

DECLARATION OF JUDGE KELLY

This case was initiated before the Tribunal by an Application filed by Panama, by which it instituted proceedings against Italy in a 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.”

The Tribunal has passed judgment in two instances, the first with respect to the written preliminary objections under article 294, paragraph 3, of the United Nations Convention on the Law of the Sea (“the Convention”) filed by Italy, and the second on the merits of the case.

In both instances, the Tribunal has, in my view, been very thorough in the application and interpretation of the Convention with respect to a very complex set of facts.

I have voted in favour of each and every Section of this Judgment. All sections are, of course, equally important as they are destined to address and adjudge the submissions made by each Party to this dispute. However, I consider it very important to highlight Sections V and VI of the Judgment, since they deal with the important issue of the application and interpretation of article 87 of the Convention in the context of the facts of this case.

The facts of this case are described by both Parties in their respective pleadings. However, the evidence provided by them was not clear enough and required a thorough examination by the Tribunal of all elements presented to it in order to arrive at a proper understanding of what this dispute was about.

The bone of contention in this case concerns, in my view, the different interpretation given by each Party to the relevant provisions of the Convention and the manner in which they should be applied, including the issues of the jurisdiction of the Tribunal and the admissibility of the application of the claimant State (Panama).

The Convention enshrines a very delicate balance between the interests of flag States on the high seas directly associated with the freedom of navigation of ships flying their flag thereon, on the one hand, and the interests of coastal States related to their sovereignty, sovereign rights and jurisdiction over their internal waters, territorial sea and exclusive economic zone, on the other.

Activities of ships on the high seas are varied but specifically one of those activities, bunkering, has occasionally been the subject of disputes between coastal and flag States. This case relates to one such occasion.

I consider this Judgment to have properly clarified the scope and meaning of certain provisions of the Convention through their concrete interpretation and application to the facts of this case, especially those provisions relating to the freedom of navigation on the high seas and to the exclusive jurisdiction of the flag State on the high seas with respect to ships flying its flag, on the one hand, and the jurisdictional powers of coastal States concerning activities of ships, namely bunkering, on the other.

The findings of the Tribunal with respect to the relevance of article 87 of the Convention in this case concern different issues that were the subject of conflicting allegations by the Parties. These findings constitute the basis upon which the Tribunal has established the existence of a breach of article 87, paragraph 1, of the Convention.

One of those issues is whether the dispute includes the arrest and detention of the *M/V "Norstar"* or is, rather, confined to the Decree of Seizure and the Request for its execution ordered by the Italian Public Prosecutor at the Court of Savona. This issue concerns the different interpretation by the Parties of paragraph 122 of the Tribunal's Judgment on Preliminary Objections. The Tribunal, having noted that Italy interpreted paragraph 122 of its Judgment on Preliminary Objections as "excluding the actual arrest and detention of the *M/V "Norstar"*", concluded that "[t]his interpretation does not correctly reflect the Tribunal's decision on jurisdiction" (para. 117 of the Judgment).

The Tribunal explained that, in its Judgment on Preliminary Objections, it considered that, given the reasons explicitly mentioned there, the dispute between the Parties included not only the Decree of Seizure and the Request for its execution but also the arrest and detention of the *M/V "Norstar"*. The Tribunal stated that its "jurisdiction over the dispute, therefore, covers the arrest and detention of the *M/V "Norstar"*" (para. 122 of the Judgment).

With respect to the relevance of article 87 of the Convention in connection with the dispute, the Tribunal refers to the following aspects of the case:

- Whether the Decree of Seizure and its execution concern activities conducted by the *M/V "Norstar"* on the high seas, alleged crimes committed in the territory of Italy, or both. The Tribunal indicated that

[i]f the Decree of Seizure and its execution concern only alleged crimes committed in the territory of Italy, as maintained by Italy, article 87 of the Convention is not applicable. However, if they concern activities conducted by the *M/V "Norstar"* on the high seas, as maintained by Panama, article 87 may be applicable.
(para. 153 of the Judgment)

The Tribunal examined extensively the arguments made by the Parties, and noted that, in the letter rogatory requesting the execution of the Decree of Seizure, the following elements were mentioned:

1. Marine gasoil was purchased exempt from taxes in Italian ports 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 observed that, while the first and the third elements may have taken place in Italian territory, the second element occurred outside the territorial sea of Italy, on the high seas.

