INTERNATIONAL DECISIONS

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Law of the sea—visit and seizure of vessels at sea—definition of piracy—right of hot pursuit—enforcement jurisdiction at sea—compliance with provisional measures

ARCTIC SUNRISE (Netherlands v. Russia). ITLOS Case No. 22. Provisional Measures Order. *At* http://www.itlos.org.
International Tribunal for the Law of the Sea, November 22, 2013.

IN RE ARCTIC SUNRISE (Netherlands v. Russia). PCA Case No. 2014-02. Merits. *At* http://www.pca-cpa.org.
UN Convention on the Law of the Sea Annex VII Arbitral Tribunal, August 14, 2015.

Russia's seizure of the Greenpeace vessel *Arctic Sunrise* and the arrest of its crew in 2013 on suspicion of piracy resulted in two significant decisions: an order of provisional measures by the International Tribunal for the Law of the Sea (ITLOS) in 2013,[1] and an award on the merits by an arbitral tribunal constituted under the auspices of the Permanent Court of Arbitration (PCA Tribunal) in 2015.[2] Together these decisions have reaffirmed the high level of protection from seizure afforded to ships on the high seas under the United Nations Convention on the Law of the Sea (UNCLOS or Convention),[3] while developing important rules on the right of hot pursuit, especially in the sensitive context of offshore oil platforms.

The *Arctic Sunrise* is a Netherlands-flagged ship chartered by the environmentalist group Greenpeace International. On September 18, 2013, the *Sunrise* staged a "protest" against the oil platform Prirazlomnaya, which was operated by a company controlled by Russia in that country's exclusive economic zone (EEZ) in the Pechora Sea, off Russia's northern Arctic coast. The Greenpeace action consisted of deploying rigid inflatable boats and, from them, boarding the platform, where the activists intended to camp out. The protesters and their small boats were apprehended by the Russian Coast Guard, although not before a few of them had managed to board the rig.

A Russian Coast Guard ship then commanded the *Sunrise* to stop to be boarded, issuing a series of threats and firing warning shots. The *Sunrise* did not comply but proceeded to circle the rig at a distance of four miles, tracked by the Coast Guard vessel. The next day, the *Sunrise*

[1] Arctic Sunrise (Neth. v. Russ.), ITLOS Case No. 22, Request for the Prescription of Provisional Measures, Order of Nov. 22, 2013 [hereinafter Prov. Measures]. The order and other ITLOS documents cited herein are available at the tribunal's website, http://www.itlos.org.

[2] *In re* Arctic Sunrise (Neth. v. Russ.), PCA Case No. 2014-02, Merits (UNCLOS Annex VII Arb. Trib. Aug. 14, 2014) [hereinafter Merits]. The award and other documents relating to the arbitration cited herein are available at the tribunal's website, http://www.pca-cpa.org.

[3] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397, *available at* http://www.un.org/depts/los/ [hereinafter UNCLOS].

was boarded by the Russian ship, arrested, and brought into the port of Murmansk where its crew was charged with piracy (Merits, para. 106). Although the charges were subsequently reduced to "hooliganism," the initial accusation of piracy was crucial, as the crime is one of the only legal grounds for arresting foreign ships on the high seas.

Both Russia and the Netherlands are parties to UNCLOS, which provides for binding adjudication of "any dispute concerning the interpretation or application of" the Convention (Art. 286). States may choose from a variety of forums for settling their disputes under the Convention, but when, as in this situation, the parties to a particular dispute do not agree on the forum, the matter must be decided by an arbitral proceeding under UNCLOS Article 287(5). The Netherlands accordingly instituted such a proceeding at the Permanent Court of Arbitration on October 4, 2013.

Yet even in cases where jurisdiction over the merits lies elsewhere, the International Tribunal for the Law of the Sea has jurisdiction under UNCLOS Article 290(5) to order provisional measures, and in particular to require the "prompt release of vessels and crews" (Art. 292(1)). On October 21, 2013, the Netherlands applied to ITLOS for the release of the vessels and crew as provisional measures.

Thus, there were two sets of rulings in the *Arctic Sunrise* matter. The first, before ITLOS, resulted in an order of provisional measures on November 22, 2013. The second, the ruling of the PCA Tribunal, was issued on August 14, 2015, and dealt with the merits, as well as examining Russia's compliance with the provisional measures ordered in the prior ITLOS ruling.

