INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
YEAR 2013

22 November 2013

List of Cases:
No. 22

THE "ARCTIC SUNRISE" CASE

(KINGDOM OF THE NETHERLANDS *v.* RUSSIAN FEDERATION)

Request for the prescription of provisional measures

ORDER

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

THE TRIBUNAL,

composed as above,

after deliberation,

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

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

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

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

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

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

Makes the following Order:

1. *Whereas*, on 21 October 2013, the Netherlands filed with the Tribunal a Request for the prescription of provisional measures (hereinafter "the Request") under article 290, paragraph 5, of the Convention in a dispute concerning the boarding and detention of the vessel *Arctic Sunrise* in the exclusive economic zone of the Russian Federation and the detention of the persons on board the vessel by the authorities of the Russian Federation;

2. *Whereas*, in a letter dated 18 October 2013 addressed to the Registrar and received in the Registry on 21 October 2013, the Minister of Foreign Affairs of the

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

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

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

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

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

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

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

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

> Upon the ratification of the Convention on the 26th February 1997 the Russian Federation made a statement, according to which, *inter alia*, "it does not accept procedures provided for in Section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes […] concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction".
>
> Acting on this basis, the Russian Side has accordingly notified the Kingdom of the Netherlands by note verbale (attached) that it does not accept the arbitration procedure under Annex VII to the Convention initiated by the Netherlands in regard to the case concerning the vessel "Arctic Sunrise" and that [it] does not intend to participate in the proceedings of the International Tribunal for the Law of the Sea in respect of the request of the Kingdom of the Netherlands for the prescription of provisional measures under Article 290, Paragraph 5, of the Convention.
>
> Meanwhile the Russian Federation has stressed its readiness to continue to seek a mutually acceptable solution to this situation;

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

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

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

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

13. Whereas, in the letter dated 25 October 2013 transmitting a copy of that Order to the Russian Federation, the Registrar informed the Ambassador of the Russian

Federation to the Federal Republic of Germany that, in accordance with article 90, paragraph 3, of the Rules, the Tribunal was ready to take into account any observations that may be presented to it by a party before the closure of the hearing;

14. *Whereas*, on 28 October 2013, the Registrar sent a letter to the Agent of the Netherlands requesting further documentation and the Netherlands submitted the requested documents on 29 October 2013, and whereas on the same day the Registrar sent a copy of those documents to the Russian Federation;

15. *Whereas*, by letter dated 30 October 2013, Stichting Greenpeace Council (hereinafter "Greenpeace International") requested the Tribunal for permission to file submissions as *amicus curiae,* and whereas a copy of the submissions was attached to that letter;

16. *Whereas*, by letter dated 31 October 2013, the Registrar invited the Parties to provide comments on the request submitted by Greenpeace International;

17. *Whereas,* by letter dated 1 November 2013, the Co-Agent of the Netherlands informed the Tribunal that "[t]he Kingdom of the Netherlands has informally informed Greenpeace International that it did not have any objection to such petition";

18. *Whereas*, on 5 November 2013, the Tribunal decided that the request by Greenpeace International should not be accepted and that its submissions would not be included in the case file;

19. *Whereas*, by communication dated 6 November 2013, the Embassy of the Russian Federation in the Federal Republic of Germany informed the Tribunal that "[t]aking into account the non-governmental character of Greenpeace International the Russian Side sees no reason for granting to this organisation the possibility to furnish information to the Tribunal in the case concerning the vessel 'Arctic Sunrise'" and underlined "that this transmission of the Russian position to the tribunal can in no way be interpreted as a form of participation of the Russian Side in the above mentioned case";

20. W*hereas,* on 8 November 2013, notice of the decision of the Tribunal of 5 November 2013 was communicated by the Registrar to the Parties and to Greenpeace International;

21. *Whereas*, on 31 October 2013, the Co-Agent of the Netherlands submitted information on a witness to be called by it before the Tribunal pursuant to article 72 of the Rules;

22. *Whereas,* in accordance with article 68 of the Rules, the Tribunal held initial deliberations on 4 and 5 November 2013 concerning the written pleadings and the conduct of the case;

23. *Whereas*, on 5 November 2013, pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal, materials were submitted to the Tribunal by the Netherlands;

24. *Whereas*, on 5 November 2013, in accordance with article 45 of the Rules, the President held consultations with the Agent of the Netherlands with regard to questions of procedure;

25. *Whereas,* on 5 November 2013, the Tribunal decided to put questions to the Parties pursuant to article 76, paragraph 1, of the Rules, which were transmitted to them on the same date;

26. *Whereas*, pursuant to article 67, paragraph 2, of the Rules, copies of the Request and documents annexed thereto were made accessible to the public on 6 November 2013;

27. *Whereas* oral statements were presented at a public sitting held on 6 November 2013 by the following:

On behalf of the Netherlands: Ms Liesbeth Lijnzaad, Legal Adviser, Ministry of Foreign Affairs,

as Agent,

Mr René Lefeber, Deputy Legal Adviser, Ministry of Foreign Affairs,

as Co-Agent,

Mr Thomas Henquet, Legal Counsel, Ministry of Foreign Affairs,

as Counsel and Advocate;

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

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

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

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

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

* * *

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

(1) The Russian Federation:

a. In boarding, investigating, inspecting, arresting and detaining the 'Arctic Sunrise' without the prior consent of the Kingdom of the Netherlands, as described in this Statement, breached its obligations to the Kingdom of the Netherlands, in its own right and in the exercise of its right to protect a vessel flying its flag, in regard to the freedom of navigation as provided by Articles 58, paragraph 1, and 87, paragraph 1(a), of UNCLOS, and under customary international law;

b. In boarding, investigating, inspecting, arresting and detaining the 'Arctic Sunrise' without the prior consent of the Kingdom of the Netherlands, as described in this Statement, breached its obligations to the Kingdom of the Netherlands, in regard to the exercise of jurisdiction by a flag state as provided by Article 58 and Part VII of UNCLOS, and under customary international law;

c. In boarding the 'Arctic Sunrise' without the prior consent of the Kingdom of the Netherlands to arrest and detain the crew members and initiating judicial proceedings against them, as described in this Statement, breached its obligations to the Kingdom of the Netherlands, in its own right, in the exercise of its right to diplomatic protection of its nationals, and its right to seek redress on behalf of crew members of a vessel flying the flag of the Kingdom of the Netherlands, irrespective of their nationality, in regard to the right to liberty and security of a vessel's crew members and their right to leave the territory and maritime zones of a coastal state as provided by Articles 9 and 12, paragraph 2, of the 1966 International Covenant on Civil and Political Rights, and customary international law;

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

(3) Said internationally wrongful acts involve legal consequences requiring the Russian Federation to:

a. Cease, forthwith, the internationally wrongful acts continuing in time;

b. Provide the Kingdom of the Netherlands with appropriate assurances and guarantees of non-repetition of all the internationally wrongful acts referred to in subparagraph (2) above;

c. Provide the Kingdom of the Netherlands full reparation for the injury caused by all the internationally wrongful acts referred to in subparagraph (2) above;

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

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

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

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

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

to declare:

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

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

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

* * *

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

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

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

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

> 1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
> …
>
> (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;

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

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

> United Nations is exercising the functions assigned to it by the Charter of the United Nations;

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

> The Russian Federation declares that, in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.
>
> The Russian Federation, bearing in mind articles 309 and 310 of the Convention, declares that it objects to any declarations and statements made in the past or which may be made in future when signing, ratifying or acceding to the Convention, or made for any other reason in connection with the Convention, that are not in keeping with the provisions of article 310 of the Convention. The Russian Federation believes that such declarations and statements, however phrased or named, cannot exclude or modify the legal effect of the provisions of the Convention in their application to the party to the Convention that made such declarations or statements, and for this reason they shall not be taken into account by the Russian Federation in its relations with that party to the Convention;

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

> Upon the ratification of the Convention on the 26th February 1997 the Russian Federation made a statement, according to which, *inter alia*, "it does not accept procedures provided for in Section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes […] concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction".
>
> Acting on this basis, the Russian Side has accordingly notified the Kingdom of the Netherlands by note verbale (attached) that it does not accept the arbitration procedure under Annex VII to the Convention initiated by the Netherlands in regard to the case concerning the vessel "Arctic Sunrise";

43. *Considering* that the Netherlands contends that:

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

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

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

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

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

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

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

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

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

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

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

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

> [a] State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation; the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment in accordance with Article 59 of the Statute
> (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *Merits, Judgment, I.C.J. Reports 1986,* p. 14, at p. 24, para. 28);

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

54. *Considering* that the Russian Federation could have facilitated the task of the Tribunal by furnishing it with fuller information on questions of fact and of law;

55. *Considering* the difficulty for the Tribunal, in the circumstances of this case, to evaluate the nature and scope of the respective rights of the Parties to be preserved by provisional measures;

56. *Considering* that the Netherlands should not be put at a disadvantage because of the non-appearance of the Russian Federation in the proceedings;

57. *Considering* that the Tribunal must therefore identify and assess the respective rights of the Parties involved on the best available evidence;

58. Considering that, before prescribing provisional measures under article 290, paragraph 5, of the Convention, the Tribunal must satisfy itself that *prima facie* the Annex VII arbitral tribunal would have jurisdiction;

59. *Considering* that the Netherlands maintains that, on 19 September 2013, in the exclusive economic zone of the Russian Federation, the vessel *Arctic Sunrise*, flying the flag of the Netherlands, was boarded by Russian authorities who detained

the vessel and the 30 persons on board and that the vessel was subsequently towed to the port of Murmansk;

60. *Considering* that in the Statement of Claim the Netherlands argues that:

> The Russian Federation … [i]n boarding, investigating, inspecting, arresting and detaining the 'Arctic Sunrise' without the prior consent of the Kingdom of the Netherlands, as described in this Statement, breached its obligations to the Kingdom of the Netherlands, in its own right and in the exercise of its right to protect a vessel flying its flag, in regard to the freedom of navigation as provided by Articles 58, paragraph 1, and 87, paragraph 1(a), of UNCLOS, and under customary international law;

61. *Considering* that the Netherlands contends that:

> The sovereign rights of a coastal State in maritime areas beyond its territorial sea are resource-oriented and limited in scope. The exercise of jurisdiction to protect these sovereign rights is functional. The law of the sea restricts the right of a coastal State to exercise jurisdiction in these areas. A coastal State cannot unilaterally extend such a right;

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

> [J]urisdiction over the establishment and use of installations and structures is limited to the rules contained in article 56, paragraph 1, and is subject to the obligations contained in article 56, paragraph 2, article 58 and article 60 of the Convention;

63. *Considering* that the Netherlands argues that:

> [T]he Convention prohibits the boarding of foreign vessels on the high seas: article 110. This prohibition applies to the boarding of foreign vessels in the exclusive economic zone: article 58, paragraph 2. The right of visit and search is an exception to the freedom of navigation and flag State jurisdiction, and thus needs a specific justification in every instance. Indeed, in the case concerning the *S.S. Lotus*, the Permanent Court of International Justice held that,
>
> > "It is certainly true that – apart from certain special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly."
>
> Any exceptions to the general prohibitive rule to exercise enforcement jurisdiction over foreign vessels are explicit and cannot be implied. The interpretation and application of any such exceptions must be narrowly construed;

64. *Considering* that, in a note verbale dated 1 October 2013 from the Embassy of the Russian Federation in the Netherlands addressed to the Ministry of Foreign Affairs of the Netherlands, the Russian Federation states that:

