

INTRODUCTORY NOTE TO THE “ARCTIC SUNRISE” CASE (NETHERLANDS/RUSSIA) (ITLOS)

BY EVA RIETER*

[November 22, 2013]

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Introduction

In September 2013, officials of the Russian Federation boarded the vessel *Arctic Sunrise*, an icebreaker flying the flag of the Netherlands. The vessel, operated by Greenpeace International, was present in the Russian Federation’s Exclusive Economic Zone in order to protest against the operation of the offshore fixed oil platform *Prirazlomnaya*. Russian authorities detained the *Arctic Sunrise* itself and all persons on board the vessel, initially based on an accusation of piracy.

On October 4, 2013, the Netherlands initiated arbitration under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS), which allows disputes under the Convention to be heard between states-parties by an arbitral tribunal. On October 21, 2013, the Netherlands requested provisional measures for the release of the *Arctic Sunrise* and its crew.¹ Under UNCLOS, a party may call on the International Tribunal for the Law of the Sea (ITLOS), a specific permanent tribunal for disputes arising out of UNCLOS, to prescribe provisional measures under Article 290(5).²

On November 6, 2013, ITLOS prescribed provisional measures for the immediate release of the vessel and “all persons who [had] been detained, upon the posting of a bond or other financial security by the Netherlands.”³ It did so by nineteen votes to two.⁴ The Netherlands subsequently posted the bond. Eventually, at the end of December 2013, the persons covered by the provisional measures were released and allowed to leave Russia, ostensibly based on reasons unrelated to the provisional measures: the Russian Parliament passed an amnesty law that included the crew members. The Russian authorities released the vessel in June 2014 and in August 2014 it was able to return to the Netherlands.

Analysis

This was not the first time ITLOS prescribed provisional measures.⁵ Nevertheless, it has mostly dealt with situations involving detention of vessels and crews under the special prompt release procedure laid down in Article 292 of UNCLOS.⁶

In the context of the *Arctic Sunrise* case, Russia contended that the arbitral tribunal did not have jurisdiction to deal with this case and stated that it did not recognize the jurisdiction of ITLOS to prescribe provisional measures under Article 290. It did not argue this before the tribunal, but instead refused to appear before it.

Apart from issues such as the jurisdiction of the arbitral tribunal,⁷ the role of negotiations between the parties,⁸ the non-appearance of one of the parties,⁹ and the role of amicus briefs,¹⁰ other significant issues triggered by this case are states’ invocation of human rights law and ITLOS’s approach to the tool of diplomatic protection. The remainder of this note refers to those issues.

In its exercise of diplomatic protection, in addition to specific UNCLOS rules, the Netherlands also invoked human rights law.¹¹ Under Article 293 of UNCLOS, the arbitral tribunal shall apply UNCLOS and other rules of international law not incompatible with it. The Netherlands’ submission pointed out that this includes the International Covenant on Civil and Political Rights (ICCPR). Both States ratified this treaty in the 1970s.¹² The Netherlands invoked the right to liberty and security of the crewmembers and others who the Russian authorities had arrested and detained, referring to Articles 9 and 12(2) of the ICCPR and to customary international law.¹³ It brought the claim on behalf of all persons detained, irrespective of their nationality. The Netherlands also stressed that conflict between states should not infringe the rights of individuals.¹⁴

It argued that Russia did not just breach its obligations towards the Kingdom of the Netherlands regarding its right to afford its nationals diplomatic protection, but also its “right to seek redress on behalf of crew members of a vessel flying the flag of the Kingdom of the Netherlands, irrespective of their nationality, in regard to the liberty and security of a vessel’s crew members and their right to leave the territory and maritime zones of a coastal state”¹⁵

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In its request to ITLOS for provisional measures, the Netherlands claimed that “as long as the vessel and crew are kept detained the internationally wrongful acts continue in time. To prolong the detention pending the constitution of the arbitral tribunal and the resolution of the dispute would prejudice the rights of the Kingdom of the Netherlands. Detention of the vessel and its crew has irreversible consequences.”¹⁶

In its order prescribing provisional measures, the judges reference the human rights concerns of the Netherlands without giving them extensive consideration.¹⁷ In a separate opinion, two of the judges with the majority commented that the reference by ITLOS to human rights considerations could have been more explicit. They note that the majority took a restrictive approach to the jurisdiction of the Tribunal under Article 290(5) of UNCLOS, which accounted for the fact that the order did “not touch upon human rights issues although argued extensively by the Netherlands.”¹⁸

Although the Netherlands’ submissions focused much more on human rights than ITLOS’s order for provisional measures, it is clear that ITLOS did take into account the rights of the individuals *irrespective of their nationality*. The Tribunal ordered the immediate release of the vessel “and all persons who [had] been detained” and stated Russia was to ensure that “all persons who [had] been detained [were] allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation.”¹⁹

The State’s request for provisional measures *and* the Tribunal’s decision to order them appear to have been inspired by a concern for the individual detained persons. The decision appears to have been based mostly on the risk of serious harm to persons, rather than to the environment.²⁰ While the decision by human rights courts to order provisional measures is generally based on the risk of irreparable harm, and the International Court of Justice (ICJ) equally applies this criterion, there is no need under UNCLOS to meet the criterion of irreparable harm.²¹ The situation here appears to have been one of serious harm.²² The Netherlands spoke of a continuing wrongful act.²³ It considered that the ongoing detention of the vessel and crew had irreversible consequences.²⁴

Apart from two Dutch nationals, another twenty-eight nationals were involved, from eighteen other states,²⁵ including a Russian photographer who had been on board. The Netherlands invoked human rights law on behalf of *all* persons detained, including the Russians.

It is noteworthy that ITLOS indeed ordered that all those detained be released. This indicates an extension of the group of persons covered by diplomatic protection due to awareness of the plight of individuals. This also applies in the specific context of the law of the sea, involving protection of all crewmembers by the flag state. This aspect of the Order shows the close relationship between the invocation of human rights law by the claimant state and the developing approach by ITLOS to the tool of diplomatic protection.

