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PARTIE II

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Declaration by the Russian Federation cannot exclude dispute concerning "law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction", unless dispute also excluded from the jurisdiction of a court or tribunal under Article 297, paragraph 2 or 3—State party may only exclude the legal effect of a provision of UNCLOS when such exclusion is expressly permitted by a provision of UNCLOS—Russian Declaration cannot create exclusion wider in scope that that permitted by Article 298(1)(*b*)—Russian actions were not "law enforcement activities in regard to the exercise of sovereign rights or jurisdiction" within the scope of Article 298(1)(*b*)—Russian Declaration does not exclude dispute from jurisdiction of the Tribunal.

Sentence sur la compétence

Mesures prises le 18 septembre 2013 par la Fédération de Russie à l'égard de l'*Arctic Sunrise*, navire battant pavillon néerlandais, et des personnes qui se trouvaient à son bord—demande de jugement déclaratoire, d'excuses officielles et de réparation pour les pertes financières subies en raison des mesures prises par la Russie.

Examen de l'exception d'incompétence soulevée par la Fédération de Russie—les Pays-Bas et la Fédération de Russie sont tous deux liés par la partie XV de la Convention des Nations Unies sur le droit de la mer (la « Convention »)—différend entre les parties relatif à l'interprétation et à l'application de la Convention—différend soumis à la procédure d'arbitrage prévue à l'annexe VII de la Convention.

La déclaration de la Fédération de Russie ne peut venir exclure un différend concernant les « actes d'exécution forcée accomplis dans l'exercice de

droits souverains ou de la juridiction » que l'article 297, paragraphe 2 ou 3, de la Convention exclut également le différend de la compétence d'une cour ou d'un tribunal—un État partie ne peut priver d'effet juridique une disposition de la Convention que si une autre disposition de la Convention l'y autorise expressément—la Fédération de Russie ne peut créer une exclusion de portée plus large que celle autorisée par l'article 298, paragraphe 1, alinéa *b*)—les mesures prises par la Russie n'étaient pas des « actes d'exécution forcée accomplis dans l'exercice de droits souverains ou de la juridiction » au sens de l'article 298, paragraphe 1, alinéa *b*)—la déclaration de la Fédération de Russie ne soustrait pas le différend de la compétence du Tribunal.

* * * * *

In the matter of the *Arctic Sunrise* Arbitration

-before-

an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea

-between-

The Kingdom of the Netherlands

-and-

The Russian Federation

Award on Jurisdiction

Arbitral Tribunal:

Judge Thomas A. Mensah (President)

Mr. Henry Burmester

Professor Alfred H.A. Soons

Professor Janusz Symonides

Dr. Alberto Székely

Registry:

Permanent Court of Arbitration

26 November 2014

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Glossary of Defined Terms

Convention	United Nations Convention on the Law of the Sea, 1982
Declaration	Declaration made by Russia upon ratification of the Convention
Greenpeace	Greenpeace International (Stichting Greenpeace Council)
ITLOS	International Tribunal for the Law of the Sea
ITLOS Order	Order prescribing provisional measures issued by ITLOS on 22 November 2013 in the *"Arctic Sunrise" case (Kingdom of the Netherlands* v. *Russian Federation)*
Memorial	Netherlands' Memorial dated 31 August 2014
the Netherlands	The Kingdom of the Netherlands, the claimant in this arbitration
Plea Concerning Jurisdiction	Russia's plea concerning jurisdiction, first made in a *Note Verbale* dated 22 October 2013 and conveyed to this Tribunal by *Note Verbale* dated 27 February 2014
PCA	Permanent Court of Arbitration
Parties	The Kingdom of the Netherlands and the Russian Federation
Russia	The Russian Federation, the respondent in this arbitration
Statement of Claim	The Netherlands' Notification and Statement of the Claim and the Grounds on which it is Based dated 4 October 2013
Supplementary Submission	The Netherlands' Supplementary Written Pleadings on Reparation for Injury dated 30 September 2014

I. Introduction

1. The Kingdom of the Netherlands ("the Netherlands") is the claimant in the arbitration. It is represented by Professor Dr. Liesbeth Lijnzaad (Agent), Legal Advisor of the Netherlands' Ministry of Foreign Affairs, and Professor Dr. René Lefeber (Co-Agent), Deputy Legal Advisor of the Netherlands' Ministry of Foreign Affairs.