> On 19 September … within the exclusive economic zone of the Russian Federation, on the basis of Articles 56, 60 and 80 of the United Nations Convention on the Law of the Sea, 1982, and in accordance with Article 36 (1(1)) of the Federal Law "On the Exclusive Economic Zone of the Russian Federation" a visit … to the vessel "Arctic Sunrise" was carried out.
> ...
> In view of the authority that a coastal State possesses in accordance with the aforementioned rules of international law, in the situation in question requesting consent of the flag State to the visit by the inspection team on board the vessel was not required;

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

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

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

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

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

68. *Considering* that, in the light of the positions of the Netherlands and the Russian Federation, a difference of opinions exists as to the applicability of the

provisions of the Convention in regard to the rights and obligations of a flag State and a coastal State, notably, its articles 56, 58, 60, 87 and 110, and thus the Tribunal is of the view that a dispute appears to exist between these two States concerning the interpretation or application of the Convention;

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

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

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

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

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

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

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

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

76. *Considering* that the Tribunal has held that "a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted" (*MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001,* p. 95, at p. 107, para. 60; see also *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, at p. 345, para. 71);

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

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

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

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

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

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

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

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

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

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

85. *Considering* that

> the said period is not necessarily determinative for the assessment of the urgency of the situation or the period during which the prescribed measures are applicable and that the urgency of the situation must be assessed taking into account the period during which the Annex VII arbitral tribunal is not yet in a position to "modify, revoke or affirm those provisional measures"
> (*Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, at p. 22, para. 68);

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

87. *Considering* that the Netherlands states:

> As a result of the continued detention of the 'Arctic Sunrise' in Kola Bay, Murmansk Oblast, its general condition is deteriorating. As the vessel is an aging icebreaker, it requires intensive maintenance in order to

> maintain its operability. The deterioration results from the impossibility to carry out the scheduled maintenance of its systems, which compromises the vessel's safety and seaworthiness. This may, amongst others, create a risk for the environment, including the release of bunker oil. This reality is compounded by the prevailing harsh weather and ice conditions in the fragile Arctic region.
>
> As a consequence of the actions taken by the Russian Federation in connection with the boarding and detention of the 'Arctic Sunrise', the crew would continue to be deprived of their right to liberty and security as well as their right to leave the territory and maritime areas under the jurisdiction of the Russian Federation. The settlement of such disputes between two states should not infringe upon the enjoyment of individual rights and freedoms of the crew of the vessels concerned.
>
> [T]he continuing detention of the vessel and its crew has irreversible consequences.
>
> As for the continuing detention of the crew, every day spent in detention is irreversible. To prolong the detention pending the constitution of the arbitral tribunal and the resolution of the dispute would further prejudice the rights of the Kingdom of the Netherlands;

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

> From the time of the ship being moored at the berth until the conclusion of the custody agreement concerning the Dutch-flagged ship *Arctic Sunrise*, IMO number 7382902, the Coast Guard of the Federal Security Service of Russia for Murmansk Oblast will be responsible for compliance with security measures.
>
> P.V. Sarsakova, as representative of the Murmansk office of the Federal State Unitary Enterprise 'Rosmorport' and S.V. Fedorov, as representative of the Coast Guard Division of the Federal Security Service of the Russian Federation for Murmansk Oblast have been notified, in accordance with article 115, paragraph 6 CCP RF [Code of Criminal Procedure of the Russian Federation], of their liability for any loss, disposal of, concealment or illegal transfer of property that has been seized or confiscated;

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

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

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

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

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

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

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

95. *Considering* that, pursuant to article 290, paragraph 5, of the Convention, the Tribunal considers it appropriate to order that the vessel *Arctic Sunrise* and all persons who have been detained in connection with the present dispute be released upon the posting of a bond or other financial security by the Netherlands, and that the vessel and the persons be allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation;

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

bank guarantee, issued by a bank in the Russian Federation or a bank having corresponding arrangements with a Russian bank;

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

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

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

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

101. *Considering* the binding force of the measures prescribed and the requirement under article 290, paragraph 6, of the Convention, that compliance with such measures be prompt (see *Southern Bluefin Tuna (New Zealand* v. *Japan;*

Australia v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999,* p. 280, at p. 297, para. 87);

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

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

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

105. *For these reasons,*

THE TRIBUNAL,

(1) By 19 votes to 2,

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

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

(b) Upon the posting of the bond or other financial security referred to above, the Russian Federation shall ensure that the vessel *Arctic Sunrise* and all persons

who have been detained are allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation;

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

AGAINST: *Judges* GOLITSYN, KULYK.

(2) By 19 votes to 2,

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

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

AGAINST: *Judges* GOLITSYN, KULYK.

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

(signed)

Shunji YANAI

President

(signed)

Philippe GAUTIER

Registrar

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

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

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

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

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

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

DECLARATION OF JUDGE *AD HOC* ANDERSON

1. I have voted for the Order, including the provisional measures allowing for the release the ship and its crew so that they are allowed to leave Russia without further delay upon the posting of a bond. I would add the following points.

The non-appearance of the Russian Federation

2. In considering the request submitted by the Netherlands, the Tribunal did not have the benefit of receiving the Russian Federation's account of the facts, notably the events occurring on 18 and 19 September 2013 prior to the arrest of the *Arctic Sunrise*, as well as the Russian Federation's arguments on points of law. While the position of the Netherlands was made clear, the stance of the Russian Federation had to be taken from its diplomatic communications, legislation and the decisions of courts in the Russian Federation. Unfortunately, these materials were both incomplete and in places inconsistent, making the task of the Tribunal more difficult.[1] Thus, the decision of the Russian Federation not to appear in this case is to be regretted. Non-appearance does not serve the efficient application of Part XV of the Convention or, more widely, the rule of law in international relations.

Article 283 of the Convention

3. When a dispute arises concerning the interpretation or application of the Convention, article 283 calls for "an exchange of views regarding the settlement of the dispute by negotiation or other peaceful means". The emphasis is more upon the expression of views regarding the most appropriate peaceful means of settlement, rather than the exhaustion of diplomatic negotiations over the substantive issues dividing the parties. The main purpose underlying article 283 is to avoid the situation whereby a State is taken completely by surprise by the institution of proceedings against it. The Tribunal has rightly noted in paragraphs 73 and 74 of the Order that there were several diplomatic exchanges between the parties before legal proceedings were instituted. Of particular relevance in this regard was the note

[1] The ICJ experienced similar problems, including fact-finding, in the *Fisheries Jurisdiction* cases *(UK* v. *Iceland and FRG v Iceland), I.C.J. Reports 1974*, p. 3 and p. 175.

verbale dated 3 October 2013 in which the Netherlands expressed the views that "there seems to be merit in submitting this dispute to arbitration under the United Nations Convention on the Law of the Sea" and that the Netherlands was considering the institution of arbitration proceedings "as soon as feasible."[2] Thus, the underlying purpose of article 283 appears *prima facie* to have been met: the question of admissibility will be for the Annex VII tribunal to determine finally.

(signed)

D.H. Anderson

[2] On this point, the Netherlands' note of 3 October 2013 was similar in content to notes addressed by Australia and by New Zealand to Japan before the institution of the proceedings in the *Southern Bluefin Tuna Cases* (*ITLOS Pleadings, Minutes and Documents 1999*, *Vol. 4,* at pp. 15, 25 and 83).

JOINT SEPARATE OPINION OF
JUDGE WOLFRUM AND JUDGE KELLY

1. We have voted in favour of the order to release the vessel *Arctic Sunrise* and all persons on board who were arrested in connection with the detention of the vessel. In our view it is mandatory that the order to release covers all persons regardless of their nationality. Considering the latest developments it may be called for to underline that release as referred to in the Order of the Tribunal means that the vessel as well as all persons shall have the right to leave the territory of the Russian Federation including its maritime zones.

2. The objective of this declaration is, firstly, to emphasize and, possibly, to enrich the reasoning in the Order of the Tribunal concerning the non-appearance of the Russian Federation. It will, secondly, deal with the declaration of the Russian Federation made when ratifying the Convention on the Law of the Sea. Thirdly, the declaration will briefly deal with issues concerning the jurisdiction of the Tribunal under article 290, paragraph 5, of the Convention. In our view the jurisdiction of the Tribunal is broader than the Order suggests. Fourthly, the declaration will discuss the enforcement powers claimed by the Russian Federation in its exclusive economic zone from the point of view that provisional measures must take into account the rights and interests of both Parties to the dispute. This latter aspect has not been touched upon in the Order of the Tribunal due to the restrictive approach taken concerning the jurisdiction of the Tribunal under article 290, paragraph 5, of the Convention. Nor does the Order, for the same reasons, touch upon human rights issues although argued extensively by the Netherlands.

3. The Order of the Tribunal deals with the non-appearance of the Russian Federation in paragraphs 46-56. It is rightly stated that the non-appearance of a party does not preclude the Tribunal from prescribing provisional measures (paragraph 48), that the non-appearing party remains a party to the case and is bound by the decision in accordance with article 33 of the Statute of the Tribunal. The Order refrains from referring to article 28 of the Statute of the Tribunal which states:

> When one of the parties does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and make its decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its decision, the 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.

4. The reason for not referring to article 28 of the Statute rests in the fact that, taken literally, the last sentence of this provision does not seem to harmonize with article 290 of the Convention. Under the procedure of article 290, paragraph 1, of the Convention the Tribunal may only establish its jurisdiction *prima facie.* In the case of article 290, paragraph 5, of the Convention the Tribunal has the function to establish the *prima facie* jurisdiction of a still to be established Annex VII arbitral tribunal. However, interpreting article 28 of the Statute of the Tribunal one should take into account that this article is to be found in Section 3 of the Statute on procedure which indicates that article 28 of the Statute is meant to cover all procedures, including provisional measures. Apart from that the latter are referred to in the same section and thus cannot be excluded. A harmonizing interpretation should read the references to jurisdiction that the claim is well founded in fact and law as referring to the requirements under the particular procedure in question. This would mean that article 28 of the Statute would apply to provisional measures as well as other procedures defined in this Section if the Tribunal finds it (or in the case of article 290, paragraph 5, of the Convention the arbitral tribunal to be established) has jurisdiction *prima facie*. This approach would have been more convincing than, as the Order of the Tribunal does, tacitly following the practice of the ICJ. The Tribunal missed the opportunity to contribute to the interpretation of article 28 of its Statute.

5. In this context the Order of the Tribunal could have shed some further light on how non-appearance is to be seen under a mandatory dispute settlement system such as the one established under Part XV of the Convention. The non-appearing party not only weakens its own position concerning the legal dispute but also hampers the other party to pursue its rights and interests in the legal discourse of the proceedings in question. But above that it hinders the work of the international court or tribunal in question. The international court or tribunal may in such a situation have to rely on the facts and the legal arguments presented by one side without

having the benefit of hearing the other side. This cannot be fully compensated by recourse to facts which are in public domain.