The *Arctic Sunrise* order confirms the approach taken in *M/V ‘Saiga’ (2)*, where ITLOS also allowed the flag state to make a claim on behalf of all crew members.²⁶ The separate opinion by Judge Jesus, attached to the order in the *Arctic Sunrise* case, argues that the order was based on the earlier “ship as a unit” approach in *M/V ‘Saiga’ (2)*. This approach brings “under the international judicial protection of that State all the crew members of the vessel flying its flag.”²⁷ He acknowledged this as a welcome extension of the traditional notion of diplomatic protection, but he disagreed with the fact that two persons with Russian citizenship were included by the Tribunal in the persons to be released. He considered that “[t]o order a State to release its own citizens who are being prosecuted in its domestic courts for alleged violations of that State’s own law may be pushing too far the scope of the applicability of the ship-as-a-unit concept.”²⁸

Indeed by including the Russians in the order for release, ITLOS clearly accepted that the traditional tool of diplomatic protection could be used for human rights protection. In the context of the law of the sea, as long as the state exercising diplomatic protection is the flag state, there is sufficient reason for it to exercise this right. Once the use of the tool of diplomatic protection can be triggered, the fate of individuals, coupled with the increased prominence of human rights law, no longer allows leaving out some persons from the protective reach of this tool simply because they have the wrong nationality.²⁹

In their separate opinion to the *Arctic Sunrise* case, Judges Wolfrum and Kelly succinctly expressed this approach as follows: “We have voted in favour of the order to release the vessel *Arctic Sunrise* and all persons on board who were arrested in connection with the detention of the vessel. In our view it is mandatory that the order to release covers all persons regardless of their nationality.”³⁰

ENDNOTES

- 1 Arctic Sunrise (No. 22) (Neth. v. Russ.), Case No. 22, Request for Provisional Measures, Oct. 21, 2013, 22 ITLOS Rep ¶ 105 [hereinafter Request for Provisional Measures], available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Request_provisional_measures_en_withtranslations.pdf. See also Alex Oude Elfrink, *The Arctic Sunrise Incident and the International Law of the Sea*, THE BLOG OF THE K. G. JEBSEN CENTRE FOR THE LAW OF THE SEA (Jan. 7, 2014), http://uit.no/Content/361427/The%20Arctic%20Sunrise%20Incident%20and%20ITLOS_final.pdf (noting various law of the sea aspects that are likely to be discussed by the Arbitral Tribunal (e.g., hot pursuit, safety zone etc.)).
- 2 Request for Provisional Measures, *supra* note 1, ¶ 58. In order for ITLOS to prescribe provisional measures under Article 290, paragraph 5, of the Convention, the Tribunal has to satisfy itself that, *prima facie*, the Annex VII arbitral tribunal would have jurisdiction.
- 3 Request for Provisional Measures, *supra* note 1, ¶ 105. The amount of the bond was for 3,600,000 euros, to be posted with the Russian Federation in the form of a bank guarantee, *id.*
- 4 *Id.* ¶ 105(1)(b) (listing Judges Golitsyn and Kulyk as having voted against).
- 5 The *Arctic Sunrise* case is the seventh case where provisional measures were requested under Article 290. Three of these cases dealt with situations involving detention of ships and crewmembers. The first was *M/V 'Saiga' (St. Vincent and the Grenadines v. Guinea)*; the second the *ARA Libertad (Argentina v. Ghana)* case; and the third the *Arctic Sunrise* case (*The Netherlands v. Russian Federation*).
- 6 United Nations Convention on the Law of the Sea, art. 292, Dec. 10, 1982, 1833 U.N.T.S. 561. Russia recognizes the role of ITLOS in matters dealing with the prompt release of detained vessels and crews under Article 292. It is noteworthy that there have been nine cases so far (including three involving Russia) where a state invoked the prompt release procedure under Article 292.
- 7 Request for Provisional Measures, *supra* note 1 (joint separate opinion of Judge Wolfrum & Judge Kelly) (discussing relevant jurisdictional issues and the non-appearance of Russia). See also Oude Elfrink, *supra* note 1.
- 8 Request for Provisional Measures, *supra* note 1, ¶¶ 72–76 (demonstrating that in the context of provisional measures, ITLOS is not overly strict on the requirement of negotiation between the parties). On the role of negotiations before the ICJ, see KAREL WELLENS, *NEGOTIATIONS IN THE CASE LAW OF THE INTERNATIONAL COURT OF JUSTICE: A FUNCTIONAL ANALYSIS* (2014).
- 9 See JEROME B. ELKIND, *NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE: FUNCTIONAL AND COMPARATIVE ANALYSIS* (1984); H. W. A. THIRLWAY, *NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE* (1985).
- 10 See Anna Dolidze, *The Arctic Sunrise and NGOs in International Judicial Proceedings*, ASIL INSIGHTS (2014), <http://www.asil.org/insights/volume/18/issue/1/arctic-sunrise-and-ngos-international-judicial-proceedings> (analyzing the tribunal's response to the amicus curiae brief by Greenpeace International).
- 11 It is not alone in this approach. See Case Concerning Ahmadou Sadio Diallo (Rep. of Guinea v. Dem. Rep. Congo) Judgment, 2010 I.C.J. 639 (Nov. 30), for a case where the applicable substantive law was expanded to include human rights law in the exercise of diplomatic protection. See also Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.) Judgment, 2012 I.C.J. 422 (Jul. 20), in which Belgium referred to citizens who were originally from Chad when it invoked the Convention against Torture.
- 12 Arctic Sunrise (No. 22), (Neth. v. Russ.), Case No. 22, Submission of Dispute to Arbitration, Oct. 4, 2013, 22 ITLOS ¶ 29 [hereinafter Submission of Dispute].
- 13 *See id.* ¶ 30(3).
- 14 Request for Provisional Measures, *supra* note 1, ¶ 38.
- 15 Submission of Dispute, *supra* note 12, ¶ 37(1)(c).
- 16 *See id.* ¶ 29.
- 17 Arctic Sunrise (No. 22) (Neth. v. Russ.), Case No. 22, Order of 22 November 2013, 22 ITLOS Rep ¶ 87 [hereinafter Order of 22 November 2013] ("As a consequence of the actions taken by the Russian Federation in connection with the boarding and detention of the 'Arctic Sunrise', the crew would continue to be deprived of their right to liberty and security as well as their right to leave the territory and maritime areas under the jurisdiction of the Russian Federation. The settlement of such disputes between two states should not infringe upon the enjoyment of individual rights and freedoms of the crew of the vessels concerned.>").
- 18 Request for Provisional Measures, *supra* note 1, ¶ 2 (joint separate opinion of Judge Wolfrum & Judge Kelly).
- 19 Order of 22 November 2013, *supra* note 17, ¶ 105(1)(b).
- 20 *See e.g.*, Request for Provisional Measures, *supra* note 1, ¶¶ 32–34, 37.
- 21 See EVA RIETER, *PREVENTING IRREPARABLE HARM: PROVISIONAL MEASURES IN INTERNATIONAL HUMAN RIGHTS ADJUDICATION* 5–101 (2010).
- 22 The approach by ITLOS in this provisional measures order does have in common with the ICJ's approach to provisional measures that they have both shown sensitivity towards the plight of individuals. See INTERNATIONAL LAW ASSOCIATION, COMMITTEE ON HUMAN RIGHTS LAW, CONFERENCE REPORT APRIL 2014 (2014), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1027>.
- 23 Request for Provisional Measures, *supra* note 1, ¶ 19, 29.
- 24 *See id.* ¶ 29.
- 25 *See id.* ¶ 19.
- 26 *M/V Saiga* (No. 2) (St Vincent v. Guinea), Case No. 2, Order of July 1, 1999, 2 ITLOS Rep. 5, ¶¶ 105–107. The Court noted that the provisions of the UN Convention on the Law of the Sea, including Article 292, do not distinguish between nationals and