2. The Russian Federation ("Russia") is the respondent. Russia has not appointed agents or representatives in the proceedings.

3. The arbitration concerns actions taken by Russia against the *Arctic Sunrise*, a vessel flying the flag of the Netherlands, and persons on board the vessel. As recounted by the Netherlands, on 18 September 2013, Greenpeace International (Stichting Greenpeace Council) ("Greenpeace"), the charterer and operator of the *Arctic Sunrise*, used the vessel to stage a protest against the Russian offshore oil platform *Prirazlomnaya*, located in the Pechora Sea within the exclusive economic zone of Russia. On 19 September 2013, in response to the protest, the *Arctic Sunrise* was boarded and detained by Russian authorities. Subsequently, the *Arctic Sunrise* was towed to Murmansk (a Northern Russian port city) and detained there, in spite of requests from the Netherlands for its release. The persons on board were arrested, charged with criminal offences, and held in custody. They were released on bail in late November 2013 and were subsequently granted amnesty by decree of the Russian State Duma on 18 December 2013. The non-Russian nationals were permitted to leave Russia shortly thereafter. On 6 June 2014, the arrest of the *Arctic Sunrise* was lifted and, on 1 August 2014, the ship departed from Murmansk, arriving in Amsterdam on 9 August 2014.

4. The Netherlands claims that, in taking the actions described above against the *Arctic Sunrise* and the persons on board, Russia violated its obligations toward the Netherlands under the United Nations Convention on the Law of the Sea ("Convention"),[1] the International Covenant on Civil and Political Rights,[2] and customary international law. The Netherlands also claims that Russia has violated the Convention by failing to fully comply with the Order of the International Tribunal for the Law of the Sea ("ITLOS") prescribing provisional measures in the case, and by failing to participate in these arbitral proceedings. The Netherlands seeks, *inter alia*, a declaratory judgment confirming the wrongfulness of Russia's conduct, a formal apology, and compensation for financial losses incurred as a result of Russia's actions.

5. Russia, in the only communication submitted to this Tribunal, referred to its declaration upon the ratification of the Convention ("Declaration"), in which it stated that it did not accept binding dispute resolution under the Convention with regard to disputes "concerning law-enforcement

[1] 1982, 1833 UNTS 3.

[2] 1966, 999 UNTS 171.

activities in regard to the exercise of sovereign rights or jurisdiction" ("Plea Concerning Jurisdiction").

6. In this Award on Jurisdiction, the Tribunal will only decide on Russia's Plea Concerning Jurisdiction.

II. Procedural History

A. Initiation of the Arbitration

7. By Notification and Statement of the Claim and the Grounds on which it is Based dated 4 October 2013 ("Statement of Claim"),[3] the Netherlands initiated this arbitration against Russia pursuant to Article 287 and Annex VII to the Convention.

B. Application to ITLOS for Provisional Measures

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

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

> The investigative activities related to the vessel *Arctic Sunrise* and its crew have been and are being conducted by the Russian authorities, since under the [Convention], as the authorities of the coastal State, they have jurisdiction, including criminal jurisdiction, to enforce compliance with the legislation of the Russian Federation.
>
> Upon ratification of the Convention on 26 February 1997 the Russian Federation drew up a declaration stating *inter alia* that it did not accept "the procedures provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes … concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction."
>
> On the basis of the above, the Russian Federation does not accept the arbitration proceedings proposed by the Kingdom of the Netherlands under Annex VII [of the Convention] in the case of *Arctic Sunrise* and does not intend to participate in the hearing by the [ITLOS] of the request of the Kingdom of the Netherlands to prescribe provisional measures pursuant to article 290, paragraph 5 of the Convention.[4]

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[3] Annex N-1.

[4] Reproduced here is the English translation (from the original Russian) of the *Note Verbale* from Russia to the Netherlands submitted by the Netherlands as Annex N-17. The *Note Verbale* from Russia to ITLOS (Annex N-18) contains the same text in a different English translation. Unless otherwise indicated, a reference hereafter to an Annex with a prefix N is a reference to an Annex to the Memorial of the Netherlands.

