

## I. INTRODUCTION

1. The Kingdom of the Netherlands (“the Netherlands”) is the claimant in this arbitration. It is represented by Professor Dr. Liesbeth Lijnzaad, Legal Adviser of the Netherlands’ Ministry of Foreign Affairs, as Agent, and Professor Dr. René Lefeber, Deputy Legal Adviser of the Netherlands’ Ministry of Foreign Affairs, as Co-Agent.
2. The Russian Federation (“Russian Federation” or “Russia”) is the respondent. It has not appointed any agents, counsel, or other representatives.
3. The arbitration concerns measures taken by Russia against the *Arctic Sunrise*, a vessel flying the flag of the Netherlands, and the thirty persons on board that vessel (“Arctic 30”). On 18 September 2013, Greenpeace International (Stichting Greenpeace Council) (“Greenpeace International”), the charterer and operator of the *Arctic Sunrise*, used the vessel to stage a protest at the Russian offshore oil platform *Prirazlomnaya* (“*Prirazlomnaya*”), located in the Pechora Sea (the south-eastern part of the Barents Sea) within the exclusive economic zone (“EEZ”) of Russia. On 19 September 2013, in response to the protest, the *Arctic Sunrise* was boarded, seized, and detained by the Russian authorities. The vessel was subsequently towed to Murmansk (a northern Russian port city). The *Arctic Sunrise* was held in Murmansk despite requests from the Netherlands for its release. The Arctic 30 were initially arrested, charged with administrative and criminal offences, and held in custody. They were released on bail in late November 2013 and subsequently granted amnesty by decree of the Russian State Duma on 18 December 2013. The non-Russian nationals were permitted to leave Russia shortly thereafter. On 6 June 2014, the arrest of the *Arctic Sunrise* was lifted. The ship departed from Murmansk on 1 August 2014 and arrived in Amsterdam on 9 August 2014.
4. The Netherlands claims that, in taking these measures against the *Arctic Sunrise* and the Arctic 30, Russia violated its obligations toward the Netherlands under the United Nations Convention on the Law of the Sea (“Convention”)<sup>1</sup> and customary international law. The Netherlands also claims that Russia violated the Convention by failing to comply fully with the provisional measures prescribed by the International Tribunal for the Law of the Sea (“ITLOS”) and by failing to participate in these arbitral proceedings. The Netherlands seeks, *inter alia*, a declaratory judgment stating that Russia’s conduct is unlawful, a formal apology, appropriate assurances and guarantees of non-repetition of unlawful acts, and compensation for losses incurred as a result of the measures taken by Russia.

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<sup>1</sup> 1982, vol. 1833, UNTS, paras. 396-581.

5. In a *Note Verbale* to the Netherlands dated 22 October 2013,<sup>2</sup> Russia referred to the declaration it made when ratifying the Convention (“Declaration”). In the Declaration, Russia stated that “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.”
6. By another *Note Verbale* dated 27 February 2014 and addressed to the Permanent Court of Arbitration (“PCA”), Russia stated that “[t]he Russian side confirms its refusal to take part in this arbitration and abstains from providing comments both on the substance of the case and procedural matters.”<sup>3</sup>
7. Russia has not participated in this arbitration at any stage. It did not submit written pleadings in response to those filed by the Netherlands; it did not attend the hearing held in Vienna on 10-11 February 2015; and it did not advance any of the funds requested by the Tribunal toward the costs of arbitration.
8. Under the Convention, non-participation in the proceedings by one of the parties to a dispute does not constitute a bar to proceedings in the case. Article 9 of Annex VII to the Convention provides that, if one of the parties to a dispute does not appear before the tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. At the first procedural meeting held on 17 March 2014 in Bonn, Germany, the Netherlands, referring to Article 9 of Annex VII to the Convention and to Article 25(1) of the Rules of Procedure of the Tribunal, requested the Tribunal “to continue with the proceedings and to make its award.” This request was subsequently formalised by a letter dated 31 March 2014 from the Netherlands.
9. As requested by the Netherlands, the Tribunal has continued the proceedings. At the same time, it has taken measures to safeguard Russia’s procedural rights. *Inter alia*, it has: (i) ensured that all communications and materials submitted in this arbitration have been promptly delivered, both electronically and physically, to the Russian Ministry of Foreign Affairs in Moscow and to the Ambassador of Russia to the Netherlands in The Hague; (ii) granted Russia adequate time to submit responses to the written pleadings submitted by the Netherlands; (iii) provided Russia adequate notice of procedural meetings and the hearing in the case; (iv) promptly provided Russia

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<sup>2</sup> Annex N-17. All references to an Annex with a prefix N are references to an Annex to the Memorial of the Netherlands.

<sup>3</sup> Annex N-34.

with copies of recordings and/or transcripts of procedural meetings and the hearing; and  
(v) reiterated the right of Russia to participate in the proceedings at any stage.

- ~~10. Further, non-participation by a State party in any of the compulsory procedures entailing binding decisions provided for in Section II of Part XV of the Convention, including arbitration, affects neither the jurisdiction of the tribunal in question nor the binding nature of any final decision rendered by that tribunal. Article 288(4) of the Convention states that “in the event of a dispute as to whether a court has jurisdiction, the matter shall be settled by decision of that court or tribunal.” Article 296(1) of the Convention provides that “[a]ny decision rendered by a court or tribunal having jurisdiction under [Section II of Part XV] shall be final and shall be complied with by all the parties to the dispute.” In addition, Article 11 of Annex VII provides: “[The] award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute.” Accordingly, the Tribunal concludes that, despite its non-participation in the proceedings, Russia is bound under international law by any awards rendered by the Tribunal.~~
- ~~11. However, Article 9 of Annex VII to the Convention states that, “[b]efore making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and in law.”~~
- ~~12. The Netherlands has repeatedly maintained that the statement of Russia in its *Note Verbale* dated 22 October 2013 constituted a plea concerning the jurisdiction of the Tribunal over the dispute. Accordingly, the Netherlands requested the Tribunal to bifurcate the proceedings. In its comments on the draft Rules of Procedure and the draft Procedural Order No. 1, submitted on 27 February 2014, the Netherlands stated, *inter alia*, that it considered the statement of Russia in its *Note Verbale* dated 22 October 2013 to be “a plea concerning the jurisdiction of the Arbitral Tribunal.” At the first procedural meeting held on 17 March 2014 in Bonn, Germany, the Netherlands requested the Tribunal to bifurcate the proceedings. In paragraph 59 of its Memorial, the Netherlands again requested the Tribunal to bifurcate the proceedings; specifically, it stated that it considered Russia’s diplomatic notes of 22 October 2013 and 27 February 2014 as a plea concerning the jurisdiction of the Tribunal, and requested the Tribunal to rule on the plea as a preliminary question.~~
- ~~13. By letter dated 6 November 2014, the Tribunal invited Russia to comment on the request of the Netherlands for bifurcation of the proceedings. No response was received from Russia.~~
- ~~14. On 14 November 2014, the Tribunal sent to the Parties a draft Procedural Order No. 4 (Bifurcation), which stated, *inter alia*, that the Tribunal would rule on Russia’s plea concerning~~

## II. PROCEDURAL HISTORY

### ~~A. INITIATION OF THE ARBITRATION~~

~~21. By Notification and Statement of the Claim and the Grounds on which it is Based dated 4 October 2013 (“Statement of Claim”),<sup>4</sup> the Netherlands initiated this arbitration against Russia pursuant to Article 287 and Annex VII to the Convention.~~

### B. APPLICATION TO ITLOS FOR PROVISIONAL MEASURES

22. Pending constitution of the Tribunal, the Netherlands submitted, on 21 October 2013, an application to ITLOS for the prescription of provisional measures pursuant to Article 290(5) of the Convention.