Russia indicated by a *note verbale* that it would not recognize the jurisdiction of either tribunal (Merits, para. 23), and it refused to participate in any part of the proceedings before both bodies. After the conclusion of almost all the proceedings in the PCA Tribunal, Russia published a position paper entitled "Certain Legal Issues Highlighted by the Action of the Arctic Sunrise against Prirazlomnaya Platform," laying out its substantive legal arguments, while continuing to reject participation (*id.*, para. 68). As a result, the arbitral tribunal took no formal cognizance of the policy paper but noted that its ruling addresses the substantive issues raised by Russia (*id.*).

Despite Russia's nonparticipation, the tribunals issued full and detailed rulings on all the relevant issues. This approach accords with the practice of most international courts and tribunals since the nonappearance of a party does not result in pure default for the other side; rather, the forum "must satisfy itself not only that it has jurisdiction over the dispute, but also that the claim is well founded in fact and law."[4]

In its ruling on provisional measures, ITLOS first affirmed its jurisdiction, rejecting the claim by Russia that a declaration it had lodged upon ratification of UNCLOS in 1997 excluded the matter from compulsory dispute settlement. The declaration provides that Russia does not accept the Convention's procedures for binding resolution, inter alia, of "disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction."[5] Indeed, UNCLOS gives states parties the right to limit the scope of compulsory adjudication under the treaty in certain circumstances, including by filing a declaration (upon ratification, as Russia

[4] *See* ITLOS Statute, UNCLOS, *supra* note 3, Annex VI, Art. 28; *see also* ICJ Statute, Art. 53.

[5] Prov. Measures, para. 41 (quoting Russian Federation, Declaration [under Art. 298] (Mar. 12, 1997), *in* UN Division for Ocean Affairs and the Law of the Sea, Declarations and Statements, *at* http://www.un.org/depts/los/conventions_agreements/convention_declarations.htm); *see also* Anna Dolidze, *The* Arctic Sunrise *and NGOs in International Judicial Proceedings*, ASIL INSIGHT (Jan. 3, 2014).

did, or at any other time) that exempts such parties from jurisdiction in "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" (Art. 298(1)(b)). The Russian declaration tracks the language of the provision except for its last several words, referring to UNCLOS itself, and the distinction is crucial. Article 297, which limits compulsory dispute resolution under UNCLOS, refers in those paragraphs only to "marine scientific research" and "fisheries," and the exceptions for jurisdiction over law enforcement activities therefore relate only to such research and fisheries.

On this point, ITLOS ruled that Russia's declaration cannot be understood as being broader than the exceptions allowed under Article 298(1)(b), which applies to law enforcement only in the research or fisheries contexts (Prov. Measures, para. 45). It read the Article 298 allowance of declarations excluding certain issues from jurisdiction narrowly, as applying only to the class of cases expressly set out there. Although ITLOS did not invoke Article 310, which prohibits declarations upon ratification from "exclud[ing] or . . . modify[ing] the legal effect" of the treaty, it was clearly enforcing this anti-reservation provision.

The provisional measures prescribed by ITLOS on November 22, 2013, required Russia "immediately" to release the vessel and "all persons who have been detained" upon the posting of a bond by the Netherlands (Prov. Measures, para. 105(1)(a)), which the latter promptly did.[6] Russia was also required to ensure that the vessel and detainees be "allowed to leave" its territory (*id.*, para. 105(1)(b)).

Russia refused to comply with the order. The ship was eventually released more than six months later, in June 2014, and left Russian waters on August 1. The Greenpeace activists had been released on bail by the time of the provisional measures order and were allowed to leave Russia on December 27, over a month afterward.

In the merits proceedings before the PCA Tribunal, the central issue was whether Russia's seizure of the vessel had been unlawful. Under UNCLOS Article 101(a), to qualify as "piracy," the attackers must have come from "another ship." This "two-ship requirement" screens out cases of mutiny and other internal disturbances by the crew and passengers, which remain within the municipal jurisdiction of the flag state. In the case of the *Arctic Sunrise*, however, the arbitral tribunal noted that the Prirazlomnaya is "not a ship" but, rather, "an offshore ice-resistant fixed platform" (Merits, para. 238).[7] Therefore, Russia could have no possible basis for arresting the *Sunrise* on suspicion of piracy.

The PCA Tribunal next turned to the issue of hot pursuit, another narrow exception to the immunity of vessels on the high seas. The case presented an interesting interplay between UNCLOS Article 111, governing hot pursuit, and Article 60, which gives coastal states jurisdiction over artificial islands and fixed installations within their EEZ. The coastal state may exercise jurisdiction to protect such structures, by, among other things, declaring a 500-meter exclusion zone around them.