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

> (*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.[5]

11. According to the Netherlands, Russia did not fully comply with the provisional measures prescribed by ITLOS.[6]

C. Constitution of the Tribunal

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

13. Russia failed to appoint a second member of the Tribunal within 30 days of receiving the Statement of Claim. Consequently, on 15 November 2013, the Netherlands requested the President of ITLOS to appoint one member of the Tribunal pursuant to article 3(*c*) and (*e*) of Annex VII to the Convention.[7]

14. On 13 December 2013, the President of ITLOS appointed Dr. Alberto Székely, a Mexican national, as a member of the Tribunal.[8]

15. By letter dated 13 December 2013, the Netherlands requested the President of ITLOS to appoint the three remaining members of the Tribunal and designate one of them as president pursuant to article 3(*d*) and (*e*) of Annex VII.[9]

16. On 10 January 2014, the President of ITLOS appointed Mr. Henry Burmester, an Australian national, Professor Janusz Symonides, a Polish

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[5] https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/published/C22_Order_221113.pdf.

[6] Memorial, paras. 355–365.

[7] Annex N-26.

[8] Annex N-29.

[9] Annex N-29, Letter from the Netherlands to ITLOS, 13 December 2013; Annex N-30, Letter from the President of ITLOS to the Netherlands, 10 January 2014.

national, and Judge Thomas A. Mensah, a Ghanaian national, as members of the Tribunal.[10] On the same day, the President of ITLOS designated Judge Thomas A. Mensah as President of the Tribunal.

D. First Procedural Meeting; Adoption of Terms of Appointment, Rules of Procedure and Timetable

17. By letter from the Permanent Court of Arbitration ("PCA") to the Parties dated 11 February 2014, the Tribunal proposed to hold a first procedural meeting with the Parties in March 2014, and invited the Parties to comment on draft Rules of Procedure and the draft Procedural Order No. 1 (Terms of Appointment) attached to the letter.

18. On 27 February 2014, the Netherlands provided comments on the draft Rules of Procedure and the draft Procedural Order No. 1. The Netherlands noted, *inter alia*, that it considered the statement of Russia in its *Note Verbale* dated 22 October 2013 to be "a plea concerning the jurisdiction of the Arbitral Tribunal."

19. On 3 March 2014, by *Note Verbale* dated 27 February 2014, Russia referred again to its *Note Verbale* of 22 October 2013 and confirmed its "refusal to take part in this arbitration."

20. By letter from the PCA dated 12 March 2014, the Tribunal informed the Parties that the first procedural meeting would take place on 17 March 2014 in Bonn, Germany, and conveyed to them revised drafts of the Rules of Procedure and Procedural Order No. 1 (Terms of Appointment) for consideration in advance of the meeting.

21. The first procedural meeting was held on 17 March 2014 in Bonn, Germany. The five members of the Tribunal participated in the meeting (with Mr. Burmester participating by teleconference). The Netherlands was represented by Professor Lijnzaad (Agent) and Professor Lefeber (Co-Agent). Russia was not represented at the meeting. The PCA was represented by Dr. Aloysius P. Llamzon (participating by teleconference), Ms. Evgeniya Goriatcheva, and Ms. Yanying Li.

22. The PCA subsequently circulated a full transcript of the meeting to the Tribunal and the Parties.

23. At the first procedural meeting, the Tribunal adopted the Rules of Procedure and Procedural Order No. 1 (Terms of Appointment), as well as the initial procedural timetable for the proceedings. With the concurrence of the Netherlands, the Tribunal decided that Vienna would be the venue of the arbitration. It was also confirmed that the International Bureau of the PCA would act as Registry for the arbitral proceedings and that the Secretary-General of the PCA would appoint a legal officer of the PCA as Registrar.

[10] Annex N-30.

24. Referring to article 9 of Annex VII to the Convention and to article 25(1) of the Rules of Procedure of the Tribunal, the Netherlands requested the Tribunal "to continue with the proceedings and to make its award." This request was subsequently formalised by a letter dated 31 March 2014 from the Netherlands.

25. The Netherlands also referred to article 20(3) of the Rules of Procedure and requested that the Tribunal bifurcate the proceedings, with "a separate stage on jurisdiction" and "a later stage on admissibility and merits."