23. By a *Note Verbale* dated 22 October 2013 addressed to ITLOS, Russia stated its position with respect to the arbitration in the following terms:

The investigative activities related to the vessel *Arctic Sunrise* and its crew have been and are being conducted by the Russian authorities, since under the [Convention], as the authorities of the coastal State, they have jurisdiction, including criminal jurisdiction, to enforce compliance with the legislation of the Russian Federation.

Upon ratification of the Convention on 26 February 1997 the Russian Federation drew up a declaration stating *inter alia* that it did 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.”

On the basis of the above, the Russian Federation does not accept the arbitration proceedings proposed by the Kingdom of the Netherlands under Annex VII [of the Convention] in the case of *Arctic Sunrise* and does not intend to participate in the hearing by the [ITLOS] of the request of the Kingdom of the Netherlands to prescribe provisional measures pursuant to article 290, paragraph 5 of the Convention.<sup>5</sup>

24. ITLOS sought the written views of the Parties on the Netherlands’ application for provisional measures. The Netherlands provided its written views. Russia did not provide any views. Having requested additional materials from the Netherlands, ITLOS held a hearing on the Netherlands’ application. Both Parties were invited to the hearing. The Netherlands participated in the hearing. Russia did not attend. On 22 November 2013, ITLOS issued an Order prescribing provisional measures (“ITLOS Order”) as follows:

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<sup>4</sup> Annex N-1.

<sup>5</sup> Reproduced here is the English translation (from the original Russian) of the *Note Verbale* from Russia to the Netherlands submitted by the Netherlands as Annex N-17. The *Note Verbale* from Russia to ITLOS (Annex N-18) contains the same text in a different English translation.

(1) (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;<sup>6</sup>

25. According to the Netherlands, Russia did not fully comply with the provisional measures prescribed by ITLOS.<sup>7</sup>

### ~~C. CONSTITUTION OF THE TRIBUNAL~~

~~26. In its Statement of Claim, the Netherlands appointed Professor Alfred H.A. Soons, a Dutch national, as a member of the Tribunal, in accordance with Article 3(b) of Annex VII to the Convention.~~

~~27. Russia failed to appoint a second member of the Tribunal within 30 days of receiving the Statement of Claim. Consequently, on 15 November 2013, the Netherlands requested the President of ITLOS to appoint one member of the Tribunal pursuant to Article 3(c) and (e) of Annex VII to the Convention.<sup>8</sup>~~

~~28. On 13 December 2013, the President of ITLOS appointed Dr. Alberto Székely, a Mexican national, as a member of the Tribunal.<sup>9</sup>~~

~~29. By letter dated 13 December 2013, the Netherlands requested the President of ITLOS to appoint the three remaining members of the Tribunal and designate one of them as president pursuant to Article 3(d) and (e) of Annex VII.<sup>10</sup>~~

~~30. On 10 January 2014, the President of ITLOS appointed Mr. Henry Burmester, an Australian national, Professor Janusz Symonides, a Polish national, and Judge Thomas A. Mensah, a~~

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<sup>6</sup> [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.22/Order/C22\\_Ord\\_22\\_11\\_2013\\_orig\\_Eng.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf). Website last visited on 9 August 2015.

<sup>7</sup> Memorial, paras. 355-365.

<sup>8</sup> ~~Letter from the Netherlands to ITLOS, 15 November 2013 (Annex N-26).~~

<sup>9</sup> ~~Letter from the Netherlands to ITLOS, 13 December 2013 (Annex N-29); Letter from the President of ITLOS to the Netherlands, 10 January 2014 (Annex N-30).~~

<sup>10</sup> ~~Letter from the Netherlands to ITLOS, 13 December 2013 (Annex N-29); Letter from the President of ITLOS to the Netherlands, 10 January 2014 (Annex N-30).~~

~~that although Russia has since released the *Arctic Sunrise* and granted amnesty to the Arctic 30, the Netherlands does not consider that the dispute between the Parties has been fully resolved.<sup>137</sup>~~

144. The dispute concerns the lawfulness of the boarding, seizure, and detention of the *Arctic Sunrise* on 19 September 2013 and subsequent measures taken by Russia with respect to the *Arctic Sunrise* (including the Arctic 30).<sup>138</sup> The dispute also concerns the lawfulness of: (i) Russia's alleged establishment of a three-nautical mile safety zone around the *Prirazlomnaya*; (ii) Russia's alleged non-compliance with the ITLOS Order; and (iii) Russia's non-payment of deposits in these proceedings. The dispute does not concern the lawfulness of the measures taken by Russia on 18 September 2013. Although, in its Third Supplementary Submission, the Netherlands submits that the "deprivation of liberty outside formal arrest and detention of Ms. Saarela and Mr. Weber on 18-19 September 2013" did not "meet the requirements of the principle of reasonableness," the Tribunal notes that the Netherlands does not seek any relief in this respect.

~~145. Article 9 of Annex VII to the Convention provides:~~

~~If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.~~

~~146. Accordingly, and as noted above at paragraph 20, in this Award the Tribunal will decide on matters of jurisdiction that were not decided in the Award on Jurisdiction, as well as on the admissibility and the factual and legal merits of the Netherlands' claims. Issues concerning the quantum of compensation will not be determined in this Award and will be reserved to a later phase if necessary.~~

~~147. The Netherlands has noted that there could potentially be "overlap" in some of the respective claims for reparation for injury submitted by the Arctic 30 to the ECtHR and the Netherlands to this Tribunal.<sup>139</sup> It submits, however, that neither international law in general, nor the Convention~~

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<sup>137</sup> Hearing Tr., 10 February 2015 at 7-9 (opening statement of the Netherlands). According to the Netherlands, "the release of the *Arctic Sunrise* and the persons who have been on board, as well as their return to their respective home countries, did not provide an adequate resolution of the dispute. Not all claims, as reflected in the Statement of Claim, had been satisfied by the Russian Federation." Furthermore, since the commencement of these proceedings, the Netherlands claims that the Russian Federation "aggravated and extended the dispute" by: (i) bringing serious criminal charges against the persons on board the *Arctic Sunrise*; (ii) keeping them in pre-trial detention for an extended period of time; (iii) failing to timely and fully implement the order of ITLOS; and (iv) failing to participate in the present arbitral procedure.

<sup>138</sup> See discussion of the unity of the ship at paras. 170-172 below.

<sup>139</sup> Second Supplementary Submission, p. 4, para. 8.

160. The Netherlands contends that its jurisdiction as a flag State encompasses the ship as well as all persons who were on board the *Arctic Sunrise* at the relevant times. The Netherlands submits that the Convention “generally considers a ship and all persons and objects on it as a ‘unit’.”<sup>153</sup> In support it cites the statement of ITLOS in *M/V “SAIGA” (No. 2)*:

The Convention considers the ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State.<sup>154</sup>

161. The Netherlands notes that the present case is the first case before an international court or tribunal under UNCLOS not involving a fishing or war ship.<sup>155</sup> All persons on board those kinds of vessels are usually part of a crew, whereas not all persons on board the *Arctic Sunrise* were crewmembers. Notwithstanding this, the Netherlands contends that the concept of the ship as a unit applies equally to the *Arctic Sunrise*.<sup>156</sup> The Netherlands submits that all of the persons on board the *Arctic Sunrise* were either “involved” or “interested” in its operations.<sup>157</sup>

162. Further, the Netherlands submits that ITLOS treated the *Arctic Sunrise* as a unit when it ordered Russia to “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” and to “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.”<sup>158</sup>

163. The Netherlands submits that the invocation of responsibility for breaches of rights directly owed by Russia to the Netherlands under the Convention is not subject to the exhaustion of local remedies rule.<sup>159</sup>

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<sup>153</sup> Memorial, para. 90.