[6] Netherlands Report on Compliance with the Provisional Measures Prescribed by the Tribunal on 22 November 2013, Arctic Sunrise (Neth. v. Russ.) (Dec. 2, 2013).

[7] Violence against and endangerment of such platforms is dealt with specifically in the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. TREATY DOC. NO. 101-1 (1989), 1678 UNTS 304 [hereinafter Fixed Platforms Protocol]. The protocol does not provide for authority to seize vessels in the EEZ. Merits, para. 278.

Russia had declared such a safety zone, and the boats from the *Arctic Sunrise* had clearly violated it, potentially committing prosecutable crimes under Russian law. Yet the commission of such crimes, in the arbitral tribunal's words, "unlike the alleged commission of the crime of piracy . . . , does not provide a basis under international law for boarding a foreign vessel in the EEZ without the consent of the flag State" (Merits, para. 244). Committing offenses punishable by the coastal state does not give that state the power to arrest vessels in the EEZ, which is part of the high seas. Arrests, however, can be made in the 500-meter safety zone around artificial installations, since the safety rules would have little point if not immediately enforceable by the removal of dangers to navigation.

The right of hot pursuit is designed specifically to prevent vessels from committing offenses within the jurisdiction of a coastal state and then escaping onto the high seas (Merits, para. 245). Hot pursuit allows the coastal state to follow a vessel that has violated its laws or regulations within its territorial waters or EEZ safety zones and arrest the vessel on the high seas. (Article 111 also permits the pursuit of ships that merely send their "boats" into the relevant zones or waters, while themselves remaining outside, as was the case here.) But beyond the initial location of the foreign ship, the hot pursuit rule entails several limitations, whose applicability the PCA Tribunal examined.

The tribunal ruled that Russia had properly satisfied the requirement of demanding that the foreign ship stop, by orders to the *Sunrise* on VHF radio (Merits, para. 256). It rejected the Netherlands' argument that such radio transmissions would not count as a "visual or auditory signal . . . given at a distance which enables it to be seen or heard by the foreign ship," as required by UNCLOS Article 111(4) (*id.*, paras. 259–60). The more difficult question was whether the signal had been given, as hot pursuit requires, while one of the Greenpeace boats was still within the 500-meter zone. The extreme narrowness of such zones obviously makes the initiation of hot pursuit a close factual question. On the basis of a detailed review of various videos of the event and other evidence, the tribunal estimated that only an eleven-minute window was open for the stop order to be made. The arbitrators found that the "order was probably given (if only a minute or two) after the last of the *Arctic Sunrise*" boats left the safety zone (*id.*, para. 266).

It might seem that Russia barely missed its opportunity for hot pursuit, not because of any laxity on its part but, rather, because of the inherently fast-moving contingencies of the situation. In the context of a 500-meter zone and rigid boats with speeds exceeding 30 knots per hour, the hot pursuit requirement could easily be transformed into a blistering hot pursuit requirement, or create a "race to the radio transmitter" to make a stop order. The PCA Tribunal took the important step of concluding "that the location of the foreign ship at the time of the first stop order should not be evaluated with the full benefit of hindsight, but rather looked at from the perspective of the pursuing ship" (Merits, para. 267). Thus, the timeliness of the stop order should not be determined by the relatively precise methods available in a subsequent review of videos and positioning data, but by the contemporaneous subjective view of the enforcing vessel: did that vessel reasonably think the intruder ship was still in its safety zone? In other words, the tribunal found an implicit margin of appreciation for the issuance of orders to stop in hot pursuit.

Despite these conclusions about the Russian stop order, the PCA Tribunal found that another requirement of hot pursuit—that it must be continuous—had not been satisfied. The Russian Coast Guard ship, after an initial "flurry of orders, threats and warning shots," did not immediately close with and board the *Arctic Sunrise* (Merits, para. 271). For thirty-three hours

the Coast Guard ship "shadowed" the *Sunrise* before actually boarding it (*id.*). With little explanation, the tribunal ruled out the possibility that the Russian ship was merely following its target and waiting for the most opportune time to board (*id.*, para. 272). Instead, it decided that the Russian vessel had not been in hot pursuit because it did not board "as soon as possible" (*id.*, para. 271). Finally, the Tribunal cursorily dismissed numerous other potential Russian claims of law enforcement rights regarding the EEZ, and concluded that the seizure of the vessel was a breach of Russia's international legal responsibility.