26. By letter dated 18 March 2014, the Secretary-General of the PCA appointed Dr. Aloysius P. Llamzon as Registrar for the proceedings. Upon the conclusion of Dr. Llamzon's term of employment with the PCA, the Secretary-General appointed Ms. Sarah Grimmer as Registrar by letter dated 16 October 2014.

27. By letter dated 21 March 2014, the PCA on behalf of the Tribunal forwarded to the Parties final signed copies of Procedural Order No. 1 (Terms of Appointment) and Procedural Order No. 2 (Rules of Procedure and Initial Procedural Timetable). Procedural Order No. 2 provided, *inter alia*, that: (i) the Netherlands would submit a Memorial on "all issues including matters relating to jurisdiction, admissibility, and the merits of the dispute" by 31 August 2014; (ii) Russia would indicate within 15 days of receipt of the Memorial if it intended to submit a Counter-Memorial; and (iii) should Russia wish to submit a Counter-Memorial, it would do so by 15 February 2015.

28. On 10 April 2014, pursuant to article 4 of the Rules of Procedure, the Netherlands formally notified the Tribunal of the appointment of Professor Lijnzaad and Professor Lefeber as the Netherlands' Agent and Co-Agent, respectively, for the purposes of the arbitration.

29. On 14 May 2014, the PCA sent to the Parties "Declarations of Acceptance and Statements of Independence and Impartiality" duly completed and signed by each member of the Tribunal, together with the *curriculum vitae* of each member.

E. Deposit for the Costs of Arbitration

30. Article 33 of the Rules of Procedure states that the PCA may from time to time request the Parties to deposit equal amounts as advances for the costs of arbitration. Should either Party fail to make the requested deposit within 45 days, the Tribunal may so inform the Parties in order that one of them may make the payment.

31. By letter dated 3 March 2014, the PCA on behalf of the Tribunal requested the Parties to each make an initial deposit of EUR 150,000. On 11 March 2014, the PCA acknowledged receipt of EUR 150,000 from the Netherlands.

32. By letter dated 13 May 2014, the Tribunal noted that Russia had not paid its share of the initial deposit and invited the Netherlands to pay the outstanding amount of EUR 150,000. On 27 May 2014, the PCA acknowledged receipt from the Netherlands of EUR 150,000, representing Russia's share of the initial deposit.

F. The Netherlands' Initial Written Submissions; Greenpeace's Application to Make Amicus Curiae Submissions

33. On 30 August 2014, at the request of the Netherlands and after having sought the views of Russia, the Tribunal granted the Netherlands an additional month to submit supplementary pleadings on reparation for injury, in addition to its Memorial.

34. On 1 September 2014, the Netherlands submitted its Memorial dated 31 August 2014 ("Memorial"), in accordance with Procedural Order No. 2.

35. On 16 September 2014, Greenpeace sent to the Tribunal a letter requesting permission to file an *amicus curiae* submission "addressing the legal issues relating to international human rights law which may arise in the proceeding." A copy of the submission was attached to the letter.

36. On 19 September 2014, the PCA on behalf of the Tribunal transmitted to the Parties the letter of application and the submission from Greenpeace, and invited the Parties' comments. Pending the Tribunal's decision on the application of Greenpeace, the *amicus curiae* submission of Greenpeace was not transmitted to the members of the Tribunal.

37. On 30 September 2014, the Netherlands filed its Supplementary Written Pleadings on Reparation for Injury ("Supplementary Submission").

38. By letter dated 3 October 2014, the Netherlands advised the Tribunal that it had informally notified Greenpeace that it had no objections to the application of Greenpeace to file an *amicus curiae* submission.

39. On 8 October 2014, the Tribunal unanimously decided that it did not find sufficient reason to grant the application of Greenpeace to file an *amicus curiae* submission in the proceedings. The Tribunal issued Procedural Order No. 3 (Greenpeace International's Request to Make an *Amicus Curiae* Submission) which determined that Greenpeace's application to file an *amicus curiae* submission in the proceedings was denied.