<sup>154</sup> *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10 at para. 106.

<sup>155</sup> Memorial, para. 93.

<sup>156</sup> *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10 at para. 106.

<sup>157</sup> Memorial, para. 93.

<sup>158</sup> Memorial, para. 92; ITLOS Order, *dispositif*, para. 105(1)(a) and (b), respectively.

<sup>159</sup> Memorial, para. 100, citing *M/V “Virginia G” (Panama v. Guinea-Bissau)*, Judgment of 14 April 2014, ITLOS Reports 2014, to be published, paras. 157-158, and J. Dugard, “Diplomatic Protection” in J. Crawford, A. Pellet & S. Olleson (eds.), *The Law of International Responsibility* (2010), p. 1062.

164. Article 42 of the Articles on Responsibility of States for Internationally Wrongful Acts (“Articles on State Responsibility”)<sup>160</sup> of the International Law Commission of the United Nations (“ILC”) addresses the invocation, by an injured State, of the responsibility of another State:

ARTICLE 42

*Invocation of responsibility by an injured State*

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) that State individually; or
- (b) a group of States including that State, or the international community as a whole, and the breach of the obligation:
  - (i) specially affects that State;
  - (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

165. The Netherlands invokes this provision for its claim that it is entitled as an injured State to invoke the responsibility of Russia with respect to breaches by Russia of obligations owed to it under the Convention.

166. Part V of the Convention sets out the rights and duties of coastal States and other States, including flag States, within the coastal State’s EEZ. Article 56(2) provides that in exercising its rights and performing its duties under the Convention in the EEZ, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the Convention. Article 58 concerns the rights and duties of other States in the EEZ. It provides that all States enjoy, subject to the relevant provisions of the Convention, the freedoms referred to in Article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms and not incompatible with other provisions of the Convention. Article 92 provides for the exclusive jurisdiction of the flag State over ships in the EEZ.

167. Part XV of the Convention concerns the settlement of disputes between States Parties. It stipulates the obligation of a State Party to a dispute to comply promptly with any provisional measure prescribed by ITLOS under Article 290 (Article 290(1)) and to comply with any decision rendered by a court or tribunal having jurisdiction under the relevant section (Article 296(1)).

168. The above provisions set out some of the rights conferred upon and obligations owed to States under the Convention. Although it is characteristic of multilateral treaties such as the Convention

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<sup>160</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries (text adopted by the ILC at its fifty-third session, in 2001).



to establish a framework of rules that apply to all State parties, in certain cases its performance in a given situation involves a relationship of a bilateral character between two parties.<sup>161</sup> That is the case here. Russia owed certain obligations to the Netherlands under the Convention. It had to ensure that any law enforcement measures taken by it against a vessel within the EEZ under the exclusive jurisdiction of the Netherlands complied with the requirements of the Convention. It was also obligated to comply with the compulsory dispute settlement regime contained in the Convention. The Netherlands also owed obligations to Russia. However, for the present purposes of assessing the standing of the Netherlands to bring claims against Russia, the Tribunal need only be satisfied that obligations were owed by Russia to the Netherlands under the Convention.

169. The Tribunal is satisfied that under the Convention the Netherlands has standing to invoke the international responsibility of Russia for breaches of obligations owed by Russia to the Netherlands under the Convention.
170. The Tribunal turns now to the question of whether the *Arctic Sunrise* and all persons on board the ship at the relevant times should be considered as part of the unit of the ship. In *M/V "SAIGA" (No. 2)* and *M/V "Virginia G"*, ITLOS held that "every person involved or interested" in a vessel's operations should be considered as part of the unit of the ship and thus treated as an entity linked to the flag State.<sup>162</sup>
171. On 3 October 2013, the Crew Manager from the Ships Unit of Greenpeace International issued a list of all persons who were on board the *Arctic Sunrise* when it left the port of Kirkenes, Norway. That list contained the names of the Arctic 30.<sup>163</sup> Not all of the persons on board the *Arctic Sunrise* were, strictly speaking, crewmembers. Notwithstanding this, the Tribunal is satisfied that all thirty individuals on board the *Arctic Sunrise* at the relevant times were "involved" or "interested" in the ship's operations. Even if some did not engage directly in the functioning of the vessel as would a crewmember, they were all closely involved or interested in the ship's campaigning operations for Greenpeace through protest at sea. As such, they are properly considered part of the unit of the ship, and thus fall under the jurisdiction of the Netherlands as the flag State.
172. Accordingly, the Tribunal considers the *Arctic Sunrise* to be a unit such that its crew, all persons and objects on board, as well as its owner and every person involved or interested in its

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<sup>161</sup> J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 258, para. 8.

<sup>162</sup> *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, p. 10 at para. 106; *M/V "Virginia G" (Panama v. Guinea-Bissau)*, Judgment of 14 April 2014, ITLOS Reports 2014, to be published, para. 127.

<sup>163</sup> Letter from Mr. Frits de Vink (Crew Manager, Greenpeace International), 3 October 2013 (Annex N-4).

operations, are part of an entity linked to the Netherlands as the flag State. The Tribunal finds that the Netherlands is entitled to bring claims in respect of alleged violations of its rights under the Convention which resulted in injury or damage to the ship, the crew, all persons and objects on board, as well as its owner and every person involved or interested in its operations. This conclusion applies regardless of the nationality of the person in question and equally when the person in question is a national of the coastal State that is taking measures to enforce its laws or protect its rights and interests within the EEZ.

173. As the claims are direct claims brought by the Netherlands against Russia under the Convention, the requirement for the exhaustion of local remedies is inapposite.

**2. The Netherlands' standing to invoke Russia's responsibility for injury caused to all persons on board the ship flying its flag, the *Arctic Sunrise*, regardless of nationality**

174. The Netherlands submits as a second ground that it has standing to invoke Russia's responsibility for injury caused to all persons on board the *Arctic Sunrise*, regardless of nationality.<sup>164</sup>

175. This statement is not a separate ground for standing of the Netherlands to invoke Russia's responsibility; rather, it concerns the scope of the Netherlands' standing as already accepted by this Tribunal above at paragraphs 164 to 172. The Tribunal accepts that all persons on board the *Arctic Sunrise* at the relevant times are part of the unit of the ship and therefore fall under the exclusive jurisdiction of the Netherlands as flag State. The nationality of the individuals is not relevant. The Netherlands is not exercising diplomatic protection in the classic sense over all of the individuals on board; it can only do that with respect to the Dutch nationals on board. Rather, the Netherlands is acting in its capacity as the flag State of the *Arctic Sunrise*, with exclusive jurisdiction over the vessel within the EEZ of Russia.

**3. The Netherlands' entitlement to exercise diplomatic protection on behalf of the individual members of the crew having Dutch nationality**

176. The Netherlands also argues that it is entitled to exercise diplomatic protection on behalf of its nationals, subject to the exhaustion of the local remedies rule and nationality of claims rule.<sup>165</sup> The Netherlands identifies two Dutch nationals on board the *Arctic Sunrise* at the relevant times: Mr. Mannes Ubels and Ms. Faiza Oulahsen.<sup>166</sup>

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<sup>164</sup> Memorial, paras. 89, 103-107.

<sup>165</sup> Memorial, paras. 89, 108-115.

<sup>166</sup> Memorial, para. 108.