After a comprehensive examination of the Decree of Seizure and other relevant documents of the Italian judiciary, the Tribunal arrived at the following conclusion:

the Decree of Seizure and its execution concern both alleged crimes committed in the territory of Italy and bunkering activities conducted by the *M/V "Norstar"* on the high seas. The Tribunal further finds that the evidence shows that the bunkering activities of the *M/V "Norstar"* on the high seas in fact constitute not only an integral part, but also a central element, of the activities targeted by the Decree of Seizure and its execution.
(para. 186 of the Judgment)

The Tribunal consequently concluded that "article 87 of the Convention may be applicable in the present case" and that "[w]hether article 87 is applicable and has been breached depends, inter alia, on how the freedom of navigation provided for in article 87 is to be interpreted and applied to the present case".

(para. 187 of the Judgment)

With respect to this last finding, the Tribunal turned to the question as to whether article 87 of the Convention is applicable and, if so, whether Italy breached it. The Parties had differing views concerning the applicability of article 87, paragraph 1, of the Convention. The Tribunal noted that their disagreement concerned the meaning and scope of the freedom of navigation under this provision, in particular,

the location where the freedom of navigation is applicable; what acts constitute a breach of the freedom of navigation; and whether the freedom of navigation can be invoked to prohibit the extraterritorial application of criminal and customs laws of the coastal State to the high seas.

The Tribunal also noted that the Parties disagree on the question of the breach of the due regard obligation established in article 87, paragraph 2, of the Convention. But before considering this issue, the Tribunal recalled its findings, mentioned above, concerning paragraph 122 of the Judgment on Preliminary Objections and paragraph 187 of the present Judgment (on the merits).

Most significantly, the Tribunal also noted with regard to the abovementioned findings "that it does not question Italy's right to investigate and prosecute persons involved in alleged crimes committed in its territory". And it further noted that "[i]t is

Italy's action with respect to activities of the *M/V "Norstar"* on the high seas that is the concern of the Tribunal" (para. 212 of the Judgment).

In the paragraphs that follow, the Tribunal referred to the implications derived from the legal status of the high seas as defined in article 87 of the Convention: the Tribunal noted that article 87 declares that the high seas are open to all States, proclaims the freedom of the high seas, and provides for the obligation of due regard in the exercise of that freedom.

The implications mentioned by the Tribunal are the following:

No State, save in exceptional cases, may exercise jurisdiction over a foreign ship on the high seas. The Tribunal noted that this principle is clearly reflected in article 92 of the Convention, which provides that "[s]hips shall sail under the flag of one State only and, save exceptional cases provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas".

The Tribunal considered that the invalidity of claims of sovereignty over the high seas and the exclusive flag State jurisdiction on the high seas over ships flying its flag are inherent in the legal status of the high seas being open and free.

The Tribunal also considered that, in interpreting article 87 of the Convention, articles 89 and 92 of the Convention come into play and that, notwithstanding the fact that Panama did not invoke these provisions in its Application, the Tribunal is not barred from considering these provisions in determining whether article 87 was breached in the present case.

The Tribunal therefore found that bunkering activities fall within the freedom of navigation except – as was determined by the Tribunal in its Judgment in the *M/V "Virginia" G* case – that "bunkering of foreign vessels fishing in the exclusive economic zone is an activity that may be regulated by the coastal State" and that the competence of coastal States does not apply "to other bunkering activities, unless otherwise determined in accordance with the Convention".