40. On 8 October 2014, the Tribunal informed the Parties that due to the 30-day extension granted to the Netherlands to submit the Supplementary Submission, "the 15-day time limit set in Procedural Order No. 2 for Russia to indicate whether it intends to submit a Counter-Memorial would expire on 14 October 2014."

G. Bifurcation

41. In paragraph 59 of its Memorial, the Netherlands re-iterated its request for a bifurcation of the proceedings in the following terms:

> The Kingdom of the Netherlands remains hopeful that the Russian Federation will reconsider its position and participate in these arbitral proceedings. For this reason, the Netherlands considers it vitally important that the Tribunal bifurcates the proceedings, considers the Russian Federation's diplomatic notes of 22 October 2013 (Annex N-17) and 27 February 2014 (Annex N-34) as a plea concerning jurisdiction, and rules on the plea as a preliminary question in accordance with article 20.3 of the Tribunal's Rules of Procedure.

42. By letter dated 6 November 2014, the Tribunal invited Russia to comment on the request of the Netherlands for a bifurcation of the proceedings.

43. No response was received from Russia.

44. On 14 November 2014, the Tribunal sent to the Parties a draft Procedural Order No. 4 (Bifurcation), and requested comments thereon. The draft Procedural Order No. 4 stated, *inter alia*, that the Tribunal would rule on Russia's Plea Concerning Jurisdiction as a preliminary question, without holding a hearing.

45. By letter dated 18 November 2014, the Netherlands stated that it supported the draft Order.

46. No comment or response was received from Russia.

47. On 21 November 2014, the Tribunal issued Procedural Order No. 4 (Bifurcation) which stated, *inter alia,* that the Tribunal would rule on Russia's Plea Concerning Jurisdiction as a preliminary question, without holding a hearing.

III. The Parties' Submissions on Russia's Plea Concerning Jurisdiction

A. Submissions of Russia

48. Russia's Plea Concerning Jurisdiction, conveyed to the Tribunal by *Note Verbale* dated 27 February 2014, is set out in full at paragraph 9 above.

B. Submissions of the Netherlands

49. Before addressing Russia's Plea Concerning Jurisdiction, the Netherlands notes that the Convention entered into force on 11 April 1997 for the Netherlands and on 28 July 1997 for Russia.[11] Russia, upon signing the Convention, chose "an arbitral tribunal constituted in accordance with Annex VII" as the means for the settlement of disputes under the Convention, while the Netherlands, upon ratification, chose the International Court of Jus-

[11] Statement of Claim, para. 8; Memorial, para. 60.

tice as the means for the settlement of disputes under the Convention.[12] The Netherlands submits that, pursuant to article 287(5) of the Convention, which provides that "[i]f the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII," this Tribunal has jurisdiction over the present dispute between the Parties.[13]

50. Further, the Netherlands submits that the Declaration made by Russia upon ratification of the Convention does not affect the Tribunal's jurisdiction.[14]

51. The Netherlands recalls that, upon ratification, Russia declared that:

> in accordance with article 298 of the [Convention], 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.[15]

52. The Netherlands also refers to articles 297, 298, 309, and 310 of the Convention. Article 297(1)(*a*) provides that a dispute shall be subject to binding dispute resolution when it is alleged "that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation … or in regard to other internationally lawful uses of the sea specified in article 58."[16]

53. Article 298 permits State parties to exclude from binding dispute settlement a "limited number of categories of disputes."[17] According to article 298(*b*) of the Convention, "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" are a category of disputes that may be excluded from the jurisdiction of the procedures in Section 2 of Part XV of the Convention.[18]

54. Article 309 of the Convention states that "[n]o reservations or exceptions may be made to the Convention unless expressly permitted by other articles of this Convention."[19]Article 310 provides that:

> Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named … provided that such declarations or statements

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[12] Statement of Claim, paras. 9–10; Memorial, paras. 62–63.

[13] Statement of Claim, paras. 11–12; Memorial, paras. 64–65.

[14] Statement of Claim, para. 13; Memorial, para. 66.

[15] Statement of Claim, para. 13; Memorial, para. 66.

[16] Memorial, para. 70.

[17] Memorial, para. 71.

[18] Memorial, para. 72.

[19] Memorial, para. 69.