185. The Tribunal will address the extent to which international human rights law is applicable in the following Section. The Tribunal has already concluded that the Netherlands has standing to invoke the international responsibility of Russia for alleged breaches owed directly to the Netherlands under the Convention. This standing applies with respect to all violations of the Netherlands' exclusive flag-State jurisdiction over the *Arctic Sunrise* claimed under the Convention as indicated in paragraph 172 above.
186. Having found that the Netherlands enjoys standing under the Convention for the above alleged breaches, it is not necessary for the Tribunal also to consider whether the Netherlands enjoys standing *erga omnes* or *erga omnes (partes)* to invoke the international responsibility of the Russian Federation with respect to its claims.

## VI. APPLICABLE LAW

187. Article 293(1) of the Convention provides that: “A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.”
188. Article 293(1) does not extend the jurisdiction of a tribunal.<sup>179</sup> Rather, it ensures that, in exercising its jurisdiction under the Convention, a tribunal can give full effect to the provisions of the Convention. For this purpose, some provisions of the Convention directly incorporate other rules of international law.<sup>180</sup>
189. The Convention also provides at Article 311(2) that: “[t]his Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.”

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<sup>179</sup> *MOX Plant (Ireland v. United Kingdom)*, Procedural Order No. 3 of 24 June 2003, para. 19, PCA Award Series (2010), p. 52; *Eurotunnel (1. The Channel Tunnel Group Limited 2. France-Manche S.A. v. 1. The Secretary of State for Transport of the United Kingdom 2. Le Ministre de l'équipement, des transports, de l'aménagement du territoire, du tourisme et de la mer de la France)*, Partial Award of 30 January 2007, 132 International Law Reports, 1, para. 152; “*ARA Libertad (Argentina v. Ghana)*”, Order of 15 December 2012, Separate Opinion of Judges Wolfrum and Cot, para. 7.

<sup>180</sup> For example, Article 74 provides that “[t]he delimitation of the exclusive economic zone between states with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 in the Statute of the International Court of Justice, in order to reach an equitable solution.”

190. In order properly to interpret and apply particular provisions of the Convention, it may be necessary for a tribunal to resort to foundational or secondary rules of general international law such as the law of treaties<sup>181</sup> or the rules of State responsibility.<sup>182</sup>
191. In the case of some broadly worded or general provisions, it may also be necessary to rely on primary rules of international law other than the Convention in order to interpret and apply particular provisions of the Convention. Both arbitral tribunals and ITLOS have interpreted the Convention as allowing for the application of relevant rules of international law. Article 293 of the Convention makes this possible. For instance, in *M/V "SAIGA" No. 2*, ITLOS took account of general international law rules on the use of force in considering the use of force for the arrest of a vessel:

In considering the force used by Guinea in the arrest of the Saiga, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.<sup>183</sup>

192. Article 293 is not, however, a means to obtain a determination that some treaty other than the Convention has been violated, unless that treaty is otherwise a source of jurisdiction,<sup>184</sup> or unless the treaty otherwise directly applies pursuant to the Convention.<sup>185</sup>
193. At times, the Netherlands appears to invite the Tribunal directly to determine that there has been a breach by Russia of Articles 9 and 12(2) of the ICCPR, to which both States are parties.<sup>186</sup> For example, in its Memorial the Netherlands submits:

The Russian Federation, through its law-enforcement actions, exercised a level of control over the *Arctic Sunrise* and the persons on board that required it to respect and ensure the rights laid down in the ICCPR. Therefore, pursuant to Article 293 UNCLOS and Article 13 of the Tribunal's Rules of Procedure, the Tribunal is required to apply international human

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<sup>181</sup> As reflected in the Vienna Convention on the Law of Treaties, 1969, for example.

<sup>182</sup> As reflected in the Articles on State Responsibility, for example.

<sup>183</sup> *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10 at para. 155.

<sup>184</sup> Article 288(2) of the Convention provides that: "[a] court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement."

<sup>185</sup> As provided, for example, in Article 301 of the Convention: "In exercising their rights and performing their duties under this Convention, State Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations."

<sup>186</sup> The Netherlands signed the ICCPR on 25 June 1969 and ratified it on 11 December 1978. The Union of Soviet Socialist Republics signed the ICCPR on 18 March 1968 and ratified it on 16 October 1973. Russia, as the successor State to the Soviet Union, is bound by the ICCPR.

rights law, in particular the ICCPR, to review the lawfulness of these law-enforcement actions under the UNCLOS.

In the alternative, should the Tribunal decide that international human rights law, or parts thereof, do not form part of the applicable law in the present case, the Netherlands requests the Tribunal to interpret the relevant provisions of the UNCLOS in light of international human rights law, in conformity with Article 31.3f(c) of the 1969 Vienna Convention on the Law of Treaties. The latter provides that for the purposes of the interpretation of a treaty, there shall be taken into account, together with the context, '[a]ny relevant rules of international law applicable in the relations between the parties.'<sup>187</sup>

194. In its Second Supplementary Submission, the Netherlands submits that: “[t]he alleged breaches set out in paragraph 397(1)(c) of the Memorial concern Articles 9 (right to liberty and security) and 12(2) (right to leave a country) of the ICCPR.”<sup>188</sup> It goes on to argue that:

... the determination of the breaches of Articles 9 and 12.2 ICCPR by the Russian Federation involves the interpretation and application of any provision of the UNCLOS that may be invoked to justify the arrest and detention of as well as the initiation of judicial proceedings against the persons on board the *Arctic Sunrise*.

In particular, in exercising such rights in its exclusive economic zone, a coastal State must have ‘due regard to the rights and duties of other States’ in accordance with Articles 56.2 UNCLOS. This obligation is not limited to the rights and duties of other States under the UNCLOS, but extends to other rules of international law, including human rights law. This is corroborated by Article 58.2 UNCLOS pursuant to which ‘other pertinent rules of international law’ apply in respect of the rights and duties of other States in the exclusive economic zone. Accordingly, the determination of the breaches of Articles 9 and 12.2 ICCPR by the Russian Federation involves the interpretation and application of Articles 56.2 and 58.2 UNCLOS.<sup>189</sup>

195. In its closing statement at the hearing and in its Third Supplementary Submission, the Netherlands clarified that it:

... was not inviting the Tribunal to determine that there is a breach of Articles 9 and 12.2 of the ICCPR if the Tribunal considers that the content of these provisions, as interpreted and applied by international courts and tribunals, are an integral part of the principle of reasonableness as applicable to law enforcement actions under the Convention.<sup>190</sup>

196. By contrast, the Netherlands has not invited the Tribunal to determine whether Russia breached the ECHR.<sup>191</sup>

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<sup>187</sup> Memorial, paras. 175-176.

<sup>188</sup> Second Supplementary Submission, p. 6, para. 1.

<sup>189</sup> Second Supplementary Submission, pp. 7-8, paras. 3-4.

<sup>190</sup> Hearing Tr., 11 February 2015 at 23:25-24:12; Third Supplementary Submission, p. 2, para. 1.

<sup>191</sup> Memorial, para. 170: “... the Netherlands does not request the Tribunal to interpret or apply the ECHR.” In addition, in its Second Supplementary Submission, the Netherlands states that “the claims of the ‘Arctic 30’ [before the ECtHR] and the Netherlands are based on different legal instruments. The claims of the ‘Arctic 30’ concern alleged breaches of rights under the ECHR, whereas the human rights aspects of the claims of the Netherlands in the present arbitration concern alleged breaches of rights under the [Convention], the [ICCPR] and customary international law” (p. 3, para. 6).