- non-nationals of the flag State, *id.* ¶ 105. According to ITLOS, the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant, *id.* ¶ 106.
- 27 Request for Provisional Measures, *supra* note 1, ¶ 18 (separate opinion of Judge Jesus).
- 28 *See id.* ¶ 20.
- 29 A similar approach might also be warranted when the flag state would not be willing to exercise diplomatic protection. Another State with nationals on board might then exercise it and speak for the other crew members as well, irrespective of their nationality.
- 30 Request for Provisional Measures, *supra* note 1, ¶ 1 (joint separate opinion of Judge Wolfrum & Judge Kelly).

THE “ARCTIC SUNRISE” CASE (NETHERLANDS/RUSSIA) (ITLOS)*

[November 22, 2013]

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INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA YEAR 2013

22 November 2013

List of Cases: No. 22

THE “ARCTIC SUNRISE” CASE

(KINGDOM OF THE NETHERLANDS v. RUSSIAN FEDERATION)

Request for the prescription of provisional measures

ORDER

Present: President YANAI; Vice-President HOFFMANN; Judges MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; Judge ad hoc ANDERSON; Registrar GAUTIER.

THE TRIBUNAL,

composed as above,

after deliberation,

Having regard to article 290 of the United Nations Convention on the Law of the Sea (hereinafter “the Convention”) and articles 21, 25 and 27 of the Statute of the Tribunal (hereinafter “the Statute”),

Having regard to articles 89 and 90 of the Rules of the Tribunal (hereinafter “the Rules”),

Having regard to the fact that the Kingdom of the Netherlands (hereinafter “the Netherlands”) and the Russian Federation are States Parties to the Convention,

Having regard to the fact that the Netherlands and the Russian Federation have not accepted the same procedure for the settlement of disputes in accordance with article 287 of the Convention and are therefore deemed to have accepted arbitration in accordance with Annex VII to the Convention,

Having regard to the Notification and the “Statement of the claim and the grounds on which it is based” (hereinafter “the Statement of Claim”) submitted by the Netherlands to the Russian Federation on 4 October 2013 instituting arbitral proceedings under Annex VII to the Convention, in a dispute concerning the boarding and detention of the vessel *Arctic Sunrise* in the exclusive economic zone of the Russian Federation and the detention of the persons on board the vessel by the authorities of the Russian Federation,

Having regard to the Request for provisional measures contained in the Statement of Claim submitted by the Netherlands to the Russian Federation pending the constitution of an arbitral tribunal under Annex VII to the Convention,

Makes the following Order:

1. *Whereas*, on 21 October 2013, the Netherlands filed with the Tribunal a Request for the prescription of provisional measures (hereinafter “the Request”) under article 290, paragraph 5, of the Convention in a dispute concerning the boarding and detention of the vessel *Arctic Sunrise* in the exclusive economic zone of the Russian Federation and the detention of the persons on board the vessel by the authorities of the Russian Federation;
2. *Whereas*, in a letter dated 18 October 2013 addressed to the Registrar and received in the Registry on 21 October 2013, the Minister of Foreign Affairs of the Netherlands notified the Tribunal of the appointment of Ms

* This text was reproduced and reformatted from the text available at the International Tribunal for the Law of the Sea website (visited July 18, 2014), http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf.

Liesbeth Lijnzaad, Legal Adviser of the Ministry of Foreign Affairs, as Agent for the Netherlands, and Mr René Lefeber, Deputy Legal Adviser of the Ministry of Foreign Affairs, as Co-Agent for the Netherlands;

3. *Whereas*, on 21 October 2013, a certified copy of the Request was transmitted by the Registrar to the Ambassador of the Russian Federation to the Federal Republic of Germany, together with a letter addressed to the Minister of Foreign Affairs of the Russian Federation;

4. *Whereas* the Tribunal does not include upon the bench a judge of the nationality of the Netherlands and, pursuant to article 17, paragraph 3, of the Statute, the Netherlands, in the Request, has chosen Mr David Anderson to sit as judge *ad hoc* in this case;

5. *Whereas*, since no objection to the choice of Mr Anderson as judge *ad hoc* was raised by the Russian Federation, and none appeared to the Tribunal itself, Mr Anderson was admitted to participate in the proceedings as judge *ad hoc* after having made the solemn declaration required under article 9 of the Rules at a public sitting of the Tribunal held on 4 November 2013;

6. *Whereas*, pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Secretary-General of the United Nations was notified of the Request by a letter from the Registrar dated 22 October 2013;

7. *Whereas* States Parties to the Convention were notified of the Request, in accordance with article 24, paragraph 3, of the Statute, by a note verbale from the Registrar dated 22 October 2013;

8. *Whereas*, by letter dated 22 October 2013, the Registrar informed the Parties that the President intended to seek their views on questions of procedure, in accordance with articles 45 and 73 of the Rules;

9. *Whereas*, in a note verbale dated 22 October 2013, received in the Registry on 23 October 2013, the Embassy of the Russian Federation in the Federal Republic of Germany stated:

Upon the ratification of the Convention on the 26th February 1997 the Russian Federation made a statement, according to which, *inter alia*, “it does not accept procedures provided for in Section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes [. . .] concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction”.

Acting on this basis, the Russian Side has accordingly notified the Kingdom of the Netherlands by note verbale (attached) that it does not accept the arbitration procedure under Annex VII to the Convention initiated by the Netherlands in regard to the case concerning the vessel “Arctic Sunrise” and that [it] does not intend to participate in the proceedings of the International Tribunal for the Law of the Sea in respect of the request of the Kingdom of the Netherlands for the prescription of provisional measures under Article 290, Paragraph 5, of the Convention.