The PCA Tribunal went on to consider Russia's compliance with the provisional measures ordered by ITLOS. It determined that the seven days it took to release the detainees constituted compliance with that part of the provisional measure, but the twenty-seven days that passed until they could leave represented a failure by Russia to ensure their prompt departure (Merits, para. 350). Moreover, Russia's six-month delay in releasing the vessel after the posting of bond also violated the provisional measure calling for prompt release. The tribunal apparently attributed some responsibility to Russia for the additional two months required for maintenance and unusually slow port inspections (*id.*, paras. 357–58).

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One of the major issues hanging over the *Arctic Sunrise* case was the refusal of Russia to appear, participate, or comply with any orders, despite its treaty obligation to do so. At the same time, Russia succeeded in informally communicating its substantive positions to the tribunals, which engaged these arguments seriously. Russia does not seem to have suffered for its nonparticipation by having the arguments in its favor given any less weight or consideration by the tribunals; indeed, they both often appeared to put Russia's potential positions in the best possible light.

On the central substantive issue of piracy, the PCA Tribunal's ruling is notable for upholding the broad immunity of ships from arrest on the high seas and rejecting efforts to broaden or expand the possible grounds for doing so. The tribunal firmly applied the formalistic two-ship requirement. Despite the broad extraterritorial criminal jurisdiction afforded by the protocol on the safety of fixed platforms on the continental shelf,[8] the arbitrators refused to see this latitude as any expansion of the rights to arrest vessels, though such an interpretation would provide a convenient (and often the only) means to secure personal jurisdiction over those who endanger or attack platforms.

The PCA Tribunal's ruling on hot pursuit derives its importance from two determinations. The first was the adoption of a subjective approach to the timing of orders to stop, an innovation that was explicitly motivated by policy concerns illustrating some of the larger issues lurking behind the technical UNCLOS questions. Oil platforms are both extremely valuable and vulnerable facilities. The 500-meter safety zone allowed by UNCLOS leaves little leeway for coastal states to respond to harmful incursions by fast-moving boats. The tribunal even noted that such situations raise the specter of terrorist attacks and the need for a legal allowance for prophylactic enforcement action. Of course, the *Sunrise* incident did not fit that situation, but the award hints that the UNCLOS regime may not be well prepared to handle one if and when it arises.

[8] *See* Fixed Platforms Protocol, *supra* note 7.

On the other hand, the PCA Tribunal's conclusion that hot pursuit was interrupted takes a needlessly restrictive approach to Article 111. To be sure, the Russian ship was not chasing the *Sunrise*; it was "shadowing" it. But nothing in the Convention suggests that hot pursuit requires an ongoing chase. Article 111 merely requires that pursuit not be "interrupted"—not that it mature into seizure as early as possible or in any other way confine the pursuer's tactical decision on when to stop the foreign vessel. After all, boarding is an outcome of hot pursuit, and it seems somewhat tautological to find an absence of the latter because of the lateness of the former. UNCLOS requires pursuit to be uninterrupted, or in the words of the ILC commentary, "continuous."[9] Continuous can be slow. The tribunal seems to have mistaken the requirement of immediacy in initiating pursuit for a requirement of maximum speed throughout.

Another approach would have been to reason that shadowing itself constituted a continued pursuit. The Russian vessel did remain engaged with the *Sunrise*. By comparison, in the prior major international precedent on hot pursuit, ITLOS had ruled that pursuit was interrupted when the pursuing vessel was "recalled."[10] Indeed, precedents and the opinion of publicists seem to require only that the vessels remain in contact, with some dispute about whether the pursuer must maintain visual or merely radar contact.[11] Other cases had allowed for hot pursuit with considerable periods of shadowing.[12]

The PCA award also contains important guidance on what constitutes sufficient compliance with provisional measures under UNCLOS. Prompt release is a remedy of particular strength and urgency under the Convention. The Tribunal affirmed that "prompt" is measured in days rather than weeks. Moreover, it placed the responsibility on the detaining power to remove ancillary obstacles to the actual release of vessels and crew, which may even suggest a positive duty to maintain detained vessels in a state of seaworthiness if they are subject to prompt release.