6. However, there is a more fundamental consideration to be mentioned. In the case of States having consented to a dispute settlement system in general – such as the Netherlands and the Russian Federation by ratifying the Convention on the Law of the Sea – non-appearing is contrary to the object and purpose of the dispute settlement system under Part XV of the Convention. Surely as stated in article 28 of the Statute of the Tribunal, the non-appearing State remains a party to the proceedings and is bound by the decisions taken. However, essential as this may be this does not cover the core of the issue. Judicial proceedings are based on a legal discourse among the parties and the co-operation of both parties with the international court or tribunal in question. Non-appearance cripples this process. As Sir Gerald Fitzmaurice has put it in his article on "The Problem of Non-Appearing Defendant Government" (*BYIL*, vol. 55 (1980), p. 89 at 115 non-appearance leaves the "outward shell" of the dispute settlement system intact but washes away the "core". For that reason article 28 of the Statute should not be understood as attributing a right to parties to a dispute not to appear, it rather reflects the reality that some States may, in spite of their commitment to co-operate with the international court or tribunal in question, take this course of action. The Order of the Tribunal does not express these concerns sufficiently and appears to be over diplomatic.

6. One of the decisive issues in this case is that the Russian Federation in its note verbale of 22 October 2013, relying on its declaration of 12 March 1997, stated that "it does not accept the arbitration procedure under Annex VII of the Convention initiated by the Netherlands in regard to the case concerning the vessel 'Arctic Sunrise.'" The declaration reads:

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

> respect of which is the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations; …

7. To the extent that the Russian Federation relied on this declaration to justify its non-appearance it is called for to state that this declaration cannot justify the non-appearance. Even if the declaration would exclude the jurisdiction of the Annex VII arbitral tribunal the decision on its jurisdiction rests with that tribunal and not with the Russian Federation. International courts and tribunals have a sole right to decide on their jurisdiction (Kompetenz-Kompetenz/la compétence de la compétence).

8. The Order of the Tribunal reflects the declaration of the Russian Federation (paragraph 41), quotes the position of the Netherlands (paragraph 43) and states in paragraph 45 that this declaration only covers those disputes excluded in article 297, paragraphs 2 and 3, of the Convention and therefore the Annex VII arbitral tribunal will have jurisdiction *prima facie*. A convincing reasoning is missing but is called for. A clarification of the scope of the declaration of the Russian Federation is a central issue in this case. Only if the Tribunal is of the view – *prima facie* – that the declaration made by the Russian Federation does not exclude the jurisdiction of the future Annex VII arbitral tribunal may it proceed to discuss whether article 283 of the Convention has been satisfied, namely whether the Netherlands *prima facie* has submitted a plausible claim and whether the urgency of the situation requires the issuing of provisional measures.

9. Dealing with the interpretation of the declaration of the Russian Federation and with the question whether it is applicable in the case concerning the *Arctic Sunrise* does not constitute an encroachment on the competences of the Annex VII arbitral tribunal. It is clear from the wording of article 290, paragraph 5, of the Convention that any such finding is without prejudice to the Annex VII arbitral tribunal as the Order seems to suggest. The arbitral tribunal has the right to modify, revoke or affirm the provisional measures taken (article 290, paragraph 5, last sentence, of the Convention). This is the mechanism to avoid any interference of the Tribunal with the functions of the Annex VII arbitral tribunal and not a self-restraint on the side of the Tribunal when taking a decision under article 290, paragraph 5, of the Convention.

10. When it comes to the interpretation of the declaration of the Russian Federation and its application to this dispute it is appropriate to note that the declaration was explicitly made under article 298 of the Convention and covers paragraph 1 of this provision. The declaration deviates from the wording in article 298, paragraph 1(b) of the Convention since it does not contain, as paragraph 1(b) does at the end, the limiting words "excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3." Article 297, paragraphs 2 and 3, of the Convention refer to the jurisdictional power of the coastal States concerning scientific research and fisheries. Deleting this reference would enlarge the declaration well beyond the scope anticipated in article 298 of the Convention and would exclude basically all potential disputes concerning the exercise of the coastal State's jurisdiction in its exclusive economic zone from judicial settlement. However, based upon its explicit reference to article 298 of the Convention it is justifiable – at least *prima facie* – to assume that the Russian Federation wanted with its declaration to remain within the realm of article 298 of the Convention. This interpretation – as said *prima facie* – is endorsed by the second part of the declaration which states the objections of the Russian Federation to any declaration that is not in keeping with article 310 of the Convention. Apart from that it is worth mentioning that the activities undertaken by the Russian authorities *prima facie* are not to be considered as "military activities" as referred to in the declaration.

11. The Order of the Tribunal does not touch upon the issue that the *Arctic Sunrise* was arrested within the exclusive economic zone of the Russian Federation whereas only several of its inflatable rubber boats entered the safety zone of the platform and only very few persons attempted to scale the installation. This could have been of relevance for the issuing of provisional measures under article 290, paragraph 5, of the Convention. Due to the non-participation of the Russian Federation some factual details are unknown in this respect. It should have been taken into account by the Order that a coastal State has only limited enforcement jurisdiction in its exclusive economic zone. These are amongst others the competences set out in articles 73, 110, 111, 220, 221 and 226 of the Convention. The situation is different in respect of artificial islands and installations where the coastal State according to article 60, paragraph 2, of the Convention enjoys

exclusive jurisdiction and in the safety zones around such artificial island or installations. This includes legislative jurisdiction as well as the corresponding enforcement jurisdiction.

12. As far as enforcement actions in the exclusive zone in general are concerned the enforcement jurisdiction of the coastal State is limited if it is not legitimized by one of the exceptions mentioned above. It is for the flag State to take the enforcement actions not entrusted to the coastal State by the Convention on the Law of the Sea. That this is a feasible and even effective way is demonstrated by a court injunction of a court in the Netherlands which prohibited Greenpeace International to enter into the safety zone of a platform in the EEZ off the coast of Greenland (see Rechtbank Amsterdam, Uitspraak, 09-06-2011, No. 491901/KGZA 11-870 Pec/PV).

13. This division of enforcement functions between the coastal State and the flag State should have been of relevance in formulating the provisional measures since such provisional measures should have taken into account that the Russian Federation enjoys enforcement functions in respect of the protection of the platform within the safety zone whereas it has no such right in its exclusive economic zone *vis-à-vis* the *Arctic Sunrise* as the facts present themselves at the moment. In the exclusive economic zone Greenpeace could invoke, amongst others, the freedom of expression as set out in the International Covenant on Civil and Political Rights whereas in the safety zone, depending on the factual situation, the exercise of such rights may have to yield to the to the safety interests of the operator of the platform.

(signed)
R. Wolfrum

(signed)
E. Kelly

SEPARATE OPINION OF JUDGE JESUS

1. I voted in favor of the Order, though I do not share entirely its legal reasoning and some of the conclusions reached, with regard to some issues related to jurisdiction, the posting of a bond and the scope of the application of the Order regarding the release of personnel. I will address them in this order:

On the issue of jurisdiction

2. In its letter dated 22 October 2013 addressed to the Tribunal, the Russian Federation informed the Tribunal that through a note verbale

> the Russian Side has … notified the Kingdom of the Netherlands … that it does not accept the arbitration procedure under Annex VII to the Convention initiated by the Netherlands in regard to the case concerning the vessel *Arctic Sunrise* and that it does not intend to participate in the proceedings of the International Tribunal for the Law of the Sea in respect of the request of the Kingdom of the Netherlands for the prescription of provisional measures under Article 290, paragraph 5, of the Convention.

3. In the same letter, the Russian Federation explains that its

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

and draws the attention of the Tribunal to the fact that

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

4. In view of this position of the Russian Federation not accepting the jurisdiction of the Annex VII arbitral tribunal to deal with the dispute (a position which may have led to its non-appearance in the provisional measures proceedings before the Tribunal), I am of the opinion that the Order of the Tribunal, in response to this

important issue of jurisdiction raised, could have given a more clear and more direct explanation as to why the Tribunal, contrary to the position of the Russian Federation, finds that the Annex VII arbitral tribunal prima facie would have jurisdiction to deal with the dispute submitted to it by the Netherlands.

5. Though I unreservedly agree with the findings of the Tribunal that the arbitral tribunal *prima facie* would have jurisdiction to entertain the case on the merits and, therefore the Tribunal has the authority to entertain the request for provisional measures under article 290, paragraph 5, I am of the view that the Tribunal should have developed its legal reasoning in paragraph 45 of the Order to specifically and clearly address the important and the only argument made in this regard by the Russian Federation in its above-mentioned letter. I therefore felt that I should detail my position on this issue as follows:

(a) The jurisdiction of the Tribunal to deal with a request for provisional measures, under article 290, paragraph 5 of the Convention, is dependent on whether the Tribunal, under the factual and legal circumstances of the case, finds that the arbitral tribunal instituted under the Annex VII of the Convention would have, on a prima facie basis, the jurisdiction to entertain the merits of the case. This is the guidance provided by that paragraph which states that

> [P]ending the constitution of an arbitral tribunal to which a dispute is being submitted …, the International Tribunal for the Law of the Sea … may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.

(b) Therefore, the Tribunal, in establishing the *prima facie* jurisdiction of the Annex VII arbitral tribunal in this case should have developed a counter-argument to the position of the Russian Federation in accordance with which

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

(c) Bearing in mind that this position of the Russian Federation is at the center of the consideration of the issue of the jurisdiction of the arbitral tribunal in this case and taking also into account that the Russian Federation's declaration made upon its ratification of the Convention, on 26 February 1977, meant to exclude from the compulsory jurisdiction set out in Section 2 of Part XV the disputes concerning "law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction", the Tribunal should have expanded its legal reasoning in this respect, to establish that:

(i) Under the Convention, States Parties to a dispute submitted to a court or tribunal referred to in article 287 of the Convention are subject to binding decisions, as set out in Section 2 of Part XV, unless the dispute falls into one of the categories of disputes referred to in article 298 of the Convention, from which States may opt out;

(ii) While exceptions to the compulsory jurisdiction established in Section 2 of Part XV of the Convention concerning law-enforcement activities in regard to the exercise of sovereign rights and jurisdiction are allowed under article 298, paragraph 1(b), of the Convention, such exceptions nonetheless can only be made in reference to two categories of disputes as clearly referred to in that subparagraph *in fine.* These two categories of disputes concern activities related to marine scientific research and fisheries, as indicated in article 297, paragraphs 2 and 3, of the Convention. It is evident from the factual background of this case that the detention by the Russian authorities of the vessel *Arctic Sunrise* and its personnel onboard has nothing to do neither with marine scientific research nor with fisheries;

(iii) From the above, it stands to reason that the declaration of the Russian Federation made upon the ratification of the Convention on 26 February 1977 cannot be construed as having excluded from the compulsory procedures entailing binding decisions under Section 2 of Part XV of the Convention the dispute that arouse out of the incident that took place in the EEZ of the Russian Federation on 19 September

2013 which led to the detention of the *Arctic Sunrise* and the personnel onboard;

(iv) On the other hand, this declaration made by the Russian Federation cannot be interpreted as excluding or modifying the legal effect of the provisions of the Convention in their application to the Russian Federation, as this is not permitted by article 310 of the Convention.

(d) For these reasons and having in mind that no other obstacles to jurisdiction were raised by the Russian Federation or seems to rise, I am of the view that the jurisdiction of the Annex VII arbitral tribunal will be well established and, as a result, the Tribunal has the authority to entertain the Netherlands' request for provisional measures.

On the issue of the bond

6. The Tribunal in its collective wisdom decided to order the release of the vessel *Arctic Sunrise* and its personnel onboard as an interim measure, pending the constitution of the Annex VII arbitral tribunal. This release was made conditional to the posting of a bond.