> do not purport to exclude or modify the legal effect of the provisions of this Convention in their applications to that State.[20]

55. The Netherlands submits that, in the light of these provisions, there are only two possible ways to interpret Russia's Declaration.[21]

56. First, Russia's Declaration can be interpreted as being in conformity with the Convention. In that case, the scope of the exception to Russia's acceptance of binding dispute settlement is confined to what is allowed by article 298(1)(*b*), *i.e.*, the exception is limited to disputes listed in article 297(2) and (3). These are disputes concerning marine scientific research and fisheries, neither of which is, in the view of the Netherlands, at issue in the present case. Accordingly, under this interpretation, Russia's Declaration does not apply to the present case.[22] The Netherlands notes that this interpretation was adopted in the ITLOS Order.[23]

57. Second, Russia's Declaration can be interpreted as purporting to exclude from binding dispute settlement under the Convention all disputes concerning "law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction," whether or not they concern marine scientific research or fisheries. The Netherlands argues that, under this interpretation, Russia's Declaration is in fact a "reservation" or "exception" that is prohibited by articles 309 and 310 of the Convention.[24] The Netherlands recalls that the prohibition of reservations and exceptions in articles 309 and 310 of the Convention was recognised and emphasised by both the Netherlands and Russia in their respective declarations upon ratification of the Convention.[25]

58. The Netherlands concludes that, depending on the interpretation chosen, Russia's Declaration either does not apply to the present dispute or is not allowed under the Convention. In either case, the Declaration has no effect on the Tribunal's jurisdiction.[26]

IV. The Tribunal's Analysis

A. Certain Matters Pertaining to Jurisdiction

59. As noted above, the purpose of the present Award is to decide on Russia's Plea Concerning Jurisdiction. Accordingly, the Tribunal will, in this Award, not decide on any question of fact which is not necessary for deciding on Russia's Plea Concerning Jurisdiction; and it will not decide on any other

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[20] Memorial, para. 74.

[21] Memorial, para. 73; *see also* Memorial, para. 79.

[22] Statement of Claim, para. 13; Memorial, para. 73.

[23] Memorial, para. 73, referring to the ITLOS Order, para. 45.

[24] Statement of Claim, para. 13; Memorial, para. 74.

[25] Statement of Claim, para. 13; Memorial, paras. 75–77.

[26] Memorial, para. 79.

questions concerning jurisdiction, admissibility, or merits that may arise in the arbitration. But before dealing with Russia's Plea Concerning Jurisdiction, the Tribunal wishes to call attention to certain matters pertaining to jurisdiction.

60. Both the Netherlands and Russia are State parties to the Convention. Accordingly, both are bound by the provisions on dispute settlement in Part XV of the Convention in respect of any dispute between them concerning the interpretation and application of the Convention.

61. In the present case, the Tribunal is satisfied that there is a dispute between the Parties concerning the interpretation and application of the Convention, as is apparent from the Parties' exchange of diplomatic notes immediately preceding the Netherlands' filing of its Statement of Claim. Following the boarding of the *Arctic Sunrise* by the Russian authorities, the Netherlands twice requested the release of the vessel and the persons on board.[27] On 29 September 2013, the Netherlands lodged a formal protest over the boarding and investigation of the *Arctic Sunrise* without the consent of the Netherlands.[28] By *Note Verbale* dated 1 October 2013, Russia stated that it did not require the Netherlands' consent "in view of the authority that a coastal State possesses in accordance with [articles 56, 60 and 80 of the Convention]."[29] By *Note Verbale* dated 3 October 2013, the Netherlands objected to Russia's interpretation of the Convention, stating that it did "not consider that these provisions justify the actions taken against the 'Arctic Sunrise'."[30]

62. Although Russia has since released the *Arctic Sunrise* and granted amnesty to the persons on board, the Netherlands does not consider that the dispute between the Parties has been fully resolved. According to the Netherlands, the release of the vessel and the grant of amnesty to the persons on board do not satisfy all of its claims in the arbitration. As noted in paragraph 4 above, the Netherlands still seeks, *inter alia*, a declaratory judgment on the wrongfulness of Russia's conduct, a formal apology, and compensation for financial losses incurred as a result of Russia's actions against the *Arctic Sunrise* and the persons on board.[31]

63. Section 2 of Part XV of the Convention provides for compulsory procedures entailing binding decisions when a dispute arises between State parties concerning the interpretation and application of any provision of the Convention. Article 287 provides that States parties may by written declaration choose among several binding procedures for the settlement of disputes. Where the parties to a dispute have not accepted the same procedure for dis-

[27] *Note Verbale* from the Netherlands to Russia, 23 September 2013, Annex N-6; *Note Verbale* from the Netherlands to Russia, 26 September 2013, Annex N-7.