Finally, both tribunals had to deal with the problem of complete nonparticipation by Russia. Its refusal to comply with either ITLOS's prompt release order or the arbitral award raises serious concerns, especially since this refusal did not result in any adverse consequences to it during the proceedings, much less in diplomatic difficulties or international rebukes. At the subsequent Meeting of State Parties of UNCLOS, for example, Russia's noncompliance with the ITLOS orders or the arbitral award was not even directly mentioned.[13] This outcome can only weaken the dispute resolution mechanisms of UNCLOS, one of the treaty's main accomplishments. Given the PCA's recent agreement to serve as registry for a much more contentious and

[9] Report of the International Law Commission to the General Assembly, 11 UN GAOR Supp. No. 9 at 253, 285, para. 1(ii), UN Doc. A/3159 (1956).

[10] M/V Saiga (No. 2) (St. Vincent v. Guinea), ITLOS Case No. 2, Merits Judgment of July 1, 1999, 2 ITLOS Rep. 4, para. 147.

[11] *See* Craig H. Allen, *Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices*, 20 OCEAN DEV. & INT'L L. 309, 320 (1989) (noting U.S. position that hot pursuit remains continuous despite periods of observational interruption).

[12] William C. Gilmore, *Hot Pursuit: The Case of* R. v. Mills and Others, 44 INT'L & COMP. L.Q. 949, 951–52, 955–56 (1995).

[13] *See* UNCLOS, Report of the Twenty-Fourth Meeting of States Parties, UN Doc. SPLOS/277 (July 14, 2014). In discussing ITLOS's annual report, several delegations vaguely observed that "the importance of participating in [dispute resolution] procedures and complying with the binding decisions resulting therefrom was emphasized." *Id.*, para. 36.

consequential dispute under UNCLOS despite the nonparticipation of one of the parties,[14] the story of the *Arctic Sunrise* does not offer a promising precedent.

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United Nations Convention on the Law of the Sea—jurisdiction and admissibility—nonparticipation of a party—South China Sea claims, activities, and maritime features

IN RE ARBITRATION BETWEEN THE PHILIPPINES AND CHINA. PCA Case No. 2013–19. Jurisdiction and Admissibility. *At* http://www.pca-cpa.org.
UN Convention on the Law of the Sea Annex VII Arbitral Tribunal, October 29, 2015.

On October 29, 2015, an arbitral tribunal (Tribunal) constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea (UNCLOS or Convention)[1] found it had jurisdiction over seven Philippine submissions concerning Chinese activities in the South China Sea and the status of particular features there.[2] The Tribunal reserved for the merits stage the question of its jurisdiction over several other submissions. The case required the Tribunal to address challenges occasioned by China's nonparticipation. The decision reinforced the central importance of UNCLOS and its system of compulsory dispute settlement with respect to maritime activities and entitlements, even where sovereignty over the maritime features that give rise to entitlements is contested.

The Philippines initiated the case on January 22, 2013. Part XV, section 2 of UNCLOS, to which China and the Philippines are parties, provides for compulsory procedures entailing binding decisions. Since neither state had declared its preferred forum among several choices specified in the Convention, both parties were deemed to have accepted Annex VII arbitration.[3] On April 21, 2015, the five-member Tribunal ordered that the proceedings be bifurcated so that it could deal first with questions of jurisdiction and admissibility. In its award of October 29, 2015, the Tribunal fully considered arguments relating to its jurisdiction and ruled unanimously on all points. Although China did not appear and has condemned the Tribunal's decision as "null and void" with "no binding effect on China,"[4] the parties will be legally bound by any decision in which the Tribunal has found that it has jurisdiction (para. 114).[5] The Permanent Court of Arbitration is serving as the registry.

The Philippines requested rulings on fifteen submissions (para. 101). Submissions 1–2 seek declarations that UNCLOS governs China's rights and obligations in the South China Sea, and

[14] *In re* Arbitration Between the Republic of the Philippines and the People's Republic of China, PCA Case No. 2013-19, Jurisdiction and Admissibility (Oct. 29, 2015).

[1] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397 [hereinafter UNCLOS], *available at* http://www.un.org/depts/los/.

[2] *In re* Arbitration Between the Republic of the Philippines and the People's Republic of China, PCA Case No. 2013-19, Jurisdiction and Admissibility (Oct. 29, 2015), *at* http://www.pca-cpa.org [hereinafter Award].

[3] UNCLOS, *supra* note 1, Art. 287(3).

[4] Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines (Oct. 30, 2015), *at* http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml.

[5] *See* UNCLOS, *supra* note 1, Arts. 288(4), 296(1), & Annex VII, Art. 11.