7. Although I joined the Tribunal in its decision to release vessel and personnel, I have some reservations as to the procedure of posting a bond, which I will hereunder attempt to explain:

(a) Although the Tribunal has dealt with several requests of provisional measures under article 290, paragraph 5, this is the first case in which the Tribunal, in the framework of the provisional measures proceedings, was requested to order the release of the vessel and persons onboard from detention for alleged violations of the maritime regulations of the coastal State regarding its exclusive economic zone. Therefore, as this case will have a precedent-setting role, the Order in this respect would require careful consideration of the legal issues involved.

(b) The majority decision, based on the language of article 290, paragraph 1, which states that the Tribunal "may prescribe any provisional measures which it considers appropriate under the circumstances to preserve rights of the parties to the dispute", decided to release the vessel *Arctic Sunrise* and its personnel on the condition that a bond be posted upon that release. This amounts to a back-door prompt release procedure that the Convention designed to be applied only to cases involving illegal fisheries in the EEZ and the specific situations referred to in article 226, paragraph 1, in conjunction with article 220, paragraphs 3 and 8, of the Convention.

(c) My reservations with regard to the reasoning of the majority decision lie on the very concept of using the request for interim protection as a way of obtaining the release of vessel and crew upon the posting of a bond. I see no difficulty in using the provisional measures proceedings to obtain the release of vessel and crew. My reservation is when this release is done upon the posting of a bond. I shall explain:

(i) As a general proposition, the criminal investigation and possible prosecution of persons presumed to have violated the laws of a State, in accordance with its procedural and substantive laws, is a normal function of any State and an emanation of its sovereignty, due regard, of course, being paid in this respect to the guarantees of the detainee under applicable international rules and standards.

(ii) States should therefore be able, within a reasonable period of time, to undertake, without undue interference from outside, the normal investigative and criminal proceedings in order to establish matters of fact and law which may lead or may not lead to the prosecution of detained persons. An early release of detainees may compromise the very purpose of the investigation and criminal proceedings.

(iii) Measures to release detainees prior to the outcome of the investigation, which may lead to their possible prosecution, may be justified where it is expressly allowed through procedures established

in the applicable law, domestic or international, as one would expect that these procedures would have taken into account the mechanisms to avoid that the investigation or prosecution be rendered void.

(iv) In the framework of the law of the sea, the possibility of releasing detained foreign vessels and crew prior to the outcome of internal criminal investigation or prosecution is only expressly provided for in the case of prompt release of vessel and crew under the urgent proceeding of article 292 of the Convention, a special procedure that is applicable only in two situations:

1. In case of alleged violations of the coastal State fishing legislation (article 73, paragraph 1, of the Convention); and

2. in the specific cases referred to in article 226, paragraph 1(b), in conjunction with article 220, paragraphs 3 and 8, of the Convention, involving the violation of applicable rules for the prevention, reduction and control of pollution from vessels.

8. The Tribunal on several occasions was requested, through the procedure of prompt release, under article 292 of the Convention, to order the release of vessel and crew that had been detained for alleged violations of the coastal State fishing legislation applicable to the EEZ, upon the posting of a reasonable bond.[1] Indeed, in the framework of cases brought to the Tribunal under the article 292 prompt release procedure, the Tribunal on several instances issued orders for release of fishing vessel and crew, always upon the posting of a reasonable bond or other financial guaranty posted with the detaining State, the amount of which the Tribunal fixed.

9. In the case of the article 292 prompt release procedure an early release of vessel and crew does not hinder the purpose of the criminal investigation and prosecution to be carried out by the domestic authorities, since under article 73, paragraph 3,

[1] See article 73 of the Convention.

> Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary, by the States concerned, or any other form of corporal punishment.

This is, of course, on the assumption that the amount of the bond would take into account all imposable monetary penalties and other amounts, as has been done in the prompt release cases entertained by the Tribunal.

10. Similar reasoning applies to the specific cases referred to in article 226, paragraph 1(b), in conjunction with article 220, paragraphs 3 and 8, of the Convention, involving the violation of applicable rules for the prevention, reduction and control of pollution from vessels. Indeed, in this case to which the procedure of prompt release under article 292 of the Convention also applies, only

> [M]onetary penalties … may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea.[2]

11. Conversely, a bond imposed as a condition for the release of vessel and crew in the framework of provisional measures, as in the present case, may not "preserve the rights" of the detaining State in cases in which the imposed or imposable penalties may involve imprisonment terms which, under the applicable domestic law, may not be convertible into a monetary penalty.

12. For these reasons, I would have preferred the reasoning of the Tribunal to be based on a different ground. In my view the release of vessel and personnel onboard of the *Arctic Sunrise* should have been justified on the grounds of freedom of navigation which the flag State of the vessel enjoys on the high seas, freedom which is also extensive to the EEZ of the Russian Federation, in accordance with article 58, paragraph 2, of the Convention.

13. Under this reasoning the release of personnel would have included even members of the personnel of the *Arctic Sunrise* who may have entered the safety

[2] See article 230 of the Convention.

zone established by the Russian Federation. As the Tribunal unfortunately did not have the benefit of the participation of the Russian Federation in proceedings before it, the Tribunal was thus prevented from having full account of the facts of this case, including facts that could have clarified for the Tribunal matters relative to those members of the personnel of the *Arctic Sunrise* that may have entered without authorization the safety zone, in violation of the Russian regulations and safety measures. For this reason, it would have been difficult to make a distinction between those that may have violated the Russian-established safety zone, from those that may have been in the Russian EEZ onboard of vessel, exercising its freedom of navigation.

14. It may be argued that if such an approach were to be followed by the Tribunal, it would have entered into the substance of the case which should be left to the Annex VII arbitral tribunal as the merits tribunal.

15. To this argument I would respond by saying that there are some matters of substance that a court or tribunal dealing with a request for provisional measure under article 290 of the Convention cannot abstain from addressing. I offer the following arguments in favor of this position:

(a) Firstly, I would say that the very object of a request for provisional measures is, as stated in article 290, paragraph 1, of the Convention, “to preserve the respective rights of the parties to the dispute”. As I see it, it is not just possible to take measures to preserve the rights of the parties without touching or even fully considering certain matters pertaining to the substance of the case. As stated by the ICJ “a request for provisional measures by its very nature relate to the substance of the case” (*United States Diplomatic and Consular Staff in Tehran, United States* v*. Iran*, *Request for Provisional Measures, 1979*);

(b) Secondly, the jurisprudence of the Tribunal itself in dealing with the provisional measures has gone at times into the substance of the case to justify such measures for preserving the rights of the parties. Such is the jurisprudence that resulted, for example, from the “*ARA Libertad” Case*. In this case, the Tribunal released the Argentinean warship without a bond, based on

its interpretation of the applicable substantive law, as reflected in paragraphs 94, 95, 98 and 100 of the Order of the Tribunal that released that warship. In paragraph 95 of that Order, for example, the incursion into substantive law was clear-cut when the Tribunal stated that "in accordance with general international law, a warship enjoys immunity, including in internal waters";

(c) The jurisprudence of the Tribunal in this regard is not an isolated one. The ICJ itself has done so. An example is the *Case United States Diplomatic and Consular Staff in Tehran, USA* v*. Iran, Provisional Measures*, where the ICJ clearly prescribed interim measures based on its interpretation of applicable substantive law;

(d) The release of the *Arctic Sunrise* and its personnel in this case based on the interpretation and application of substantive provisions of the Convention would not have interfered with the merits consideration of the case before the Annex VII arbitral tribunal, as the claims by the Netherlands before that arbitral tribunal are more related to compensation and not to the release of vessel and personnel.

16. Therefore I am of the view that the Tribunal could have instead released vessel and crew on the basis of the arguments developed in paragraphs 7 to 16 of this opinion, without recourse to a bond.

17. It would appear to me that, when dealing with a request for provisional measures the Tribunal should determine whether the Applicant has a good cause for obtaining the provisional measures requested and, if that is its conclusion, then it should take a decision accordingly to preserve the rights of the applicant *pendente lite* and therefore no bond should be required as a condition for the release, or, if the facts and the law applicable to the request do not warrant the imposition of such measures, then the Tribunal should not order them.

On the issue of scope of the application of the Order regarding the release of personnel

18. The decision of the Tribunal ordering the Russian Federation to release all the detained persons includes members of the personnel of Russian citizenship. I understand that the ship-as-a-unit concept developed by the Tribunal in the *M/V "SAIGA" (No. 2) Case* brings under the international judicial protection of that State all the crew members of the vessel flying its flag, even if the crew members hold a different nationality from that of the flag State.

19. While I am in full agreement that crew members of a ship that hold a nationality different from that of the flag State should also have the international judicial protection from that State, as promoted by the ship-as-a-unit concept, I do not think, however, that the concept should interfere with the special legal relationship that exists between a State and its citizens in its own territory.

20. To order a State to release its own citizens who are being prosecuted in its domestic courts for alleged violations of that State's own law may be pushing too far the scope of the applicability of the ship-as-a-unit concept, which is, otherwise, a good contribution to international law developed by the Tribunal in its early case law, a contribution that complements the institute of diplomatic protection. For these reasons alone, I would have preferred that the order of release applies to all personnel and not to the Russian citizens.

(signed)

J.L. Jesus

SEPARATE OPINION OF JUDGE PAIK

1. In the present proceedings, the Tribunal was, for the first time since its establishment, faced with a situation in which one of the parties, the Russian Federation in this case, did not appear. The Tribunal in paragraphs 46-57 of the Order thus had to examine the implications of the non-appearance of the Russian Federation in the present proceedings and to consider how the proceedings should be conducted in such a situation. Nowhere in the above paragraphs, however, did the Tribunal invoke or make reference to article 28 of the Statute of the Tribunal (hereinafter "the Statute"), the only provision in the Statute dealing with a situation of default of appearance, thus raising doubt about its applicability to the present proceedings. In so doing, the Tribunal apparently followed the practice of the International Court of Justice (hereinafter "the ICJ") in the matter, this being that the ICJ has never made specific reference to its own default provision in proceedings for the indication of provisional measures. In my view, however, a better approach is to apply article 28 of the Statute to the present proceedings in conjunction with article 290, paragraph 5, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"), under which the request for provisional measures was made by the Applicant. Let me explain why.

2. The rule and procedure to be followed by the Tribunal in the event of the default of one of the parties is provided for in article 28 of the Statute, which reads as follows:

> *Article 28*
> *Default*
>
> When one of the parties does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and make its decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its decision, the 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.

Article 28 of the Statute was undoubtedly influenced by, and closely follows, the default provision of the Statute of the ICJ (hereinafter "the ICJ Statute"), as can be

seen from its drafting history (see Myron H. Nordquist (ed.), *UNCLOS 1982: A Commentary*, Vol. V, 1989, pp. 389-390). Article 53 of the ICJ Statute reads as follows:

Article 53

> 1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.
> 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

Despite their similarities, there exist some noticeable differences between the two provisions. First, whereas, under article 53 of the ICJ Statute, the appearing party in a case of default may "call upon the Court to decide in favour of its claim", such a party, under article 28 of the Statute, may "request the Tribunal to continue the proceedings and make its decision". By allowing the appearing party to request the Tribunal only to continue the proceedings and make its decision (rather than to call upon the Tribunal to decide in favour of its claim), article 28 of the Statute appears to give the Tribunal more latitude in making its decision. In practice, however, it is doubtful if this difference is likely to be of any consequence, because non-appearance even under Article 53 of the ICJ Statute does not entail any special form of proceedings in which a so-called "default judgment" can automatically be granted in favour of the appearing party. Such a default judgment is clearly prohibited by Article 53, paragraph 2, of the ICJ Statute. Second, article 28 of the Statute explicitly provides that absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings, while the ICJ Statute contains no sentence to that effect. However, this point has been consistently emphasized by the ICJ in default situations it has had to deal with. In fact, article 28 of the Statute is a reflection of the settled jurisprudence of the ICJ on this matter.