Meanwhile the Russian Federation has stressed its readiness to continue to seek a mutually acceptable solution to this situation;

10. *Whereas*, by letter dated 23 October 2013, the Registrar, while transmitting a copy of this note verbale to the Agent of the Netherlands, drew her attention to article 28 of the Statute and informed her that any comments that the Netherlands might wish to make on the matter should be received by 24 October 2013;

11. *Whereas*, in a letter dated 24 October 2013, the Agent of the Netherlands stated that,

in accordance with Article 28 of the Statute of the Tribunal, the Kingdom of the Netherlands respectfully requests the Tribunal to continue the proceedings and make its decision on the Request for Provisional Measures, even if, regrettably, these proceedings would be in default of appearance by the Russian Federation;

12. *Whereas*, pursuant to article 90, paragraph 2, of the Rules, the President, by Order dated 25 October 2013, fixed 6 November 2013 as the date for the opening of the hearing, notice of which was communicated to the Parties on 25 October 2013;

13. *Whereas*, in the letter dated 25 October 2013 transmitting a copy of that Order to the Russian Federation, the Registrar informed the Ambassador of the Russian Federation to the Federal Republic of Germany that, in accordance with article 90, paragraph 3, of the Rules, the Tribunal was ready to take into account any observations that may be presented to it by a party before the closure of the hearing;

14. *Whereas*, on 28 October 2013, the Registrar sent a letter to the Agent of the Netherlands requesting further documentation and the Netherlands submitted the requested documents on 29 October 2013, and whereas on the same day the Registrar sent a copy of those documents to the Russian Federation;
15. *Whereas*, by letter dated 30 October 2013, Stichting Greenpeace Council (hereinafter "Greenpeace International") requested the Tribunal for permission to file submissions as *amicus curiae*, and whereas a copy of the submissions was attached to that letter;
16. *Whereas*, by letter dated 31 October 2013, the Registrar invited the Parties to provide comments on the request submitted by Greenpeace International;
17. *Whereas*, by letter dated 1 November 2013, the Co-Agent of the Netherlands informed the Tribunal that "[t]he Kingdom of the Netherlands has informally informed Greenpeace International that it did not have any objection to such petition";
18. *Whereas*, on 5 November 2013, the Tribunal decided that the request by Greenpeace International should not be accepted and that its submissions would not be included in the case file;
19. *Whereas*, by communication dated 6 November 2013, the Embassy of the Russian Federation in the Federal Republic of Germany informed the Tribunal that "[t]aking into account the non-governmental character of Greenpeace International the Russian Side sees no reason for granting to this organisation the possibility to furnish information to the Tribunal in the case concerning the vessel 'Arctic Sunrise'" and underlined "that this transmission of the Russian position to the tribunal can in no way be interpreted as a form of participation of the Russian Side in the above mentioned case";
20. *Whereas*, on 8 November 2013, notice of the decision of the Tribunal of 5 November 2013 was communicated by the Registrar to the Parties and to Greenpeace International;
21. *Whereas*, on 31 October 2013, the Co-Agent of the Netherlands submitted information on a witness to be called by it before the Tribunal pursuant to article 72 of the Rules;
22. *Whereas*, in accordance with article 68 of the Rules, the Tribunal held initial deliberations on 4 and 5 November 2013 concerning the written pleadings and the conduct of the case;
23. *Whereas*, on 5 November 2013, pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal, materials were submitted to the Tribunal by the Netherlands;
24. *Whereas*, on 5 November 2013, in accordance with article 45 of the Rules, the President held consultations with the Agent of the Netherlands with regard to questions of procedure;
25. *Whereas*, on 5 November 2013, the Tribunal decided to put questions to the Parties pursuant to article 76, paragraph 1, of the Rules, which were transmitted to them on the same date;
26. *Whereas*, pursuant to article 67, paragraph 2, of the Rules, copies of the Request and documents annexed thereto were made accessible to the public on 6 November 2013;
27. *Whereas* oral statements were presented at a public sitting held on 6 November 2013 by the following:

On behalf of the Netherlands: Ms Liesbeth Lijnzaad, Legal Adviser, Ministry of Foreign Affairs,
as Agent,
Mr René Lefeber, Deputy Legal Adviser, Ministry of Foreign Affairs,
as Co-Agent,
Mr Thomas Henquet, Legal Counsel, Ministry of Foreign Affairs,
as Counsel and Advocate;

28. *Whereas*, during the hearing, Mr Daniel Simons, Legal Counsel, Greenpeace International, was called as a witness by the Netherlands and examined by Mr Henquet, and *whereas* in the course of his testimony, Mr Simons responded to questions put to him by Judge Golitsyn, in accordance with article 76, paragraph 3, of the Rules;

29. *Whereas*, during the hearing, Judges Wolfrum, Cot, Golitsyn, Akl and Bouguetaia put questions to the Agent of the Netherlands and Judge *ad hoc* Anderson put a question to the Counsel of the Netherlands, in accordance with article 76, paragraph 3, of the Rules;

30. *Whereas* the Russian Federation was not represented at the public sitting held on 6 November 2013;

31. *Whereas*, on 7 November 2013, the Netherlands submitted a written response to the questions put by the Tribunal on 5 November 2013 and by Judges during the hearing;

32. *Whereas* no response was received from the Russian Federation on the questions put to it;

* * *

33. *Whereas*, in the Notification and the Statement of Claim dated 4 October 2013, the Netherlands requests the arbitral tribunal to be constituted under Annex VII (hereinafter “the Annex VII arbitral tribunal”) to adjudge and declare that:

(1) The Russian Federation:

- a. In boarding, investigating, inspecting, arresting and detaining the ‘Arctic Sunrise’ without the prior consent of the Kingdom of the Netherlands, as described in this Statement, breached its obligations to the Kingdom of the Netherlands, in its own right and in the exercise of its right to protect a vessel flying its flag, in regard to the freedom of navigation as provided by Articles 58, paragraph 1, and 87, paragraph 1(a), of UNCLOS, and under customary international law;
- b. In boarding, investigating, inspecting, arresting and detaining the ‘Arctic Sunrise’ without the prior consent of the Kingdom of the Netherlands, as described in this Statement, breached its obligations to the Kingdom of the Netherlands, in regard to the exercise of jurisdiction by a flag state as provided by Article 58 and Part VII of UNCLOS, and under customary international law;
- c. In boarding the ‘Arctic Sunrise’ without the prior consent of the Kingdom of the Netherlands to arrest and detain the crew members and initiating judicial proceedings against them, as described in this Statement, breached its obligations to the Kingdom of the Netherlands, in its own right, in the exercise of its right to diplomatic protection of its nationals, and its right to seek redress on behalf of crew members of a vessel flying the flag of the Kingdom of the Netherlands, irrespective of their nationality, in regard to the right to liberty and security of a vessel’s crew members and their right to leave the territory and maritime zones of a coastal state as provided by Articles 9 and 12, paragraph 2, of the 1966 International Covenant on Civil and Political Rights, and customary international law;