197. The Tribunal considers that, if necessary, it may have regard to general international law in relation to human rights in order to determine whether law enforcement action such as the boarding, seizure, and detention of the *Arctic Sunrise* and the arrest and detention of those on board was reasonable and proportionate. This would be to interpret the relevant Convention provisions by reference to relevant context. This is not, however, the same as, nor does it require, a determination of whether there has been a breach of Articles 9 and 12(2) of the ICCPR as such. That treaty has its own enforcement regime and it is not for this Tribunal to act as a substitute for that regime.
198. In determining the claims by the Netherlands in relation to the interpretation and application of the Convention, the Tribunal may, therefore, pursuant to Article 293, have regard to the extent necessary to rules of customary international law, including international human rights standards, not incompatible with the Convention, in order to assist in the interpretation and application of the Convention's provisions that authorise the arrest or detention of a vessel and persons. This Tribunal does not consider that it has jurisdiction to apply directly provisions such as Articles 9 and 12(2) of the ICCPR or to determine breaches of such provisions.

## **VII. MERITS: ALLEGED INTERNATIONALLY WRONGFUL ACTS OF RUSSIA**

199. Having found that it has jurisdiction over the dispute and that the Netherlands' claims are admissible, the Tribunal now turns to the merits of the Netherlands' allegations of breaches by Russia of its international obligations.
200. Below, the Tribunal addresses the Netherlands' allegations in the order in which they were presented in the Memorial, as they relate to: (A) Russia's establishment of a safety zone around the *Prirazlomnaya*; (B) the lawfulness of the measures taken by Russia against the *Arctic Sunrise* and its crew; (C) compliance with the ITLOS Order; and (D) Russia's failure to pay deposits in this arbitration.
201. Before dealing with the specific allegations, the Tribunal concludes that all of the internationally wrongful acts alleged by the Netherlands are attributable to the Russian Federation.

### **A. RUSSIA'S ESTABLISHMENT OF A SAFETY ZONE AROUND THE *PRIRAZLOMNAYA***

202. Pursuant to Article 56(1)(b)(i) of the Convention, a coastal State has jurisdiction in its EEZ with regard to "the establishment and use of artificial islands, installations and structures." The scope of this jurisdiction is described in Article 60, which provides, in relevant part:

## ARTICLE 60

### ARTIFICIAL ISLANDS, INSTALLATIONS AND STRUCTURES IN THE EXCLUSIVE ECONOMIC ZONE

1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:

- (a) artificial islands;
- (b) installations and structures for the purposes provided for in article 56 and other economic purposes;
- (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

[ . . . ]

4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.

5. The breadth of the safety zones shall be determined by the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extent of safety zones.

6. All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.

[ . . . ]

203. The Netherlands submits that Russia breached its obligations toward the Netherlands under the Convention by applying national legislation establishing a zone of three nautical miles around the *Prirazlomnaya* “in which navigation without prior authorization of the Russian Federation is prohibited.”<sup>192</sup> According to the Netherlands, this three-nautical mile zone is in contravention of Article 60(5) of the Convention, pursuant to which the maximum allowed breadth of a safety zone around an artificial island, installation, or structure is 500 metres.<sup>193</sup>
204. On this basis, the Netherlands requests that the Tribunal, *inter alia*, “order the Russian Federation to issue a notice to mariners revoking the existing notices to mariners relating to the *Prirazlomnaya*, including in particular Notices to Mariners No. 51/2011 and Notices to Mariners

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<sup>192</sup> Memorial, paras. 181, 183, 189, 197.

<sup>193</sup> Memorial, paras. 190-196.

21/2014, and replacing them by notices to mariners that are in accordance with the [Convention].”<sup>194</sup>

205. The Tribunal agrees with the Netherlands that the *Prirazlomnaya* is an “artificial island, installation or structure” to which Article 60 of the Convention applies. This conclusion is also in line with the apparent views of the Russian authorities.<sup>195</sup>
206. The Tribunal notes, however, that the Netherlands’ argument that the establishment of a three-nautical mile zone by Russia around the *Prirazlomnaya* violates the Convention’s rules regarding safety zones in the EEZ assumes that Russia in fact established a three-nautical mile “safety zone” within the meaning of the Convention. This assumption requires further examination.
207. Insofar as the Tribunal is aware, at the time of the events at issue, Notice to Mariners No. 51/2011 was in effect, by which Russia had declared an area with a radius of three nautical miles around the *Prirazlomnaya* to be “dangerous to navigation,” with the following “caution note”: “Vessels should not enter a safety zone of the marine ice-stable platform without permission of an operator of the platform.”<sup>196</sup>
208. The Tribunal further understands that the “caution note” of Notice to Mariners No. 51/2011 was modified on 24 May 2014 by Notice to Mariners No. 21/2014 to read: “Vessels are not recommended to enter a safety zone of the offshore ice-resistant platform (OIRP)(69° 15’56.9” N 57° 17’17.3”E) without the platform operator permission.”<sup>197</sup>
209. The Tribunal is not aware of any other Russian law, regulation, or notice, setting forth any special rules applicable to an area with a radius of three nautical miles around the *Prirazlomnaya*. The question therefore appears to be whether Notices to Mariners Nos. 51/2011 and 21/2014 create a “safety zone” within the meaning of the Convention. The Tribunal does not think so.
210. First, on their face, Notices to Mariners Nos. 51/2011 and 21/2014 label the three-nautical mile zone around the *Prirazlomnaya* only as “dangerous to navigation.” They do not expressly indicate that this zone constitutes a safety zone within the meaning of the Convention.

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<sup>194</sup> Supplementary Submission, para. 55.

<sup>195</sup> Written instructions per Article 39 of the Criminal Procedure Code of the Russian Federation from Mr. A. Y. Mayakov to Mr. S. O. Torvinen, 21 October 2013 (Appendix 17); Decision on qualification, Investigation Committee, 23 October 2013 (Appendix 18).

<sup>196</sup> Notice to Mariners No. 51/2011 (Annex N-37).

<sup>197</sup> Notice to Mariners No. 21/2014 (Annex N-39).



211. Second, as stated in Article 60(4) of the Convention, a safety zone is an area in which the coastal State “may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.” In the view of the Tribunal, this provision allows the coastal State to take, in the safety zone, appropriate measures in the nature of the enactment of laws or regulations, and of the enforcement of such laws and regulations, provided that such measures are aimed at ensuring the safety of both navigation and the artificial islands, installations, or structures. These rights of the coastal State go beyond its rights in the EEZ at large.
212. Russia’s Notices to Mariners Nos. 51/2011 and 21/2014, however, do not purport to create a zone in which Russia may enact safety laws and regulations and enforce them, nor do they themselves impose mandatory rules on foreign ships. The Notices’ “caution note” does not bear a mandatory character; it is, rather, in the nature of a recommendation, the thrust of which is to inform ships that a danger to navigation may exist in a three-nautical mile area surrounding the platform and that it would be *preferable* for ships to seek the permission of the platform operator before entering this zone. Although slightly different language is used in the English version of the two Notices, the Notice to Mariners No. 51/2011 stating that ships “should not enter”<sup>198</sup> without permission and the Notice to Mariners No. 21/2014 stating that ships “are not recommended to enter”<sup>199</sup> without permission, in the Russian original of the Notices the exact same phrase appears, using the word “recommended.”<sup>200</sup>
213. It thus appears that the Notices to Mariners Nos. 51/2011 and 21/2014 are not issued in the exercise of Russia’s jurisdiction over a safety zone within the meaning of Article 60 of the Convention, but rather as an encouragement to ships to communicate with the platform in an effort to reduce the risk of collision or any other accident.
214. Third, although Russia is not entirely consistent in its statements in this respect,<sup>201</sup> it does appear to believe that its Notices to Mariners do not have the effect of prohibiting navigation within three nautical miles of the *Prirazlomnaya* (as the Netherlands asserts). Thus, over the radio on 17 September 2013, the *Ladoga* advised the *Arctic Sunrise* that Notice to Mariners No. 51/2011 established “a 3-mile zone deemed dangerous to navigation and a 500-meter zone declared prohibited for navigation.”<sup>202</sup> When it contacted the *Arctic Sunrise* with orders to stop on 18 September 2013, the *Ladoga* similarly only complained that the Greenpeace RHIBs had

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<sup>198</sup> Notice to Mariners No. 51/2011 (Annex N-37).

