Switzerland v. Nigeria), Provisional Measures*. The dispute itself has been submitted to an Annex VII Arbitral Tribunal (Annex VII of UNCLOS; Request for Provisional Measures by Switzerland, paras 3 and 20). The M/T "San Padre Pio" is flying the Swiss flag. According to Switzerland's submission, the M/T "San Padre Pio" was involved in bunkering in the Nigerian EEZ when the Nigerian authorities intercepted, arrested and detained the vessel, crew and cargo (Request for Provisional Measures by Switzerland, paras 7-13).

Beyond being a welcome addition to the practice of landlocked states exercising their UNCLOS rights, the subject matter of the *M/T "San Padre Pio" Case* provides the Tribunal with an opportunity to build on and refine the recent developments that have crystallised in the *"Norstar" Judgement*. This is because Switzerland's submission includes the allegation that Nigeria's arrest and detention of M/T "San Padre Pio" violates both the freedom of navigation (Articles 58 and 87 of UNCLOS) and the interrelated exclusive flag state jurisdiction (Article 92 of UNCLOS).

First, in reaffirming the applicability of Article 87 of UNCLOS to non-flag state jurisdiction upon the high seas or EEZ, ITLOS or an Annex VII Arbitral Tribunal could clarify that the *"Norstar" Judgement* should not be interpreted as affecting the customary prescriptive jurisdiction of states when this is exercised in a manner that is compatible with UNCLOS. This would build on the *"Norstar", Declaration of Judge Kittichaisaree* (para 8), whereby judge Kittichaisaree insightfully addresses the customary basis of extraterritorial jurisdiction in the context of port states.

Second, a Judgement that addressed the Tribunal's interpretation of the scope of exclusive flag state jurisdiction should be commended because it is an UNCLOS provision that is frequently raised in dispute settlement (see the ongoing proceedings in *The 'Enrica Lexie" Incident*). Given this debate, the cursory reference in the *"Norstar" Judgement* suggesting that Article 92 of UNCLOS also applies to prescriptive jurisdiction merits more detailed analysis and clarification of the term 'lawful activities'. Alternatively, as Article 92 of UNCLOS was not in dispute in the "*Norstar" Case* but is the subject matter of the *M/T "San Padre Pio" Case*, the relevant tribunal in proceedings in that matter remains free to reinterpret Article 92 of UNCLOS as only concerning enforcement jurisdiction upon the high seas and EEZ. Regardless of the relevant tribunal's adoption of a broad or narrow interpretation of Article 92, any accompanying reasoning on that matter could help resolve the current differences of interpretation.

Third, while the *M/T "San Padre Pio" Case* will concern the freedom of navigation and non-flag state enforcement, the relevant tribunal in these proceedings is not precluded from building on the "*Norstar" Case* so as to set out a general test for breaches of Article 87 of UNCLOS. This test might clarify the methodology that the relevant tribunal might apply in order to distinguish those cases where the extraterritorial 'extension' of laws over foreign vessels results in Article 87 of UNCLOS applying to a dispute from those cases where Article 87 is both applicable and breached by a state. This would provide greater legal certainty for both states and vessels, as well as demonstrate the careful consideration called for by *The M/V "Norstar" Case (Panama v. Italy), Preliminary Objections, Joint Separate Opinion of Judges Wolfrum and Attard* (paras 37-42).

Finally, readers of this post will differ on whether ITLOS or the Arbitral Tribunal in the *M/T "San Padre Pio" Case* is the relevant tribunal to address the three proposals outlined above. An ITLOS Provisional Measures Order is probably unlikely to provide this detailed reasoning. The author of this post nonetheless believes an Annex VII Arbitral Tribunal could greatly benefit from ITLOS – or separate opinions - providing such clarification and reasoning on Article 87 and Article 92 of UNCLOS. The previous *Southern Bluefin Tuna Cases* are testament to the tribunals' freedom to interpret the same treaties differently (*Southern Bluefin Tuna, Order of 27 August 1999*, paras 55 and 62; *Southern Bluefin Tuna Case, Award on Jurisdiction and Admissibility*, paras 57-59 and 65), but equally the need for greater dialogue between tribunals upon their reasoning (subsequent cases and separate opinions distanced themselves from the *Southern Bluefin Tuna Cases*' Arbitral Tribunal interpretation of UNCLOS, Boyle, 2008, 'Southern Bluefin Tuna Cases', para 19; Colson and Hoyle, 2010, 'Did the Southern Bluefin Tuna Tribunal Get It Right?', at 73-74). If ITLOS merely repeats the "*Norstar" Case* position on Article 87 of UNCLOS, it will be left to an Annex VII Arbitral Tribunal to develop an analytical process for determining when a breach of Article 87 of UNCLOS occurs. This process may depart from what the majority of ITLOS had in mind. If ITLOS merely repeats the "*Norstar" Case* position on Article 92 of UNCLOS, a significant risk of conflicting interpretations will arise because there will be no reasoning that might compel the Annex VII Arbitral Tribunal to follow ITLOS and depart from previous interpretations of Article 92 that are confined to the exclusivity of enforcement jurisdiction.

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