(2) The aforementioned violations constitute internationally wrongful acts entailing the international responsibility of the Russian Federation;

- (3) Said internationally wrongful acts involve legal consequences requiring the Russian Federation to:
- a. Cease, forthwith, the internationally wrongful acts continuing in time;
 - b. Provide the Kingdom of the Netherlands with appropriate assurances and guarantees of non-repetition of all the internationally wrongful acts referred to in subparagraph (2) above;
 - c. Provide the Kingdom of the Netherlands full reparation for the injury caused by all the internationally wrongful acts referred to in subparagraph (2) above;

34. *Whereas*, in paragraph 47 of the Request filed on 21 October 2013, the Netherlands requests the Tribunal to prescribe the following provisional measures:

For the reasons set out above, the Kingdom of the Netherlands requests that the Tribunal prescribe as provisional measures that the Russian Federation:

- (i) Immediately enable the 'Arctic Sunrise' to be resupplied, to leave its place of detention and the maritime areas under the jurisdiction of the Russian Federation and to exercise the freedom of navigation;
- (ii) Immediately release the crew members of the 'Arctic Sunrise', and allow them to leave the territory and maritime areas under the jurisdiction of the Russian Federation;
- (iii) Suspend all judicial and administrative proceedings, and refrain from initiating any further proceedings, in connection with the incidents leading to the boarding and detention of the 'Arctic Sunrise', and refrain from taking or enforcing any judicial or administrative measures against the 'Arctic Sunrise', its crew members, its owners and its operators; and
- (iv) Ensure that no other action is taken which might aggravate or extend the dispute;

35. *Whereas*, at the public sitting held on 6 November 2013, the Agent of the Netherlands made the following final submissions:

The Kingdom of the Netherlands requests the International Tribunal for the Law of the Sea with respect to the dispute concerning the 'Arctic Sunrise',

to declare:

- a) that the Tribunal has jurisdiction over the request for provisional measures;
- b) the arbitral tribunal to which the dispute is being submitted has *prima facie* jurisdiction;
- c) the claim is supported by fact and law;

to order, by means of provisional measures, the Russian Federation:

- d) to immediately enable the 'Arctic Sunrise' to be resupplied, to leave its place of detention and the maritime areas under the jurisdiction of the Russian Federation and to exercise the freedom of navigation;
- e) to immediately release the crew members of the 'Arctic Sunrise', and allow them to leave the territory and maritime areas under the jurisdiction of the Russian Federation;
- f) to suspend all judicial and administrative proceedings, and refrain from initiating any further proceedings, in connection with the incidents leading to the dispute concerning the 'Arctic Sunrise', and refrain from taking or enforcing any judicial or administrative measures against the 'Arctic Sunrise', its crew members, its owners and its operators; and
- g) to ensure that no other action is taken which might aggravate or extend the dispute;

36. *Considering* that, in accordance with article 287 of the Convention, the Netherlands, on 4 October 2013, instituted proceedings under Annex VII to the Convention against the Russian Federation in a dispute concerning the vessel *Arctic Sunrise*;

37. *Considering* that the Netherlands sent the notification instituting proceedings under Annex VII to the Convention to the Russian Federation on 4 October 2013, together with a Request for provisional measures;

38. *Considering* that, on 21 October 2013, after the expiry of the time-limit of two weeks provided for in article 290, paragraph 5, of the Convention, and pending the constitution of the Annex VII arbitral tribunal, the Netherlands submitted to the Tribunal a Request for the prescription of provisional measures;

39. *Considering* that article 298, paragraph 1, of the Convention in its relevant part provides:

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

...

(b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;

40. *Considering* that the Russian Federation, upon signing the Convention, on 10 December 1982 made the following declaration under article 298 of the Convention:

The Union of Soviet Socialist Republics declares that, in accordance with article 298 of the Convention, it does not accept the compulsory procedures entailing binding decisions for the consideration of disputes relating to sea boundary delimitations, disputes concerning military activities, or disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations;

41. *Considering* that the Russian Federation, in its instrument of ratification of 12 March 1997, made the following declaration under article 298 of the Convention:

The Russian Federation declares that, in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.

The Russian Federation, bearing in mind articles 309 and 310 of the Convention, declares that it objects to any declarations and statements made in the past or which may be made in future when signing, ratifying or acceding to the Convention, or made for any other reason in connection with the Convention, that are not in keeping with the provisions of article 310 of the Convention. The Russian Federation believes that such declarations and statements, however phrased or named, cannot exclude or modify the legal effect of the provisions of the Convention in their application to the party to the Convention that made such declarations or statements, and for this reason they shall not be taken into account by the Russian Federation in its relations with that party to the Convention;

42. *Considering* that, relying upon its declaration of 12 March 1997, the Russian Federation, in the note verbale dated 22 October 2013, states:

Upon the ratification of the Convention on the 26th February 1997 the Russian Federation made a statement, according to which, *inter alia*, “it does not accept procedures provided for in Section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes [. . .] concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction”.