<sup>199</sup> Notice to Mariners No. 21/2014 (Annex N-39).

<sup>200</sup> See Russian Ministry of Defence website, <http://structure.mil.ru/structure/forces/hydrographic/esim.htm>. Website last visited on 9 August 2015.

<sup>201</sup> See E-mail from the Russian Ministry of Transport to the Netherlands, 5 December 2012 (Annex N-38).

<sup>202</sup> Marchenkov Interrogation Report, p. 10 (Appendix 8.a).

entered the 500-metre zone around the *Prirazlomnaya*, without mentioning the three-nautical mile zone.<sup>203</sup> These communications suggest that, in Russia's own view, only a 500-metre zone around the platform is prohibited to navigation and that enforcement action is permissible in respect of this zone only.

215. The Tribunal therefore concludes that Russia did not at any time establish a safety zone of three nautical miles around the *Prirazlomnaya* within the meaning of Article 60 of the Convention.

216. The structure and content of Russian laws and regulations regarding safety zones around artificial islands, installations, and platforms in the EEZ and on the continental shelf confirm that no safety zone of three nautical miles was established around the *Prirazlomnaya*.

217. During the hearing, the Netherlands mentioned that, on 10 September 2013, the Russian Ministry of Transport issued Order No. 285 "On determining measures to assure navigation safety in safety zones established around artificial islands, installations, and structures located on the Russian Federation continental shelf," which prohibited navigation in safety zones established around artificial islands, installations, and structures on the continental shelf of the Russian Federation for all vessels, with some expressly stated exceptions (which, however, do not cover the *Arctic Sunrise*).<sup>204</sup>

~~218. The Tribunal is also aware of the following relevant Russian laws and regulations:<sup>205</sup>~~

- ~~• the Federal Law No. 187-F3 dated 20 November 1995 "On the continental shelf of the Russian Federation" ("1995 Federal Law"), Article 16 of which provides that:~~
  - ~~— safety zones shall be established around artificial islands, installations, and structures located on the continental shelf, which shall extend not more than 500 metres from each point of their outer edge;~~
  - ~~— the limits of these safety zones shall be established by the federal executive agencies responsible in the sphere of transportation;~~

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<sup>203</sup> Video 27 (shot from the *Arctic Sunrise* bridge) at 2'00, 3'30.

<sup>204</sup> Hearing Tr., 10 February 2013 at 23:6-23:15 (opening statement of the Netherlands). A translation of this Order into English was obtained by the Tribunal in the course of its deliberations.

<sup>205</sup> Certified English Translations of the relevant parts of these laws and regulations into English were obtained by the Tribunal in the course of its deliberations. The PCA provided the Parties with copies of the relevant parts of the Russian laws and regulations and certified English translations of the same on 29 May 2015.

authorised by the Convention.<sup>272</sup> A coastal State can, for instance, engage in hot pursuit of a vessel in relation to such offences. However, for the reasons already given above, Russia did not validly engage in hot pursuit in relation to the *Arctic Sunrise*. Its actions in boarding, seizing, and detaining the *Arctic Sunrise* were not, therefore, a valid exercise of its law enforcement powers in relation to possible terrorist offences any more than they were in relation to other possible offences like hooliganism. There is no other basis for boarding or seizing the *Arctic Sunrise* on 19 September 2013 in the Russian EEZ in relation to possible terrorism offences arising from the actions on the 18 September 2013. Any justification for actions against the *Arctic Sunrise* based on preventing terrorist acts is discussed below at paragraphs 314 to 323.

**iv. Right of the coastal State to enforce its laws regarding non-living resources in the EEZ**

279. Although the Arctic 30 were not charged with any offences related to Russia's non-living resources in its EEZ, and there is no indication before the Tribunal that Russia considered the Arctic 30 of having committed such an offence, the Tribunal has also considered whether a coastal State has the right to enforce its laws regarding non-living resources in the EEZ.

280. Article 73 of the Convention deals expressly with the enforcement of laws relating to *living* resources in the EEZ. Article 73(1) provides that:

ARTICLE 73  
ENFORCEMENT OF LAWS AND REGULATIONS OF THE COASTAL STATE

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with laws and regulations adopted by it in conformity with this Convention.

281. Article 73(1) confers authority on a coastal State to board, inspect, arrest, and commence judicial proceedings against a ship where that may be necessary to ensure compliance with its laws and regulations over its living resources. There is no equivalent provision relating to *non-living* resources in the EEZ. At the Third United Nations Conference on the Law of the Sea, proposals were made to extend enforcement powers with respect to living resources to non-living resources, but these proposals were not accepted.<sup>273</sup>

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<sup>272</sup> Article 4 of the SUA Fixed Platforms Protocol provides that “[n]othing in this Protocol shall affect in any way the rules of international law pertaining to fixed platforms located on the continental shelf.”

<sup>273</sup> M. Nordquist, S. Nandan & S. Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II, pp. 791-794, and in particular p. 793.

282. The activity of the *Arctic Sunrise* and the law enforcement actions taken by the Russian Federation did not concern living resources within Russia's EEZ. The actions taken by the Russian Federation were triggered by Greenpeace's protest actions in relation to the *Prirazlomnaya*, which was constructed for the exploitation of non-living resources. Accordingly, Article 73(1) could not serve as a legal basis for the measures of the Russian Federation.
283. The absence of any express enforcement provision in the Convention dealing with the right to enforce the coastal State's laws regarding non-living resources in the EEZ<sup>274</sup> makes it necessary to recall that its Article 77, which deals with non-living resources in the continental shelf, largely reproduces the 1958 Convention on the Continental Shelf. That convention was itself based on draft articles prepared by the ILC. The commentary of the ILC in relation to the draft provision now reflected in Article 77 of the Convention says that the words setting out the rights of the coastal State in relation to the continental shelf:
- . . . leave no doubt that the rights conferred upon the coastal state cover all rights necessary for and connected with the exploration and exploitation of the resources of the continental shelf. Such rights include jurisdiction in connexion with the prevention and punishment of violations of the law.<sup>275</sup>
284. Although the Tribunal does not find it necessary to reach a view on the extent of the coastal State's right to enforce its laws in relation to non-living resources in the EEZ, it is clear that such a right exists. However, there is no basis to conclude on the evidence that the *Arctic Sunrise* had violated any Russian laws in relation to exploration and exploitation activities on non-living resources in the EEZ.<sup>276</sup>
285. The Tribunal concludes that the measures taken by Russia against the *Arctic Sunrise* on 19 September 2013 did not constitute a lawful exercise of Russia's law enforcement powers concerning the exploration and exploitation of its non-living resources in the EEZ.

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<sup>274</sup> With the exception of Article 80, which extends the coastal State's exclusive rights and jurisdiction over artificial islands, installations, and structures in the EEZ under Article 60 to artificial islands, installations, and structures on the continental shelf.

<sup>275</sup> ILC Articles concerning the law of the sea with commentaries," (1956) Yearbook of the ILC, vol. II, p. 297; reproduced in M. Nordquist, S. Nandan & S. Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II, p. 896. See also *M/V "Virginia G" (Panama v. Guinea-Bissau)*, Judgment of 14 April 2014, ITLOS Reports 2014, to be published, para. 211; Natalie Klein, *Maritime Security and the Law of the Sea*, OUP 2011, p. 99.