On the other hand, the common feature in both provisions is that the Tribunal or the Court, before making its decision, must satisfy itself not only that it has jurisdiction but also that the claim is well founded in fact and law. Even here, however, a subtle difference can be noticed. Whereas Article 53, paragraph 2, of the ICJ Statute states "jurisdiction in accordance with Articles 36 and 37", article 28 of the Statute states

"jurisdiction over the dispute". It will be seen below if the addition of "over the dispute" after "jurisdiction" in article 28 of the Statute entails any consequence (see the next paragraph of this opinion).

Article 28 of the Statute clarifies and expands the rules and procedures applicable to instances of default in light of the experience gained by the ICJ. By spelling out the right of the appearing party in a more neutral way, this provision avoids apparent tension lurking between Article 53, paragraphs 1 and 2, of the ICJ Statute. It thus further elaborates on the balance achieved in Article 53 of the ICJ Statute between the interest of an appearing party and that of a defaulting party. In that sense, I believe that this provision is an improvement on the corresponding provision of the ICJ Statute.

3. In the 1970s and 1980s, when instances of non-appearance occurred with alarming frequency at the ICJ, it was the subject of acute controversy what action or inaction, at what phase of the proceedings, would bring the default provision of the ICJ Statute into operation. The controversy arose, quite often, in the context of proceedings for the indication of interim measures of protection. Requests for interim measures raised difficult questions whether the default provision applies to such proceedings and, if it does, how that provision should apply. The ICJ has never pronounced on those questions, although some judges have expressed their views in individual opinions. Scholarly opinion was divided. It was submitted by those who opposed the applicability of the default provision that a main difficulty in applying Article 53 of the ICJ Statute to proceedings for the indication of interim measures lay in its paragraph 2, which requires the Court to ensure that it has jurisdiction and that the claim is well founded in fact and law. According to this view, the result would be plainly absurd if the above paragraph were applied to proceedings for interim measures, because the appearing party would then have to meet a more stringent burden of proof for jurisdiction in default proceedings than in normal proceedings for provisional measures in which only a *prima facie* basis of jurisdiction needs to be shown. Such a result would amount to placing appearing States at a great disadvantage in cases of default.

The same concern or difficulty may be raised in respect of applying article 28 of the Statute to proceedings for provisional measures under article 290 of the Convention, which provides that such measures may be prescribed on the basis of *prima facie* jurisdiction. On closer examination, however, this difficulty may prove illusory. For one thing, the term "jurisdiction" has more than one meaning. As Judge Fitzmaurice noted in the *Northern Cameroons* case:

> Thus in the jurisdictional field, there is the substantive or basic jurisdiction of the Court (i.e. to hear and determine the ultimate merits), and there is the possibility of (preliminary) objections to the exercise of that jurisdiction. But also, there is the Court's *preliminary* or "incidental" jurisdiction (e.g. to decree interim measures of protection, admit counterclaims or third-party interventions, etc.) which it can exercise even in advance of any determination of its basic jurisdiction as to the ultimate merits; even though the latter is challenged; and even though it may ultimately turn out that the Court lacks jurisdiction as to the ultimate merits.
> (*Northern Cameroons* case *(Cameroon* v. *United Kingdom), Separate Opinion of Judge Fitzmaurice, I.C.J. Reports 1963*, p. 103)

Then the term "jurisdiction" in the third sentence of article 28 of the Statute can easily be interpreted to refer not only to the jurisdiction to hear and determine the merits of the case but to the jurisdiction to prescribe provisional measures. Indeed, this was the position of the Netherlands when it requested the Tribunal in its final submissions to declare that the Tribunal had jurisdiction over the request for provisional measures (*Final Submissions of the Netherlands (a)*).

Likewise, "claim" can also be understood to be a broad notion, encompassing any demand or assertion made as a right at various stages of proceedings. As such, the term "claim" includes not only a claim on the merits but also a claim to jurisdiction, a claim to compensation, and indeed, a claim to provisional measures (see D.W. Bowett, *Contemporary Developments in Legal Techniques in the Settlement of Disputes*, Vol. 180 (1983), p. 208). There is little reason to confine the term "claim" in the third sentence of article 28 of the Statute to a claim on the central issue of the merits. The term "claim" in the said sentence in the context of proceedings for provisional measures should be understood as a claim to such measures. Again, this was the position of the Netherlands when it requested the Tribunal in its final submissions to declare that the claim was supported by fact and law (*Final Submissions (c) of the Netherlands*). The claim mentioned in the final submissions

obviously refers to the claim to the prescription of provisional measures under article 290, paragraph 5, of the Convention.

The third sentence of Article 28 of the Statute requiring Tribunal to ensure that it has jurisdiction and that the claim is well founded in fact and law in no way intends to set the standard of proof for the existence of jurisdiction or the validity of claim that has to be satisfied by the appearing party in case of default. That sentence is to ensure that the principle of the equality of the parties, despite the default by one of them, continues to apply. It has little to do with the standard of proof applicable to proceedings in case of default. For proceedings for provisional measures, it would be sufficient for the appearing party to show *prima facie* jurisdiction, be it default proceedings or normal adversarial proceedings. As Professor Bowett observed in the context of Article 53, paragraph 2, of the ICJ Statute, "the Court can just as well be 'satisfied' that there is a *prima facie* case of jurisdiction as it can be 'satisfied' that there is conclusive proof of jurisdiction" (D.W. Bowett, *ibid.*). The addition of the words "over the dispute" after "jurisdiction" in the third sentence of article 28 of the Statute makes no difference in this regard.

There is no reason to exclude the procedure under article 28 of the Statute from proceedings for the prescription of provisional measures. Therefore, Article 28 of the Statute can and should be applied to the present proceedings. Furthermore, it should be applied in conjunction with article 290 of the Convention, as there is no contradiction between them.

4. The applicability of article 28 of the Statute to the present proceedings is *a fortiori* convincing considering its object and purpose. The purpose of the provision on default is well known. It is aimed at enabling the Tribunal to continue its proceedings in the case of default by one of the parties, thus safeguarding the right of the appearing State to the judicial settlement of the dispute, and at the same time protecting the rights of the defaulting State in such proceedings. The first two sentences of the provision embody the notion that default must not obstruct the proceedings, while the third and last sentence ensures the principle of the equality of the parties. Given the above purpose, there is no reason why the provision cannot or should not be applied to proceedings for the prescription of provisional measures.

The rationale behind the provision is as valid for incidental proceedings like the one before the Tribunal as for principal proceedings. The fact that article 28 is the only provision on default in the Statute lends further support to its general applicability to different phases of the case, including the request for provisional measures.

5. Another factor to be considered on the subject of the applicability of article 28 of the Statute to the present proceedings is the fact that procedurally the present case has been conducted on the basis of that provision. By note verbale dated 22 October 2013, the Russian Federation notified the Netherlands and the Tribunal that it did not accept the arbitration procedure under Annex VII of the Convention in regard to the case concerning the vessel *Arctic Sunrise* and that it did not intend to participate in the proceedings before the Tribunal in respect of the request for provisional measures under article 290, paragraph 5, of the Convention. The Registrar of the Tribunal, at the request of the President of the Tribunal, then sent a letter to the Agent of the Netherlands on 23 October 2013, drawing her attention to article 28 of the Statute and requesting any comments the Netherlands might wish to make. As indicated in paragraph 11 of the Order, the Agent of the Netherlands replied that "*in accordance with Article 28 of the Statute of the Tribunal*, the Kingdom of the Netherlands respectfully requests the Tribunal ... to continue the proceedings and make its decision on the Request for Provisional Measures ..." (italics added).

Thus it is clear that the Netherlands invoked article 28 of the Statute in the present proceedings. Apart from the question whether the default provision applies automatically when a situation of default occurs, or upon the invocation of an appearing party, at least in this case, the invocation of article 28 of the Statute by the Netherlands upon the request of the Tribunal should be the basis for the Tribunal to continue its proceedings and make its decision after being satisfied of the existence of jurisdiction and the validity of the claim. Instead of doing so, however, the Order in paragraphs 48-50 referred to the jurisprudence of the ICJ that the absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings, provided that the parties have been given an opportunity of presenting their observation, and pointed out that the Russian Federation was given ample opportunity to present its observation, but declined to do so. Thus the Tribunal apparently based its decision to continue the proceedings upon the fact that the

Russian Federation was given an opportunity to be heard in accordance with the jurisprudence of the ICJ. However, such reasoning is inconsistent with the way the case has been conducted, as has been explained above.

The Netherlands went on to state during the hearing that “Article 28 of the Tribunal’s Statute applies to requests for provisional measures” and that “Article 28 should be read in conjunction with Article 290, paragraph 5, of the Convention” (ITLOS/PV.13/C22/1, p. 9, lines 5-10). In fact, the entire argument made by the Netherlands during the hearing was structured on, and in accordance with, article 28 of the Statute, as can be understood from its final submissions. Given the way the present case has been conducted, and, *inter alia,* considering the explicit statement of non-participation by the Russian Federation and the subsequent invocation of article 28 by the Applicant upon the request of the Tribunal, the total silence of the Order in regard to article 28 of the Statute is estranged from the facts of the proceedings and thus hard to justify.

6. Where there is a statutory provision which envisages a certain situation, that provision should be applied when the situation envisaged arises, unless there is a high degree of uncertainties or ambiguities about its applicability. Some edges of the provision may need to be rounded through the process of interpretation so that it can fit into the situation. Needless to say, the legal regime based on a statute and the jurisprudence of the tribunal entrusted to safeguard that regime cannot be expected to develop unless serious efforts are made to clarify some inevitable uncertainties or ambiguities lurking in many statutory provisions. Bypassing a provision of its own statute and simply relying on the jurisprudence that has been developed on the basis of the provision, though similar, of another statute would hardly be conducive to such development. Instead of ignoring article 28 of its Statute, the Tribunal in the present Order ought to have considered applying it, and to have developed its own jurisprudence on the basis of and within the framework of this provision.

7. As this is the first case before the Tribunal involving the non-appearance of a party, the Tribunal should have taken the opportunity offered to it to clarify a few questions related to article 28 of the Statute, in particular whether and how the provision should apply to proceedings for the prescription of provisional measures.

Had it done so, the Tribunal would have made a substantial contribution to the clarification, and also development, of the international law on dispute settlement. I regret that it did not do so. However, I agree with the conclusion of the Order and thus voted for it.

(signed)
J.-H. Paik

DISSENTING OPINION OF JUDGE GOLITSYN

1. It is with great regret that I submit the present dissenting opinion. I am unable to lend support to the present Order because in my view, for the reasons explained below: the request submitted by the Kingdom of the Netherlands (hereinafter "the Netherlands") is inadmissible; the Tribunal wrongly concludes that the arbitral tribunal, to be constituted, would have *prima facie* jurisdiction; and a decision by the Tribunal on provisional measures does not conform to the requirements set out in article 290, paragraphs 1 and 5, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention").