Acting on this basis, the Russian Side has accordingly notified the Kingdom of the Netherlands by note verbale (attached) that it does not accept the arbitration procedure under Annex VII to the Convention initiated by the Netherlands in regard to the case concerning the vessel “Arctic Sunrise”;

43. *Considering* that the Netherlands contends that:

The jurisdiction of the arbitral tribunal is not affected by the declaration of the Russian Federation upon ratification that “in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to [. . .] disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction”. Under Article 298, paragraph 1(b), of the Convention, the optional exception in connection with disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction to the applicability of Section 2 of Part XV of the Convention only applies with respect to “disputes [. . .] excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3”. Such disputes concern marine scientific research and fisheries, respectively, neither of which is at issue in the present case;

44. *Considering* that the Netherlands further contends that:

Insofar as the Russian Federation intended the aforementioned declaration to apply to disputes other than those concerning marine scientific research and fisheries, this would be in contravention of Article 309 of the Convention, which provides: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention". Furthermore, the Kingdom of the Netherlands upon ratification declared that it "objects to any declaration or statement excluding or modifying the legal effect of the provisions of the United Nations Convention on the Law of the Sea";

45. *Considering* that, in the view of the Tribunal, the declaration made by the Russian Federation with respect to law enforcement activities under article 298, paragraph 1(b), of the Convention *prima facie* applies only to disputes excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3, of the Convention;

46. *Considering* that, in the note verbale dated 22 October 2013, the Russian Federation informed the Tribunal that it did not

intend to participate in the proceedings of the International Tribunal for the Law of the Sea in respect of the request of the Kingdom of the Netherlands for the prescription of provisional measures under Article 290, Paragraph 5, of the Convention;

47. *Considering* that the Netherlands states that it "regrets the refusal of the Russian Federation to participate in the proceedings before the Tribunal" and that "[t]his has an impact on the sound administration of justice";

48. *Considering* that the absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings and does not preclude the Tribunal from prescribing provisional measures, provided that the parties have been given an opportunity of presenting their observations on the subject (see *Fisheries Jurisdiction (United Kingdom v. Iceland)*, *Interim Protection, Order of 17 August 1972*, *I.C.J. Reports 1972*, p. 12, at p. 15, para. 11; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, *Interim Protection, Order of 17 August 1972*, *I.C.J. Reports 1972*, p. 30, at pp. 32-33, para. 11; *Nuclear Tests (Australia v. France)*, *Interim Protection, Order of 22 June 1973*, *I.C.J. Reports 1973*, p. 99, at p. 101, para. 11; *Nuclear Tests (New Zealand v. France)*, *Interim Protection, Order of 22 June 1973*, *I.C.J. Reports 1973*, p. 135, at p. 137, para. 12; *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, *Interim Protection, Order of 11 September 1976*, *I.C.J. Reports 1976*, p. 3, at p. 6, para. 13; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, *Provisional Measures, Order of 15 December 1979*, *I.C.J. Reports 1979*, p. 7, at pp. 11-12, para. 9, and at p. 13, para. 13);

49. *Considering* that all communications pertaining to the case were transmitted by the Tribunal to the Russian Federation and that the Russian Federation was informed that, pursuant to article 90, paragraph 3, of the Rules, the Tribunal was ready to take into account any observations that might be presented to it by a party before the closure of the hearing;

50. *Considering* that the Russian Federation was thus given ample opportunity to present its observations, but declined to do so;

51. *Considering* that the non-appearing State is nevertheless a party to the proceedings (see *Nuclear Tests (Australia v. France)*, *Interim Protection, Order of 22 June 1973*, *I.C.J. Reports 1973*, p. 99, at pp. 103-104, para. 24), with the ensuing rights and obligations;

52. *Considering* that, as stated by the International Court of Justice,

[a] State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation; the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment in accordance with Article 59 of the Statute

(*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, *I.C.J. Reports 1986*, p. 14, at p. 24, para. 28);

53. *Considering* that the prescription of provisional measures must also take into account the procedural rights of both parties and ensure full implementation of the principle of equality of the parties in a situation where the absence of a party may hinder the regular conduct of the proceedings and affect the good administration of justice;

54. *Considering* that the Russian Federation could have facilitated the task of the Tribunal by furnishing it with fuller information on questions of fact and of law;
55. *Considering* the difficulty for the Tribunal, in the circumstances of this case, to evaluate the nature and scope of the respective rights of the Parties to be preserved by provisional measures;
56. *Considering* that the Netherlands should not be put at a disadvantage because of the non-appearance of the Russian Federation in the proceedings;
57. *Considering* that the Tribunal must therefore identify and assess the respective rights of the Parties involved on the best available evidence;
58. *Considering* that, before prescribing provisional measures under article 290, paragraph 5, of the Convention, the Tribunal must satisfy itself that *prima facie* the Annex VII arbitral tribunal would have jurisdiction;
59. *Considering* that the Netherlands maintains that, on 19 September 2013, in the exclusive economic zone of the Russian Federation, the vessel *Arctic Sunrise*, flying the flag of the Netherlands, was boarded by Russian authorities who detained the vessel and the 30 persons on board and that the vessel was subsequently towed to the port of Murmansk;
60. *Considering* that in the Statement of Claim the Netherlands argues that:
- The Russian Federation . . . [i]n boarding, investigating, inspecting, arresting and detaining the ‘Arctic Sunrise’ without the prior consent of the Kingdom of the Netherlands, as described in this Statement, breached its obligations to the Kingdom of the Netherlands, in its own right and in the exercise of its right to protect a vessel flying its flag, in regard to the freedom of navigation as provided by Articles 58, paragraph 1, and 87, paragraph 1(a), of UNCLOS, and under customary international law;
61. *Considering* that the Netherlands contends that:
- The sovereign rights of a coastal State in maritime areas beyond its territorial sea are resource-oriented and limited in scope. The exercise of jurisdiction to protect these sovereign rights is functional. The law of the sea restricts the right of a coastal State to exercise jurisdiction in these areas. A coastal State cannot unilaterally extend such a right;
62. *Considering* that the Netherlands further contends that:
- [J]urisdiction over the establishment and use of installations and structures is limited to the rules contained in article 56, paragraph 1, and is subject to the obligations contained in article 56, paragraph 2, article 58 and article 60 of the Convention;
63. *Considering* that the Netherlands argues that:
- [T]he Convention prohibits the boarding of foreign vessels on the high seas: article 110. This prohibition applies to the boarding of foreign vessels in the exclusive economic zone: article 58, paragraph 2. The right of visit and search is an exception to the freedom of navigation and flag State jurisdiction, and thus needs a specific justification in every instance. Indeed, in the case concerning the *S.S. Lotus*, the Permanent Court of International Justice held that,
- “It is certainly true that – apart from certain special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly.”
- Any exceptions to the general prohibitive rule to exercise enforcement jurisdiction over foreign vessels are explicit and cannot be implied. The interpretation and application of any such exceptions must be narrowly construed;
64. *Considering* that, in a note verbale dated 1 October 2013 from the Embassy of the Russian Federation in the Netherlands addressed to the Ministry of Foreign Affairs of the Netherlands, the Russian Federation states that:
- On 19 September . . . within the exclusive economic zone of the Russian Federation, on the basis of Articles 56, 60 and 80 of the United Nations Convention on the Law of the Sea, 1982, and in

accordance with Article 36 (1(1)) of the Federal Law “On the Exclusive Economic Zone of the Russian Federation” a visit . . . to the vessel “Arctic Sunrise” was carried out.