<sup>276</sup> With the exception of the breach of the 500-metre safety zone, which is addressed above in Section VII.B.2(a)ii, paras. 247 *et seq.*

**v. Enforcement jurisdiction related to the protection of the marine environment**

286. Under certain circumstances, the Convention allows coastal States to take enforcement action against foreign vessels in the EEZ that have committed serious violations of applicable laws of the coastal State related to the protection of the marine environment.
287. Although the Arctic 30 were not charged with such violations, the Tribunal notes that in a *Note Verbale* dated 18 September 2013, Russia referred to the actions of Greenpeace as a provocation that “exposed the Arctic region to a threat of an ecological disaster of unimaginable consequences.”<sup>277</sup> On 1 November 2013, the Interfax News Agency reported that the Prime Minister of the Russian Federation, Mr. Dmitry Medvedev, had stated at a news conference that his country “cannot support activities which may cause damage to the environment and which may be dangerous for people on the whole.”<sup>278</sup>
288. Accordingly, the Tribunal shall examine whether the measures taken by Russia could have been based on the enforcement jurisdiction of the coastal State with respect to the protection of the marine environment.

(a) Article 220 of the Convention

289. Article 220 of the Convention allows a coastal State to take enforcement measures against vessels in the EEZ in order to reduce and control vessel-source pollution. It provides, in relevant part:

ARTICLE 220  
ENFORCEMENT BY COASTAL STATES

[ . . . ]

3. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards, that State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.

[ . . . ]

5. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a substantial discharge causing or threatening significant pollution of the marine environment, that State may undertake

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<sup>277</sup> *Note Verbale* from the Russian Federation to the Netherlands, 18 September 2014 (Annex N-5).

<sup>278</sup> Memorial, para. 312, referring to the *Verbatim record of the public sitting at the International Tribunal for the Law of the Sea in the ‘Arctic Sunrise’ Case on 6 November 2013*, ITLOS/PV.13/C22/1/Rev.1, pp. 19-20.

physical inspection of the vessel for matters relating to the violation if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.

6. Where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may, subject to section 7, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.

[. . .]

290. Under these provisions, where there are “clear grounds” for believing that a vessel navigating in the EEZ has committed a violation of applicable international rules and standards for the prevention, reduction, and control of vessel-source pollution in the EEZ, the coastal State may require the vessel to provide information. Where there are “clear grounds” for believing that such a violation has occurred, resulting in a substantial discharge causing or threatening significant pollution of the marine environment, and the vessel has refused to provide information or has provided manifestly untrustworthy information, the coastal State may undertake a physical inspection of the vessel.<sup>279</sup> Where there is “clear objective evidence” for believing that such a violation has occurred, resulting in a discharge causing major damage or threat of major damage to the interests of the coastal State, the coastal State may institute proceedings and detain the vessel.
291. The Tribunal considers that there were no grounds for Russia to believe that the *Arctic Sunrise* had committed a violation of applicable international rules and standards for the prevention, reduction, and control of vessel-source pollution in Russia’s EEZ. There is also no evidence of a discharge from the *Arctic Sunrise* or its RHIBs causing pollution or major damage (or a threat thereof). This conclusion is confirmed, in particular, by a review of the video evidence before the Tribunal. It is also confirmed by the fact that at no time during the events in question did Russia accuse the *Arctic Sunrise* or any of its RHIBs of vessel-source pollution.

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<sup>279</sup> Article 226(1) of the Convention sets out the parameters of such an inspection:

1. (a) States shall not delay a foreign vessel longer than is essential for purposes of the investigations provided for in articles 216, 218 and 220. Any physical inspection of a foreign vessel shall be limited to an examination of such certificates, records or other documents as the vessel is required to carry by generally accepted international rules and standards or of any similar documents which it is carrying; further physical inspection of the vessel may be undertaken only after such an examination and only when:
- (i) there are clear grounds for believing that the condition of the vessel or its equipment does not correspond substantially with the particulars of those documents;
  - (ii) the contents of such documents are not sufficient to confirm or verify a suspected violation; or
  - (iii) the vessel is not carrying valid certificates and records.

[...]

292. While the Russian Federation made no accusation of *actual* vessel-source pollution by the *Arctic Sunrise* and its RHIBs, it did allude to a concern that the actions of the *Arctic Sunrise* “exposed the Arctic region to a threat of an ecological disaster of unimagin[a]ble consequences,” implying that its actions were preventive in nature. Russia’s rights to take preventive action to protect against adverse environmental consequences are addressed below at paragraphs 307 to 313. However, under Article 220 of the Convention, a coastal State is only entitled to take enforcement measures where there are “clear grounds” for believing that a vessel *has* committed a violation of applicable international rules and standards for the prevention, reduction, and control of vessel-source pollution in the EEZ. That is not the case here.

(b) Article 234 of the Convention

293. Article 234 of the Convention provides:

ARTICLE 234  
ICE-COVERED AREA

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

294. Article 234 accords to Russia the right to adopt and enforce in ice-covered areas within the limits of its EEZ its own nondiscriminatory laws and regulations for the prevention, reduction, and control of marine pollution in the circumstances contemplated by the Article.

295. The Netherlands argues that this provision does not apply to the protest actions at the *Prirazlomnaya* as the *Prirazlomnaya* is located outside the area to which Russia applies navigational regulations concerning the Northern Sea Route for ice-covered areas.<sup>280</sup> The Netherlands alludes to four occasions in the summer of 2013 on which the *Arctic Sunrise* unsuccessfully attempted to obtain permission from Russian authorities to sail the Northern Sea Route.<sup>281</sup> After the third denial, the *Arctic Sunrise* nonetheless entered the zone and was shortly thereafter boarded by Russian authorities. The fourth denial of permission by the Russian authorities included express reference to rules of navigation for the area enforced in accordance with Article 234 of the Convention:

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<sup>280</sup> Memorial, para. 316.

<sup>281</sup> Memorial, para. 317.

Violation of the Rules of navigation in the water area of the Northern Sea Route, adopted and enforced by the Russian Federation in accordance with the article 234 of the United Nations Convention on the Law of the Sea, 1982, - navigation in the water area of the Northern Sea Route from 24.08.2013 to 27.08.2013 without permission of the Northern Sea Route Administration, as well as taken actions in this creating potentially threat of marine pollution in the water area of the Northern Sea Route, ice-covered for most part of the year.<sup>282</sup>

296. The Tribunal is not satisfied that the boarding, seizure, and detention of the *Arctic Sunrise* by Russia on 19 September 2013 constituted enforcement measures taken by Russia pursuant to its laws and regulations adopted in accordance with Article 234 of the Convention. There is evidence before the Tribunal that indicates that the regulations adopted by Russia in accordance with Article 234 of the Convention apply to an area that does not include the Barents Sea, where the *Prirazlomnaya* is located.<sup>283</sup> Further, at no time did Russia invoke its laws and regulations adopted under Article 234 of the Convention as the impetus for its boarding, seizure, and detention of the *Arctic Sunrise* on 19 September 2013. This contrasts with at least one previous instance in which the Russian Federation did expressly invoke rules of navigation adopted in accordance with Article 234 of the Convention after the *Arctic Sunrise* entered the “water area of the Northern Sea Route, ice-covered for most part of the year” without permission.<sup>284</sup>
297. The Tribunal concludes that the measures taken by Russia against the *Arctic Sunrise* on 19 September 2013 did not constitute a lawful exercise of Russia’s enforcement rights as a coastal State under Articles 220 or 234 of the Convention.