Prima facie jurisdiction and admissibility

2. The Netherlands and the Russian Federation take differing positions on the question of whether a disagreement between them on the Russian Federation's rights and obligations as a coastal State in its exclusive economic zone and on the continental shelf may be subject to the procedures contained in Section 2 of Part XV of the Convention.

3. Clarifying its position in connection with a request by the Netherlands for the prescription of provisional measures under article 290, paragraph 5, of the Convention, the Russian Federation stated in its communication to the Tribunal that

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

and consequently it "does not accept the arbitration procedure under Annex VII to the Convention initiated by the Netherlands in regard to the case concerning the vessel 'Arctic Sunrise' ..." (note verbale from the Embassy of the Russian Federation in the Federal Republic of Germany to the International Tribunal for the Law of the Sea, dated 22 October 2013).

4. Despite the divergence of views between the two States on the availability in this case of the procedures contained in Section 2 of Part XV of the Convention, the Tribunal, nevertheless, has come to the conclusion, with which I disagree, that *prima facie* jurisdiction exists and therefore the Tribunal may decide whether it would be appropriate to prescribe provisional measures.

5. In my view the Tribunal should not have even considered the issue of *prima facie* jurisdiction because the request for the prescription of provisional measures submitted by the Netherlands should have been declared inadmissible, as the requirements of article 283, paragraph 1, of Section 1 of Part XV of the Convention have not been met in the present case.

6. Article 283 of the Convention, entitled "*Obligation to exchange views"*, in paragraph 1 provides the following:

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

7. It follows from this provision that, when a dispute arises between States Parties, they must first make every effort to try to settle it by **negotiations** or **other peaceful means.** In other words **negotiations** or efforts to find a settlement of a dispute by **other peaceful means** must take place.

8. The Tribunal in the past has emphasized the importance of the requirements laid down in article 283, paragraph 1, which constitute an integral element of the dispute-settlement procedures contained in Part XV of the Convention (*Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003,* paragraphs 37 and 38; Judge Chandrasekhara Rao in his Separate Opinion in that case emphasized that "[t]he requirements of this article regarding exchange of views is not an empty formality, to be dispensed with at the whims of a disputant", paragraph 11). The International Court of Justice while noting that the exhaustion of

diplomatic negotiation does not constitute a precondition for a matter to be referred to the Court, has clearly proceeded on the understanding that such negotiations are supposed to take place (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 303, paragraph 56). Judge Wolfrum in his dissenting opinion (*The M/V "Louisa" Case (Saint Vincent and the Grenadines* v. *Kingdom of Spain, Request for Provisional Measures,* paragraph 27*)* drew attention to the fact that the reference to negotiations in article 283, paragraph 1, of the Convention has "a distinct purpose clearly expressed in this provision namely to solve the dispute without recourse to the mechanisms set out in Section 2 of Part XV of the Convention".

9. It appears from the information provided by the Netherlands that the Dutch authorities have never tried to undertake an exchange of views with the Russian authorities regarding settlement of a dispute between the two States by negotiation or other peaceful means.

10. The *Arctic Sunrise* was detained by the Russian authorities on 19 September 2013. On 23 September 2013 the Netherlands, as the flag State of the *Arctic Sunrise*, by note verbale requested the Russian Federation to provide information concerning the actions of the Russian Federation's authorities against the vessel and its crew (Statement of Claim, paragraphs 21 and 22). This request was reiterated by the Netherlands in its note verbale of 26 September 2013 (Statement of Claim, paragraph 24). In a note verbale, dated 1 October 2013 sent in response to these requests for information, the Russian Federation stated that the boarding, investigation and detention of the *Arctic Sunrise* and its crew were justified on the basis of general provisions of the Convention related to the exclusive economic zone and the continental shelf. In this regard the Russian Federation referred to the provisions of the Convention contained in its articles 56, 60 and 80 (Annex 7 to the Statement of Claim and Statement of Claim, paragraph 26).

11. Following receipt of the above note verbale from the Russian Federation, the Netherlands, by note verbale, dated 3 October 2013, informed the Russian Federation that it did not consider that the provisions of the Convention referred to in

the Russian note justified the actions taken against the *Arctic Sunrise*. The Dutch note verbale further states: “it appears therefore that the Russian Federation and the Kingdom of the Netherlands have diverging views on the rights and obligations of the Russian Federation as a coastal state in its exclusive economic zone”.

12. The Dutch note verbale does not suggest that the Russian Federation and the Netherlands should proceed expeditiously to an exchange of views regarding the settlement of a dispute, the existence of which was for the first time specifically defined in the note, by negotiations or other peaceful means, as provided for in article 283, paragraph 1, of the Convention. There is not even a hint in the note verbale of an attempt to undertake consultations with a view to solving the dispute by negotiations or other peaceful means. Quite the contrary, the note verbale simply states straightforwardly and rather bluntly in conclusion that “there seems to be merit in submitting this dispute to arbitration under the United Nations Convention on the Law of the Sea” and that “the Kingdom of the Netherlands is considering to initiate such arbitration as soon as possible”. Immediately after sending this note verbale the Ministry of Foreign Affairs of the Netherlands on the next day by a note verbale, dated 4 October 2013, notified the Russian Federation through its Embassy in The Hague that “it submits the dispute between the Kingdom of the Netherlands and the Russian Federation, set out in the ‘Statement of the claim and the grounds on which it is based’ annexed to this notification, to the arbitral tribunal procedure provided for in Annex VII of the 1982 United Nations Convention on the Law of the Sea”.

13. The reference by the Netherlands to the fact that

> [t]he Ministers of Foreign Affairs of the Kingdom of the Netherlands and the Russian Federation discussed the dispute thrice: before its submission to arbitration (28 September 2013 and 1 October 2013) and once before the submission of this Request (17 October 2013)
> (Request, paragraph16)

is both misleading and not convincing evidence that the requirements under article 283, paragraph 1, of the Convention have been met**.** First, the last exchange of views, as acknowledged by the Netherlands, took place after the dispute had been submitted on 4 October 2013 to arbitration. Second, the exchange of views between

the Ministers on 1 October 2013 was held one day before the Russian Federation conveyed to the Netherlands its position regarding the grounds for detaining the *Arctic Sunrise* and its crew, in other words before the dispute crystallized and its existence could be ascertained. Consequently, these exchanges of views were not conducted for the purpose defined in article 283, paragraph 1, of the Convention.

14. In the light of the foregoing, in my view there has never been any serious attempt to exchange views regarding the settlement of the dispute between the two States by negotiations or other peaceful means. Consequently, the obligation laid down in article 283, paragraph 1, of the Convention has not been met and the request for the prescription of provisional measures should be considered inadmissible.

Whether provisional measures are appropriate in the present case

15. Irrespective of whether the request for provisional measures is admissible and whether the there is *prima facie* jurisdiction, the question arises whether it is appropriate to prescribe any provisional measures in this case.

16. The Netherlands states in its request that "**[t]he principal reason** (emphasis added) for requesting provisional measures is that the Russian Federation's actions constitutes internationally wrongful acts having a continuing character" (Request, paragraph 19). The Netherlands argues that

> the Russian Federation, in boarding, investigating, inspecting, arresting and detaining the "*Arctic Sunrise*" in its exclusive economic zone as well as in subsequently seizing the vessel in Murmansk Oblast, without the prior consent of the Kingdom of the Netherlands, breached its obligations owed to the Kingdom of the Netherlands in regard to the freedom of navigation and its right to exercise jurisdiction over the "*Arctic Sunrise*"

and that "[t]hese actions are prohibited under the Convention, in particular Part V and Part VII, notably Article 56, paragraph 2, Article 58, paragraph 2, Article 110, paragraph 1, as well as customary international law" (Request, paragraph 20).

17. In support of its request for provisional measures the Netherlands claims that "[a]s a result of the continued detention of the '*Arctic Sunrise'* in Kola Bay, Murmansk Oblast, its general condition is deteriorating" (Request, paragraph 37).

18. It follows from article 290, paragraphs 1and 5, of the Convention that the Tribunal, in deciding under the circumstances on the appropriateness of prescribing any provisional measures to preserve the respective rights of the parties, should determine whether the urgency of the situation so requires. Consequently, the Tribunal is not supposed to rule on the merits of the dispute.

19. However, it is obvious from the explanations given by the Netherlands with regard to what constitutes the "primary reason" for its request for provisional measures that the Netherlands in effect asks the Tribunal to rule on the merits of the dispute: this is contrary to what is provided for in article 290 of the Convention.

20. Under the circumstances, by deciding on the prescription of provisional measures the Tribunal actually indirectly supports the position of the Netherlands in the present dispute.

21. In the light of the foregoing it is therefore necessary to analyze whether the position of the Netherlands is consistent with the Convention and therefore justified.

22. Pursuant to article 60, paragraphs 1 and 2, of the Convention, in the exclusive economic zone and on the continental shelf "the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of ... artificial islands, ... installations and structures for the purposes provided for in article 56 and other economic purposes" and "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".

23. Laws and regulations enacted by the coastal State in furtherance of its exclusive jurisdiction under article 60, paragraph 2, of the Convention would be

meaningless if the coastal State did not have the authority to ensure their enforcement. Consequently, it follows from article 60, paragraph 2, of the Convention that the coastal State has the right to enforce such laws and regulations, including by detaining and arresting persons violating laws and regulations governing activities on artificial islands, installations and structures.

24. Under article 60, paragraph 4, of the Convention

> [t]he 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.

25. Reference in article 60, paragraph 4, to the right of the coastal State **to take appropriate measures** means that under the Convention the coastal State has the authority to take appropriate measures to ensure compliance with its regulations governing activities within safety zones, in other words to take the necessary enforcement measures.

26. As provided for in article 60, paragraph 5, of the Convention, the Federal Law on the Continental Shelf of the Russian Federation adopted on 30 November 1995 states in article 16 that the aforementioned safety zones shall extend for not more than 500 metres from each point on the outer edge of artificial islands, installations and structures. The Decree of the Ministry of Transport of the Russian Federation adopted on 10 September 2013 further to the authority given to the Ministry by the Decree of the President of the Russian Federation No. 23 of 14 January 2013 states in paragraph 2 that

> as a security measure in respect of navigation in safety zones around artificial islands, installations and structures established on the continental shelf of the Russian Federation, it is forbidden for all kinds of ships, including small ones, to stay in or sail through safety zones, except for ships performing rescue operations, cleaning up oil spills, carrying out ice-breaking operations for the artificial islands, installations and structures, or performing repair works on the artificial islands, installations and structures, and for ships proceeding towards the artificial islands, installations and structures to board or disembark people or to load or unload cargo.

Paragraph 4 of the same Decree further provides that “ships mentioned in paragraph 2 of the present Decree are forbidden to enter the safety zone before receiving permission from responsible persons to enter the safety zone.”

27. It is worthy of note that there have been at least three national court rulings against Greenpeace – two in the Netherlands and one in the United States of America (Alaska) – which declare Greenpeace’s actions against oil rigs in the Arctic to be illegal, covered by neither the freedom of expression nor the freedom of demonstration. An essential element in all these cases was that the actions were carried out in the safety zones and an attempt was made to climb the rigs.