. . .

In view of the authority that a coastal State possesses in accordance with the aforementioned rules of international law, in the situation in question requesting consent of the flag State to the visit by the inspection team on board the vessel was not required;

65. *Considering* that the Embassy of the Russian Federation in the Federal Republic of Germany, in its note verbale of 22 October 2013 addressed to the Tribunal, further stated that:

The actions of the Russian authorities in respect of the vessel “Arctic Sunrise” and its crew have been and continue to be carried out as the exercise of its jurisdiction, including criminal jurisdiction, in order to enforce laws and regulations of the Russian Federation as a coastal state in accordance with the relevant provisions of the United Nations Convention on the Law of the Sea;

66. *Considering* that the Netherlands has invoked as the basis of jurisdiction of the Annex VII arbitral tribunal article 288, paragraph 1, of the Convention, which reads as follows:

A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part;

67. *Considering* that the Netherlands maintains that the dispute with the Russian Federation concerns the interpretation and application of certain provisions of the Convention, including, in particular, Part V and Part VII, notably article 56, paragraph 2, article 58, article 87, paragraph 1(a), and article 110, paragraph 1;

68. *Considering* that, in the light of the positions of the Netherlands and the Russian Federation, a difference of opinions exists as to the applicability of the provisions of the Convention in regard to the rights and obligations of a flag State and a coastal State, notably, its articles 56, 58, 60, 87 and 110, and thus the Tribunal is of the view that a dispute appears to exist between these two States concerning the interpretation or application of the Convention;

69. *Considering* that, at this stage of the proceedings, the Tribunal is not called upon to establish definitively the existence of the rights claimed by the Netherlands;

70. *Considering* that, in the view of the Tribunal, the provisions of the Convention invoked by the Netherlands appear to afford a basis on which the jurisdiction of the arbitral tribunal might be founded;

71. *Considering* that, for the above reasons, the Tribunal finds that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute;

72. *Considering* that article 283, paragraph 1, of the Convention reads as follows:

When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means;

73. *Considering* that the Netherlands and the Russian Federation have exchanged views regarding the settlement of their dispute as reflected in the exchange of diplomatic notes and other official correspondence between them since 18 September 2013, including the note verbale dated 3 October 2013 from the Ministry of Foreign Affairs of the Netherlands to the Embassy of the Russian Federation in the Netherlands;

74. *Considering* that, according to the Netherlands, the dispute was discussed on a number of occasions between the respective Ministers of Foreign Affairs;

75. *Considering* that the Netherlands, in the Request, maintains that “[t]he possibilities to settle the dispute by negotiation or otherwise have been exhausted”;

76. *Considering* that the Tribunal has held that “a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted” (*MOX Plant (Ireland)*

v. *United Kingdom*), *Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at p. 107, para. 60; see also “*ARA Libertad*” (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, at p. 345, para. 71);

77. *Considering* that, in the circumstances of the present case, the Tribunal is of the view that the requirements of article 283 are satisfied;

78. *Considering* that, according to article 290, paragraph 5, of the Convention, provisional measures may be prescribed pending the constitution of the Annex VII arbitral tribunal if the Tribunal considers that the urgency of the situation so requires;

79. *Considering* that article 290, paragraph 5, of the Convention provides that:

Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4;

80. *Considering* that the Tribunal holds that article 290, paragraph 5, of the Convention has to be read in conjunction with article 290, paragraph 1, of the Convention;

81. *Considering* that article 290, paragraph 1, of the Convention provides that:

If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision;

82. *Considering* that, in accordance with article 290, paragraph 1, of the Convention, the Tribunal may prescribe provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment;

83. *Considering* that, in accordance with article 290, paragraph 5, of the Convention, the Annex VII arbitral tribunal, once constituted, may modify, revoke or affirm any provisional measures prescribed by the Tribunal;

84. *Considering* that there is nothing in article 290, paragraph 5, of the Convention to suggest that the measures prescribed by the Tribunal must be confined to the period prior to the constitution of the Annex VII arbitral tribunal (see *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, *Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, at p. 22, para. 67);

85. *Considering* that

the said period is not necessarily determinative for the assessment of the urgency of the situation or the period during which the prescribed measures are applicable and that the urgency of the situation must be assessed taking into account the period during which the Annex VII arbitral tribunal is not yet in a position to “modify, revoke or affirm those provisional measures”

(*Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, *Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, at p. 22, para. 68);

86. *Considering* that the Netherlands, in its final submissions, requests the Tribunal to order the immediate release of the vessel *Arctic Sunrise* and the members of its crew and maintains that the requested provisional measures are appropriate to preserve the rights of the Netherlands;

87. *Considering* that the Netherlands states:

As a result of the continued detention of the ‘Arctic Sunrise’ in Kola Bay, Murmansk Oblast, its general condition is deteriorating. As the vessel is an aging icebreaker, it requires intensive maintenance in order to maintain its operability. The deterioration results from the impossibility to carry out the scheduled maintenance of its systems, which compromises the vessel’s safety and seaworthiness. This may, amongst others, create a risk for the environment, including the release of bunker oil. This reality is compounded by the prevailing harsh weather and ice conditions in the fragile Arctic region.

As a consequence of the actions taken by the Russian Federation in connection with the boarding and detention of the ‘Arctic Sunrise’, the crew would continue to be deprived of their right to liberty and security as well as their right to leave the territory and maritime areas under the jurisdiction of the Russian Federation. The settlement of such disputes between two states should not infringe upon the enjoyment of individual rights and freedoms of the crew of the vessels concerned.

[T]he continuing detention of the vessel and its crew has irreversible consequences.

As for the continuing detention of the crew, every day spent in detention is irreversible. To prolong the detention pending the constitution of the arbitral tribunal and the resolution of the dispute would further prejudice the rights of the Kingdom of the Netherlands;

88. *Considering* that the “Official Report on seizure of property”, issued by Russian authorities on 15 October 2013, states that:

From the time of the ship being moored at the berth until the conclusion of the custody agreement concerning the Dutch-flagged ship *Arctic Sunrise*, IMO number 7382902, the Coast Guard of the Federal Security Service of Russia for Murmansk Oblast will be responsible for compliance with security measures.