Furthermore, the Tribunal established that “bunkering on the high seas is part of the freedom of navigation to be exercised under the conditions laid down by the Convention and other rules of international law”. The Tribunal therefore found that “the bunkering of leisure boats carried out by the *M/V “Norstar”* on the high seas falls within the freedom of navigation under article 87 of the Convention” (para. 219 of the Judgment).

With respect to the locus where the freedom of navigation applies, the Tribunal noted that, in accordance with the Convention, the navigational rights enjoyed by foreign ships differ in the various maritime zones contemplated in the Convention.

According to the Tribunal, “[f]reedom of navigation applies to the high seas and also in the exclusive economic zone pursuant to article 58, paragraph 1, of the Convention” (para. 220 of the Judgment).

The Tribunal noted that a State exercises sovereignty in its internal waters and that foreign ships have no freedom of navigation therein, unless conferred by the Convention. In this respect, the Tribunal clearly indicated that “to interpret the 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”, thereby rejecting Panama’s claim to that effect.

Turning to the issue of what acts constitute a breach or violation of the freedom of navigation under article 87, the Tribunal stated that “any act of interference with the navigation of foreign ships” or “any exercise of jurisdiction over such ships on the high seas” constitutes a breach of the freedom of navigation.

The Tribunal further clarified this concept by determining that “even acts that do not involve physical interference or enforcement on the high seas may constitute a breach of the freedom of navigation” including “acts falling short of enforcement action on the high seas could be relevant in terms of a breach of article 87 of the Convention”, as was recognized by Italy when it described the possibility of actions being carried out that might create what Italy calls a “chilling effect” (which it

discarded as not having occurred in this case because the Decree of Seizure “was not known or knowable”).

In the view of the Tribunal, whether or not a “chilling effect” occurs is of no consequence. The Tribunal clearly stated that, 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” (para. 224 of the Judgment).

The Tribunal further stated that “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” (para. 224 of the Judgment).

The Tribunal found that the principle of exclusive flag State jurisdiction on the high seas under article 87 “prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas”. In this respect the Tribunal declared that it cannot accept Italy’s argument that “extraterritoriality is not the test to assess a breach of article 87” (para. 225 of the Judgment).

The Tribunal also declared that Italy’s central argument in this case (that since the Decree of Seizure was enforced not on the high seas but in internal waters of Spain, article 87 is not applicable, let alone breached) is not convincing. While recognizing that the locus of the enforcement is relevant for assessing the applicability and breach of article 87, it is not the sole criterion to be considered.

The Tribunal found that even when enforcement is carried out in internal waters, “article 87 may still be applicable and breached if a State extends its criminal and customs laws extraterritorially to activities of foreign ships on the high seas and criminalizes them”, which, the Tribunal added, is precisely what Italy did in the present case.

The conclusion arrived at by the Tribunal is that it found

that article 87, paragraph 1, 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.
(para. 226 of the Judgment)

In its final pronouncement made on this issue concerning the application and breach of article 87, the Tribunal stated that

[i]n light of the foregoing, the Tribunal concludes that Italy, through the Decree of Seizure by the Public Prosecutor at the court of Savona against the *M/V “Norstar”*, the Request for its execution, and the arrest and detention of the vessel, breached article 87, paragraph 1, of the Convention.
(para. 230 of the Judgment)

I find that this part of the Judgment is most important and should be highlighted because through this process of analysing the facts of this case, as reflected in the documents and assertions by the Parties, the Tribunal has provided a thorough interpretation of the provisions of the Convention related to the freedoms of the high seas. In particular, the Tribunal dealt specifically with all aspects that may have blurred the proper understanding of the legal status of the high seas.

It has also sought to protect the delicate balance of interests enshrined in the Convention associated with the rights of flag and coastal States alike, which extend also to the different stakeholders that embark on activities on the high seas as well as in the maritime zones subject to the authority and jurisdiction of coastal States.

(signed) Elsa Kelly