28. According to one of the rulings, rendered by the Dutch Judge on 9 June 2011, Greenpeace International is prohibited to enter the 500-metre zone surrounding the platform *Leiv Eiriksson* situated in the exclusive economic zone around Greenland. Greenpeace International was also ordered to pay *Capricorn* c.s. (the operator of the platform) 50.000 Euro for each day or part thereof they enter the 500-metre zone up to a maximum of 1,000,000 Euro (Rechtbank Amsterdam, 491901/KGZA 11-870 Pee/PV, dated 9.06.2011, pp. 8 and 9); Rechtbank Den Haag, 09/797035-13, dated 23.08.2013).

29. In the present case, according to the note verbale of 18 September 2013 from the Ministry of Foreign Affairs of the Russian Federation to the Embassy of the Netherlands in Moscow, the *Arctic Sunrise*, sailing the flag of the Netherlands, had been continuously engaged in provocative activities in waters off the Russian Federation’s northern coastline and on 18 September 2013 four speedboats carrying crew members were lowered from the ship, entered the safety zone, approached the drilling platform *Prirzlomnaya* and attempted to gain admittance and force entry using special equipment. The note further states that as the speedboats travelled in the direction of the platform they trailed an unidentified, barrel-shaped object (Statement of Claim, Annex 2).

30. The facts described in the note verbale are more or less confirmed by the description of the events provided by Greenpeace International, the operator of the

Arctic Sunrise (Request, Annex 2). According to this information five rigid-hull inflatable boats were launched from the *Arctic Sunrise* and, when the first boat arrived at *Prirazlomnaya,* two activists attempted to climb the outside structure of the platform with the aim of unfurling a banner some distance below the main deck (Request, Annex 2, paragraph 12 and 13). At the same time a group of three boats further back towed a "safety pod", a foam tube, towards the platform with the intention of hanging it from the side of the platform as a cover under which the climbers could hide from the elements and fire hoses (Request, Annex 9, paragraph 14).

31. The factual account of the events having occurred on 18 September 2013 confirms that the *Arctic Sunrise* crew members taking part in the actions described above clearly disregarded the Russian laws and regulations governing activities within the safety zone and on the platform. **It is worthy of note that such disregard has been intentional.**

32. During the hearings Greenpeace International's legal counsel was asked whether the crew members had been advised before they undertook the trip on inflatable boats that their activities in the safety zone and on the platform might constitute violations of the safety regulation governing the zone and also the regulations governing the continental shelf installations enacted by the Russian Federation in exercise of Russian jurisdiction under article 60 of the Convention. His response was that Greenpeace International "always conduct[s] an assessment of the legal risks that may be involved in advance of any protest at sea" and such "assessment is made available to management" and "to prospective participants in such a protest", who "have the ability to opt out of the action if they are not comfortable with the risks that are entailed". The legal counsel declined to disclose the content of the assessment in this case because of the ongoing prosecution of the crew members by the Russian authorities.

33. It appears that Greenpeace International's activities in the present case constitute part of a general campaign conducted by this non-governmental organization in various parts of the Arctic. Reference has already been made to two

rulings by the Dutch courts. In the judgment handed down by the United States Court of Appeals, Ninth Circuit, on 12 March 2013 in the case *Shell Offshore, Inc. v. Greenpeace, Inc.* the court observed that "the record before the district court contained evidence that Greenpeace activities used illegal 'direct action' to interfere with legal oil drilling on many occasions". The court further noted that "'stop Shell' is not merely a campaign of words and images" and that "Greenpeace USA also uses so-called 'direct actions' to achieve its goals, and its general counsel has conceded that direct action can include illegal activity". According to the ruling of the Court of Appeals the district court acted within its discretion in determining that the balance of equities favored a preliminary injunction to prevent the environmental organization from interfering with the oil company's off-shore drilling in the Arctic. The Court of Appeals concluded that the district court acted within its discretion in determining that it was in the public interest to issue a preliminary injunction to prevent the environmental organization from interfering with the oil company's off-shore drilling in Arctic. (United States Court of Appeals, Ninth Circuit, *Shell Offshore, Inc. v Greenpeace, Inc.,* No. 12-35332, dated 12 March, 2013).

34. It follows from the above that in the light of the events that took place on 18 September 2013 within Russian Federation's safety zone and on the continental shelf platform, the Russian authorities had the right to take the necessary enforcement measures against violators of its applicable laws and regulations.

35. It should be observed in this regard that the ship from which the activities violating the laws and regulations of the coastal State have been launched cannot claim to be free of responsibility for these activities because it exercised freedom of navigation by staying outside the safety zone. The Convention is quite clear in article 111 on the right of hot pursuit that a mother ship is responsible for the activities of its boats or other craft as they work as a team. In the present case the *Arctic Sunrise* and the inflatable boats launched from it acted as a team and the *Arctic Sunrise* is equally responsible for the violations committed and therefore cannot claim that it simply exercised freedom of navigation. Consequently, the Russian authorities have the authority to take enforcement measures against the *Arctic Sunrise* as the mother ship.

36. The factual account of events given by the Russian authorities in their note verbale of 1 October 2013 and by Greenpeace International in its Statement of Facts contained in Annex 2 to the Request provide sufficient grounds to conclude that the Russian coastguard vessel *Ladoga*, which detained the *Arctic Sunrise* on 19 September 2013 was exercising the right of hot pursuit of the ship for violations committed within the safety zone and on the continental shelf platform. The Russian Federation therefore acted in full conformity with the Convention, which provides in article 111, paragraph 2:

> the right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, **including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones** (emphasis added).

37. If the Russian Federation in detaining the *Arctic Sunrise* and its crew acted in accordance with the respective provisions of the Convention (articles 60 and 111), then there are no grounds for a claim that the freedom of navigation was violated in the present case and consequently such a claim cannot serve as the principal reason for requesting provisional measures.

38. As to the statement that the *Arctic Sunrise* should be release because the continued detention of this ship is causing its general condition to deteriorate, it appears that the Russian authorities have taken all appropriate measures to prevent any significant deterioration of the ship by assigning responsibility for its maintenance to the competent authorities of the Russian Federation.

39. According to the Official Report of seizure of property, dated 15 October 2013, the seized property – the Dutch-flagged ship *Arctic Sunrise* – was transferred to the representative of the Murmansk office of the Federal State Unitary Enterprise "*Roscomflot*". From the time the ship was moored at the berth until the conclusion of the custody agreement, the Coast Guard of the Federal Security Service of the Russian Federation for Murmansk Oblast will be responsible for compliance with security measures. Representatives of *Roscomflot* and the Coast Guard Division of

the Federal Security Service have been notified in accordance with the applicable law of their liability for any loss, deposal of, concealment or illegal transfer of property that has been sized (Request, Annex 2, Appendix 7).

40. In its comments on that Official Report submitted in response to a question addressed to it during the hearings, the Netherlands stated that in its view it was not clear whether “the security measures” referred to in the Report covered servicing, or whether it could invoke the liability referred to in the Report. It further stated that the Netherlands cannot be expected to avail itself of Russian procedures to enforce this liability under Russian law as the responsibility of the Russian Federation towards the Netherlands arises under international law.

41. It is my view that despite these reservations expressed by the Netherlands, the Official Report, by assigning respective responsibilities to the competent Russian authorities provides sufficient guarantees that the *Arctic Sunrise* will be properly maintained and will not “perish”.

42. It is worth recalling that in the *The M/V "Louisa" Case (Saint Vincent and the Grenadines* v. *Kingdom of Spain, Request for Provisional Measures)* the Tribunal decided that the assurances given by the State detaining the ship, in the present case in the form of the Official Report, should be placed on record and thus treated with due regard.

Inconsistency of the provisional measures prescribed by the Tribunal with the requirements contained in article 290, paragraphs 1 and 5, of the Convention

43. Even if it is assumed that the request is admissible and that *prima facie* jurisdiction exists, conclusions with which, as stated earlier, I totally disagree, analysis of the provisional measures prescribed in the present case by the Tribunal still proves that that they do not conform to the requirements set out in article 290, paragraphs 1 and 5, of the Convention.

44. Article 290, paragraph 1, clearly stipulates that any provisional measures that might be prescribed must preserve the respective rights of the parties pending the final decision. The provisional measures prescribed by the Tribunal do not comply with this requirement.

45. By ordering the release of the *Arctic Sunrise* and all detained members of its crew upon posting of a bond or other financial security, the Tribunal completely disregards the rights of the Russian Federation and its position according to which: (i) the ship and its crew have been lawfully detained by the Russian authorities for having been involved in activities violating the applicable Russian laws and regulations, enacted by the Russian Federation in exercise of its jurisdiction under article 60 of the Convention, governing the activities in safety zones and on continental shelf installations; (ii) the detention has been sanctioned by the competent Russian court, which *inter alia* determined that the *Arctic Sunrise* had been used "as a criminal instrument" (Order, Leninsky district court, Murmansk, Statement of Claim, Annex 3); and finally (iii), there is an ongoing criminal investigation in this regard. The position of the Russian Federation is quite clear. As the *Arctic Sunrise* has been involved in activities violating Russian laws and regulations governing activities in safety zones and on continental shelf installations, it will be for the competent Russian court to decide on the penalty that should be imposed in respect of the *Arctic Sunrise,* detained on account of violations committed, and also to determine with regard to each crew member to what extent, if at all, the individual has been involved in activities violating the applicable Russian laws and regulations and whether any penalty should be imposed in this regard.

46. What is utterly incomprehensible in this connection is how the Tribunal can prescribe a provisional measure calling for all detained persons to be allowed to leave the territory under the jurisdiction of the Russian Federation, including, and this is the most astounding, the Russian nationals among them.

47. The Tribunal cannot claim under the circumstances that it preserves the rights of the Russian Federation by prescribing the release of the ship and its crew upon the posting of a bond or other financial security.

Can posting of a bond as a provisional measure be prescribed under article 290, paragraph 5?

48. The authority of the Tribunal in respect of establishing a bond is defined by article 292 of the Convention. Under this article the Tribunal can take a decision prescribing the release of a detained or arrested ship and its crew upon the posting of a reasonable bond or other financial security only in limited cases explicitly described in the Convention. According to the Convention these includes cases in which a ship and its crew have been detained or arrested by the coastal State in accordance with article 73, paragraph 2, of the Convention, or in which a ship has been detained for alleged pollution violations (article 220, paragraphs 6 and 7, and article 226, paragraphs (1) (b) and (c), of the Convention).

49. The present case does not fall under any of the above Convention provisions and therefore it is questionable whether the Tribunal can prescribe the release of the ship upon the posting of a bond under article 290, paragraph 5, of the Convention.

(signed)
V. Golitsyn

DISSENTING OPINION OF JUDGE KULYK

While voting against, I believe it is necessary to clarify certain points with respect to the present case. The following observations meant to explain briefly my position on requirements of the 1982 UN Convention on the Law of the Sea ("the Convention") related to the prescription of provisional measures and my reservations regarding the use of a bond or other security as provisional measures.

1. The option of prescription of provisional measures is well-known to both domestic and international proceedings. Their main purpose is to ensure that pending settlement of a dispute, its subject or the relevant rights and interests of the parties are not transformed or distorted so much that the prevailing party would be prevented from recovering the subject or enjoying claimed rights and interests. Thus, provisional measures are intended to restrain or otherwise direct actions of parties prior to a decision on the merits of a dispute itself.

2. Pursuant to paragraph 5 of article 290, the International Tribunal for the Law of the Sea ("the Tribunal") may prescribe provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted, in this case an arbitral tribunal under Annex VII of the Convention, would have jurisdiction and that the urgency of the situation so requires. Reference in paragraph 5 to the prescription of provisional measures "in accordance with this article" limits the range of discretional authority of this Tribunal which the Convention confers upon it to those provisional measures that are "appropriate under the circumstances to preserve respective rights of the parties to the dispute or prevent serious harm to the marine environment".