P.V. Sarsakova, as representative of the Murmansk office of the Federal State Unitary Enterprise ‘Rosmorport’ and S.V. Fedorov, as representative of the Coast Guard Division of the Federal Security Service of the Russian Federation for Murmansk Oblast have been notified, in accordance with article 115, paragraph 6 CCP RF [Code of Criminal Procedure of the Russian Federation], of their liability for any loss, disposal of, concealment or illegal transfer of property that has been seized or confiscated;

89. *Considering* that, under the circumstances of the present case, pursuant to article 290, paragraph 5, of the Convention, the urgency of the situation requires the prescription by the Tribunal of provisional measures;

90. *Considering* that the order for the seizure of the vessel *Arctic Sunrise*, dated 7 October 2013, of the Leninsky district court, Murmansk, states

that the seizure of the aforementioned property is necessary for the enforcement of the part of the judgment concerning the civil claim, other economic sanctions or a possible forfeiture order in respect of the property in accordance with article 104.1 CCRF [Criminal Code of the Russian Federation];

91. *Considering* that the Ministry of Foreign Affairs of the Netherlands requested, in its note verbale of 26 September 2013, addressed to the Embassy of the Russian Federation in the Netherlands, that “the Russian Federation immediately release the vessel and its crew” and inquired “whether such release would be facilitated by the posting of a bond or other financial security and, if so, what the Russian Federation would consider to be a reasonable amount for such bond or other financial security”;

92. *Considering* that the Netherlands states that the Russian Federation did not respond to this inquiry;

93. *Considering* that the Tribunal is of the view that, under article 290 of the Convention, it may prescribe a bond or other financial security as a provisional measure for the release of the vessel and the persons detained;

94. *Considering* that, in accordance with article 89, paragraph 5, of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested;

95. *Considering* that, pursuant to article 290, paragraph 5, of the Convention, the Tribunal considers it appropriate to order that the vessel *Arctic Sunrise* and all persons who have been detained in connection with the present

dispute be released upon the posting of a bond or other financial security by the Netherlands, and that the vessel and the persons be allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation;

96. *Considering* that the Tribunal determines, taking into account the respective rights claimed by the Parties and the particular circumstances of the present case, that the bond or other financial security should be in the amount of 3,600,000 euros, to be posted by the Netherlands with the competent authority of the Russian Federation, and that the bond or other financial security should be in the form of a bank guarantee, issued by a bank in the Russian Federation or a bank having corresponding arrangements with a Russian bank;

97. *Considering* that the issuer of the bank guarantee undertakes and guarantees to pay the Russian Federation such sum up to 3,600,000 euros as may be determined by a decision of the Annex VII arbitral tribunal or by agreement of the Parties, as the case may be, and that payment under the guarantee will be made promptly after receipt by the issuer of a written demand by the competent authority of the Russian Federation accompanied by a certified copy of the decision or agreement;

98. *Considering* that the Netherlands and the Russian Federation shall each ensure that no action is taken which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal, or might prejudice the carrying out of any decision on the merits which the Annex VII arbitral tribunal may render;

99. *Considering* that any action or abstention by either Party in order to avoid aggravation or extension of the dispute should not in any way be construed as a waiver of any of its claims or an admission of the claims of the other Party to the dispute (see *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, *Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58, at p. 70, para. 79);

100. *Considering* that the present Order in no way prejudices the question of the jurisdiction of the Annex VII arbitral tribunal to deal with the merits of the case, or any questions relating to the merits themselves, and leaves unaffected the rights of the Netherlands and the Russian Federation to submit arguments in respect of those questions (see *"ARA Libertad" (Argentina v. Ghana)*, *Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, at p. 350, para. 106);

101. *Considering* the binding force of the measures prescribed and the requirement under article 290, paragraph 6, of the Convention, that compliance with such measures be prompt (see *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, *Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, at p. 297, para. 87);

102. *Considering* that pursuant to article 95, paragraph 1, of the Rules, each Party is required to submit to the Tribunal a report and information on compliance with any provisional measures prescribed;

103. *Considering* that it may be necessary for the Tribunal to request further information from the Parties on the implementation of the provisional measures and that it is appropriate that the President be authorized to request such information in accordance with article 95, paragraph 2, of the Rules;

104. *Considering* that in the view of the Tribunal, it is consistent with the purpose of proceedings under article 290, paragraph 5, of the Convention, that parties also submit reports to the Annex VII arbitral tribunal, unless the arbitral tribunal decides otherwise;

105. *For these reasons,*

THE TRIBUNAL,

(1) By 19 votes to 2,

Prescribes, pending a decision by the Annex VII arbitral tribunal, the following provisional measures under article 290, paragraph 5, of the Convention:

- (a) The Russian Federation shall immediately release the vessel *Arctic Sunrise* and all persons who have been detained, upon the posting of a bond or other financial security by the Netherlands which shall be in the amount of 3,600,000 euros, to be posted with the Russian Federation in the form of a bank guarantee;

- (b) Upon the posting of the bond or other financial security referred to above, the Russian Federation shall ensure that the vessel *Arctic Sunrise* and all persons who have been detained are allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation;

FOR: *President* YANAI; *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, PAIK, KELLY, ATTARD; *Judge ad hoc* ANDERSON;

AGAINST: *Judges* GOLITSYN, KULYK.

(2) By 19 votes to 2,

Decides that the Netherlands and the Russian Federation shall each submit the initial report referred to in paragraph 102 not later than 2 December 2013 to the Tribunal, and *authorizes* the President to request further reports and information as he may consider appropriate after that report.

FOR: *President* YANAI; *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, PAIK, KELLY, ATTARD; *Judge ad hoc* ANDERSON;

AGAINST: *Judges* GOLITSYN, KULYK.

Done in English and in French, both texts being equally authoritative, in the Free and Hanseatic City of Hamburg, this twenty-second day of November, two thousand and thirteen, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of the Kingdom of the Netherlands and the Government of the Russian Federation, respectively.

(signed)
Shunji YANAI
President

(signed)
Philippe GAUTIER
Registrar

Judge *ad hoc* Anderson appends a declaration to the Order of the Tribunal.

Judges Wolfrum and Kelly append a joint separate opinion to the Order of the Tribunal.

Judge Jesus appends a separate opinion to the Order of the Tribunal.

Judge Paik appends a separate opinion to the Order of the Tribunal.

Judge Golitsyn appends a dissenting opinion to the Order of the Tribunal.

Judge Kulyk appends a dissenting opinion to the Order of the Tribunal.