#### vi. Dangerous manoeuvring

298. In a *Note Verbale* dated 1 October 2013, referring to 19 September 2013, Russia accused the *Arctic Sunrise* of dangerous manoeuvring:

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<sup>282</sup> Memorial, para. 317, referring to Ministry of Transport of the Russian Federation, Federal Agency of Maritime and River Transport, Federal State Institution, The Northern Sea Route Administration, Notification No. 77, 20 September 2013 (English Translation provided by the Administration), <http://www.nsr.ru/files/zayavka/20130920143952ref%20A%20S.pdf>. Webpage last visited on 9 August 2015.

<sup>283</sup> Memorial, para. 316, referring to Article 3 of the Federal Law dated 28 July 2012 No. 132-F3 28 “On the Introduction of Changes to Certain Legislative Acts of the Russian Federation Related to the Governmental Regulation of Merchant Shipping in the Water Areas of the Northern Sea Route,” amending Article 5(1) of the Merchant Marine Code of the Russian Federation. Under Russian law, the western limit of the Northern Sea Route for ice-covered areas is presently defined as the “Novaya Zemlya Archipelago . . . , with the eastern coastline of the Novaya Zemlya Archipelago and the western borders of Matochkin Strait, Kara Strait and Yugorski Shar.”

<sup>284</sup> Ministry of Transport of the Russian Federation, Federal Agency of Maritime and River Transport, Federal State Institution, The Northern Sea Route Administration, Notification No. 77, 20 September 2013 (English Translation provided by the Administration), <http://www.nsr.ru/files/zayavka/20130920143952ref%20A%20S.pdf>. Webpage last visited on 9 August 2015.



legitimate aim and be necessary and proportionate to that aim.<sup>308</sup> It cites examples of such actions taken by itself and other States.<sup>309</sup>

326. In the view of the Tribunal, the protection of a coastal State's sovereign rights is a legitimate aim that allows it to take appropriate measures for that purpose. Such measures must fulfil the tests of reasonableness, necessity, and proportionality.
327. The Tribunal has given careful and detailed consideration to the types of protest actions that could reasonably be considered as constituting an interference with the exercise of those sovereign rights, particularly in the context of the case at hand. In that regard, the Tribunal considers that it would be reasonable for a coastal State to act to prevent: (i) violations of its laws adopted in conformity with the Convention; (ii) dangerous situations that can result in injuries to persons and damage to equipment and installations; (iii) negative environmental consequences (*see* paragraphs 307 to 313 above); and (iv) delay or interruption in essential operations. All of these are legitimate interests of coastal States.
328. At the same time, the coastal State should tolerate some level of nuisance through civilian protest as long as it does not amount to an "interference with the exercise of its sovereign rights." Due regard must be given to rights of other States, including the right to allow vessels flying their flag to protest.<sup>310</sup>
329. At the time it was boarded and seized, the *Arctic Sunrise* was no longer engaged in actions that could potentially interfere with the exercise by Russia of its sovereign rights as a coastal State. The measures taken by Russia might have been designed to prevent a resumption of the *Arctic Sunrise*'s protest actions, but the Russian authorities did not give this as the reason for the boarding, seizure, and detention of the vessel. The criminal and administrative proceedings that were instituted were based on other grounds.
330. There is no basis to conclude that the conduct of the *Arctic Sunrise* at the time of its boarding amounted to interference with Russia's exercise of its sovereign rights for the exploration and exploitation of non-living resources of its continental shelf. At that time, the *Arctic Sunrise* was exercising the freedom of navigation. Its involvement in the protest action against the

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<sup>308</sup> Hearing Tr., 10 February 2015 at 53 (opening statement of the Netherlands).

<sup>309</sup> Hearing Tr., 10 February 2015 at 33-48 (opening statement of the Netherlands). *See also* the Netherlands' letter dated 25 February 2015 enclosing *Official documentation of examples referred to by the Co-Agent* and attached documents.

<sup>310</sup> *See* para. 227 above.

## **X. COSTS**

398. Article 7 of Annex VII to the Convention provides:

ARTICLE 7  
EXPENSES

Unless the arbitral tribunal decides otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares.

399. In the present case, the Tribunal considers that there are no “particular circumstances” that would justify departing from the presumption of equal allocation of the expenses of the Tribunal. The Tribunal therefore considers that its expenses shall be borne by the Parties in equal shares.

400. As regards the Parties’ costs arising from this arbitration (including the expenses referred to in paragraph 396 above), the Tribunal considers that the normal rule is that each party bears its own costs. Article 32(1) of the Rules of Procedure provide that “[u]nless the Arbitral Tribunal determines otherwise because of the particular circumstances of the proceedings, each Party shall bear the costs of presenting its own case.” In the view of the Tribunal, there is no reason to depart from this rule at this stage of the present case.

## **XI. DECISION**

401. For the above reasons, the Tribunal unanimously:

- A. FINDS that it has jurisdiction over all the claims submitted by the Netherlands in this arbitration;
- B. FINDS that all the claims submitted by the Netherlands in this arbitration are admissible;
- C. FINDS that by boarding, investigating, inspecting, arresting, detaining, and seizing the *Arctic Sunrise* without the prior consent of the Netherlands, and by arresting, detaining, and initiating judicial proceedings against the Arctic 30, the Russian Federation breached obligations owed by it to the Netherlands as the flag State under Articles 56(2), 58(1), 58(2), 87(1)(a), and 92(1) of the Convention;
- D. FINDS that by failing to comply with Paragraphs (1) and (2) of the *dispositif* of the ITLOS Order, the Russian Federation breached its obligations to the Netherlands under Articles 290(6) and 296(1) of the Convention;

- E. FINDS that by failing to pay its share of the deposits requested in procedural directions issued by the Tribunal to cover its fees and expenses in this arbitration, the Russian Federation has breached its obligations under Part XV and Article 300 of the Convention;
- F. FINDS that the Netherlands is entitled to compensation for:
1. damage to the *Arctic Sunrise*, including physical damage to the vessel, resulting from the measures taken by the Russian Federation, and costs incurred to prepare the vessel for its return voyage from Murmansk to Amsterdam; as well as costs incurred due to loss of use of the *Arctic Sunrise* during the relevant period;
  2. non-material damage to the Arctic 30 for their wrongful arrest, prosecution, and detention in the Russian Federation;
  3. damage resulting from the measures taken by the Russian Federation against the Arctic 30, including the costs of bail paid as security for their release from custody, expenses incurred during their detention in the Russian Federation, and costs in respect of the persons detained between their release from prison and their departure from the Russian Federation; and
  4. the costs incurred by the Netherlands for the issuance of the bank guarantee to the Russian Federation pursuant to the ITLOS Order;
- G. FINDS that the Netherlands is entitled to interest, at a rate to be decided by the Tribunal, on the amounts referred to in sub-paragraphs F and I of this paragraph;
- H. ORDERS the Russian Federation to return to the Netherlands, by 14 October 2015, all objects belonging to the *Arctic Sunrise* and the persons on board the vessel at the time of its seizure that have not yet been returned, and, failing the timely restitution of these objects, to compensate the Netherlands for the value of any objects not returned;
- I. ORDERS the Russian Federation immediately to reimburse the Netherlands the amounts of Russia's share of the deposits paid by the Netherlands;
- J. DECIDES that the fees and expenses of the Tribunal incurred to date shall be borne by the Parties in equal shares;
- K. DECIDES that each Party shall bear its own costs incurred to date (including the expenses referred to in paragraph 396 above); and

L. RESERVES all questions concerning quantum of compensation and interest to a later phase of these proceedings.

Dated: 14 August 2015



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Professor Alfred H.A. Soons  
Arbitrator



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Dr. Alberto Székely  
Arbitrator



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Mr. Henry Burmester  
Arbitrator



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Professor Janusz Symonides  
Arbitrator



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Judge Thomas A. Mensah  
President of the Tribunal



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Ms. Sarah Grimmer  
Registrar