3. It is also well established in the practice of the Tribunal that respective rights are preserved against irreparable prejudice or irreversible damage and that prescribed measures are appropriate under the particular circumstances. The Tribunal stated in the *MOX Plant* case

> that according to article 290, paragraph 5, of the Convention, provisional measures may be prescribed pending the constitution of the Annex VII arbitral tribunal if the Tribunal considers that the urgency of the situation so requires in the sense that action prejudicial to the rights of either party or causing serious harm to the marine environment is likely to be taken before the constitution of the Annex VII arbitral tribunal
> […]
> that the Tribunal must, therefore, decide whether provisional measures are required pending the constitution of the Annex VII arbitral tribunal.
> *(MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, par. 64 and 65)

4. It highlighted in the *Land Reclamation* case that there has to be "a risk that the rights it [Malaysia] claims with respect to an area of territorial sea would suffer irreversible damage pending consideration of the merits of the case by the Annex VII arbitral tribunal" *(Land Reclamation in and Around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003,* p. 10, par. 72). The Tribunal further developed its jurisprudence on provisional measures in the *"M/V Louisa"* case requiring existence of "a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute" *(M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58, par. 72).

5. The above jurisprudence in practice means that for the provisional measures, which are essentially exceptional and discretionary in nature, to be granted, it is not sufficient for the party merely to claim that it is suffering injury to its rights due to the continued wrongfulness of the actions of the other party. The burden upon the party is to prove to the Tribunal that there exists irreparable prejudice or irreversible damage to its rights or at least that these rights are under real, if not imminent, risk of suffering prejudice or damage. The prejudice or damage to the rights have to be irreparable as this notion is understood in international adjudication, meaning in practical terms that the rights of the injured party cannot be restored by "the payment of an indemnity or by compensation or restitution in some other material form" *(Denunciation of the Treaty of 2 November 1865 between China and Belgium, Order of 8 January 1927, P.C.I.J. Series A, No. 8,* p. 7). It could be possible also to argue that prejudice or damage shall even be further qualified as "serious", since paragraph 1 of article 290 provides for "serious harm to the marine environment". In addition, the urgency of the situation under paragraph 5 of article 290 requires that

prejudice or damage to the rights is expected to occur before the arbitral tribunal has been constituted and given a chance to consider a request on prescription of provisional measures (but the urgency does not mean that the effect of the prejudice is confined only to the period before the constitution of the arbitral tribunal).

6. Thus, one of the questions before the Tribunal in this case was whether the rights claimed by the Kingdom of the Netherlands were under the risk of suffering irreparable prejudice or irreversible damage before the constitution of the Annex VII tribunal from alleged continued breaches by the Russian Federation of its obligations owed to the Kingdom of the Netherlands. In my view the Order should have specifically addressed this matter.

7. It may be also concluded that the Tribunal has chosen not to rely on the standards of "irreparability" or "irreversibility" and instead to emphasise the urgency of the situation in this case. The requirement of urgency as mentioned above is a direct consequences of paragraph 5 of article 290 of the Convention. The Tribunal may not prescribe provisional measures unless it is satisfied that under the particular circumstances of the case the situation of urgency exists in accordance with the strict conditions on the time frame envisaged in the relevant provisions, meaning that not just potentially the prejudice and damage to the rights might exist but rather that the prejudice and damage could reasonably be expected to happen in the period before the constitution of the Annex VII tribunal. I believe that these standards along with the limits of "appropriateness" outline the constraints of the discretionary nature of the provisional measures which should be prescribed with prudence and according to their purposes. They may not be dismissed lightly.

8. Emphasis on the urgency has some parallel with the most recent case on provisional measures, the *"ARA Libertad",* when the Tribunal did not directly refer to "irreparable prejudice" or "imminent risk" while ascertaining that under the circumstances of that case "the urgency of the situation requires the prescription by the Tribunal of provisional measures that will ensure full compliance with the applicable rules of international law, thus preserving the respective rights of the Parties" (*"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012,* para. 100). However, I do not consider that it is applicable to this

case. Evidently detention of the warship calls for urgency and runs the risk of causing irreparable prejudice and damage to the rights of all the parties involved into the dispute.

9. Both in its written and oral pleadings the Kingdom of the Netherlands argued that the vessel required intensive maintenance and was at risk of perishing and that continued detention of the crew would have irreversible consequences. As far as the vessel, an ageing icebreaker, is concerned reference was made to the Memorandum of the Ministry of Infrastructure and the Environment, Human Environment and Transport Inspectorate, of 18 September 2013 (Annex VII of the Request for the prescription of provisional measures). But relevant provisions of the Memorandum are not themselves unambiguous. It stated in the relevant part that

> Leaving a vessel that is not in operational condition at the quayside does not in itself necessarily give rise to problems, provided that the ship has been sufficiently prepared for this. If no preparations are made a ship cannot be laid up directly after being fully operational without the risk of damage. Substantial problems may arise in such a case upon putting the ship back into operation, particularly in view of local weather conditions.

It is necessary to point out several aspects. First, nothing is said about irreversible damage. Second, if proper maintenance procedures are carried on the risk of suffering damages is lower. And third, there is no indication that irreversible damage to the ship is likely to occur before constitution of the Annex VII tribunal. Almost the same arguments were repeated during the oral hearing with some additional references to claims of the operator of the *Arctic Sunrise*, which had expressed concern “that keeping a vessel unmanned for extended periods in cold weather may cause damage to machinery, and may cause fire, flooding, pollution, security and health risks.”

10. Regrettably the Tribunal did not have an opportunity to consider the arguments of the other party on the facts of the dispute and applicable law. In this regard it had to evaluate the available information, facts and evidence, especially those concerning the risk or continued prejudice and damage to the rights of the parties, mainly on an uncontested basis. This however does not mean that some or parts of the documents submitted within this case may be discounted. Annex 4 to the

Request for provisional measures contains the Official Report of seizure of property, dated 15 October 2013, also referred to in the Order, which clearly stipulates responsibility and liability of the appropriate authorities and persons in the Russian Federation for security measures regarding the *Arctic Sunrise* and for any loss to the vessel. Bearing in mind that it is an official document attributed to one of the parties, until proven otherwise, its provisions have to be considered as sufficient confirmation of the obligation which had been undertaken by the Russian Federation upon itself. Taking different approach in this regard could amount to defeating by the Tribunal of the presumption of good faith with regard to at least one of the parties.

11. Therefore I would have preferred that other options on provisional measures beyond straightforward release of the vessel were looked into by the Tribunal, for instance in the direction of granting to the operator of the *Arctic Sunrise* access to the vessel in order to perform necessary preservation and maintenance procedures to ensure operability of the vessel.

12. The situation with the crew and other persons detained on the *Arctic Sunrise* tends to be different. I see merits in invoking by the Kingdom of the Netherlands of the rights of those detained on board to liberty and to security as well as to leave the territory and maritime zone of a coastal state as provided by Articles 9 and 12 of the 1966 International Covenant on Civil and Political Rights and customary international law. In virtue of article 293 of the Convention it could not be found *a priori* that relevant rules will not apply in the present case. That might also affect considerations at the stage of provisional measures. Apart of this, it is not my intention to elaborate on the matter within this Opinion since in light of the recent developments, when most of the detained persons from *Arctic Sunrise* are being released on bail, I believe the Request for provisional measures has lost its object in this part. It should be recalled that the Tribunal dealt with a request for prescription of provisional measures to preserve the respective rights and not with the prompt release procedure.

13. The procedure on prompt release of a vessel or its crew upon posting of a reasonable bond or other financial security appeared in the Convention as one of the mechanisms to balance the new extended rights of the coastal States in the

exclusive economic zone (EEZ) with the interests of continued operation and protection of ships, primarily fishing vessels, and their crews. It also serves as an assurance at the international level against unreasonable conditions for release of ships or crew or excessive penalties that might be imposed by national courts. The purpose of a bond or other financial security basically is, on the one hand, to make certain that the accused will duly appear before the court and the judgement can be effectively executed against vessel or crew, and, on the other hand, to safeguard the ship owner, operator, other interested persons and crew against damages and hardships of the prolonged periods of detention pending trial. In general the effect of ordering release on the posting of a bond is to transfer custody and subsequent obligation to ensure appearance of the accused from the competent law enforcement authorities to the person who assumed that obligation pursuant to the conditions of the bond.

14. The procedure of the prompt release of a vessel or its crew may be invoked irrespective of whether there is an underlying dispute between states on the application or interpretation of the Convention; consequently I do not consider that the Tribunal is formally precluded from prescribing “release of vessel or its crew upon posting of reasonable bond” also as the provisional measure. It is the specific function of the “bond” to ensure effective compliance with the jurisdiction of the national court that draws inconsistency to the situations when that jurisdiction is particularly contested at the international level. The Tribunal should be careful not to undermine the rights of the parties through prescribing provisional measures that in practice may imply recognition of the very issue that is contested. In addition, I had the opportunity to read the Separate Opinion of Judge Jesus and want to register my concurrence with the reservations on the applicability of a bond within provisional measures in cases when eventual penalties include imprisonment.

15. In the note verbale of 26 September 2013, addressed to the Embassy of the Russian Federation to the Kingdom of the Netherlands, the Ministry of Foreign Affairs of the Kingdom of the Netherlands enquired “whether such release [of the vessel *Arctic Sunrise* and its crew] would be facilitated by posting of a bond or other financial security and, if so, what the Russian Federation would consider to be a reasonable amount for such bond or other financial security”. The Kingdom of the

Netherlands specifically referred to that enquiry during the oral hearing and apparently the option of prescribing a bond or other financial security in order to release the *Arctic Sunrise* and its crew has never been rejected in the present case. I, therefore, would have probably considered a bond acceptable under the particular circumstances of this case if not for its form outlined in the provisions of the Order. Paragraph 97 of the Order provides that

> the issuer [bank present in the Russian Federation] of the bank guarantee undertakes and guarantees to pay the Russian Federation such sum up to 3,600,000 Euros as may be determined by a decision of the Annex VII arbitral tribunal or by agreement of the Parties ... .

In my view set linkage of the "bond in the form of a bank guarantee" to the Annex VII tribunal confuses two separate objectives – to obtain release of the *Arctic Sunrise* and persons who were detained on board against a bond and to guarantee implementation of the future decision of the Annex VII tribunal in the part of possible payment to the Russian Federation. These conditions undercut what was the essential purpose for introduction of the bond into this case, namely to achieve release of the vessel and crew and through that release preserve the respective rights. In other words the Russian Federation is supposed to release the vessel and crew upon posting of a bond by the Kingdom of the Netherlands; the latter receives the vessel and crew and assumes obligation to deliver the appropriate persons under the jurisdiction of the court inasmuch as the Annex VII tribunal decides in favour of the Russian Federation, which, in its turn, in the event of non-performance of the above obligation would be in a position to receive satisfaction from the bond. The guarantee to pay the Russian Federation the sum determined by a decision of the Annex VII tribunal has nothing to do with the preservation of the rights of the Kingdom of the Netherlands that it claims to be under prejudice or risk of damage due to the alleged breaches of obligations by the Russian Federation and continued detention of the vessel *Arctic Sunrise*, its crew and other persons which had been on board.

(signed)

M. Kulyk