[28] *Note Verbale* from the Netherlands to Russia, 29 September 2013, Annex N-9.

[29] *Note Verbale* from Russia to the Netherlands, 1 October 2013, Annex N-10.

[30] *Note Verbale* from the Netherlands to Russia, 3 October 2013, Annex N-11.

[31] Statement of Claim, para. 37; Memorial, para. 397; Supplementary Submission, para. 55.

pute settlement, the dispute may be submitted to arbitration in accordance with Annex VII of the Convention.

64. By their respective declarations, made pursuant to article 287 of the Convention, the Netherlands and Russia have chosen different procedures for the settlement of disputes between them.[32] Hence, the present dispute has correctly been submitted to arbitration in accordance with Annex VII.

B. Russia's Plea Concerning Jurisdiction

65. Russia's Plea Concerning Jurisdiction is based on the Declaration it made upon ratification of the Convention. The full Declaration reads as follows:

> The Russian Federation declares that, in accordance with article 298 of the [Convention], 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.

66. The Tribunal must first determine whether Russia's Declaration has the effect of excluding the present dispute between the Parties from the compulsory dispute settlement procedures entailing binding decisions as set

[32] The U.S.S.R.'s declaration upon signature of the Convention, 10 December 1982: "… under article 287 of the [Convention], [the U.S.S.R.] chooses an arbitral tribunal constituted in accordance with Annex VII as the basic means for the settlement of disputes concerning the interpretation or application of the Convention"; the Netherlands' declaration upon ratification of the Convention, 28 June 1996: "… having regard to article 287 of the Convention, [the Netherlands] accepts the jurisdiction of the International Court of Justice in the settlement of disputes concerning the interpretation and application of the Convention with States Parties to the Convention which have likewise accepted the said jurisdiction."

out in Section 2 of Part XV of the Convention and, consequently, from the jurisdiction of this Tribunal.

67. In its Declaration, Russia refers to the provision of the Convention that excludes from the jurisdiction of the procedures specified in Section 2 of Part XV of the Convention, "disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction."[33] By this the Tribunal understands that Russia considers that the present dispute falls within that category of disputes and is, therefore, excluded from the jurisdiction of the Tribunal.

68. The Netherlands does not dispute that the present dispute concerns "law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction." However, it contends that Russia's Declaration is either (i) prohibited under the Convention, as being too broad, or (ii), if properly interpreted with due regard to article 298(1)(*b*), can only exclude from the procedures in Section 2 of Part XV of the Convention those "law enforcement activities in regard to the exercise of sovereign rights or jurisdiction" that are "excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3."[34]

69. The first question for the Tribunal, therefore, concerns the scope of Russia's Declaration. In the view of the Tribunal, the Declaration cannot exclude from the jurisdiction of the procedures in Section 2 of Part XV of the Convention "every dispute" that concerns "law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction." It can only exclude disputes "concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction" which are also "excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3." Accordingly, the Declaration cannot and does not exclude from the jurisdiction of the procedures in Section 2 of Part XV of the Convention any dispute that concerns "law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction" unless the dispute is also excluded from the jurisdiction of a court or tribunal under paragraph 2 or 3 of article 297.

70. In the view of the Tribunal, Russia's Declaration must be interpreted with due regard to the relevant provisions of the Convention. Article 309 of the Convention provides that no reservation or exception may be made to the Convention unless expressly permitted by its other provisions. Although article 310 states that article 309 does not preclude a State party from making declarations or statements, it adds the proviso that "such declarations or statements [should] not purport to exclude or to modify the legal effect of the provisions of this Convention." It follows that a State party may only exclude the legal effect of a provision of the Convention when such exclusion is expressly permitted by a provision of the Convention. The second paragraph of Russia's

[33] *Note Verbale* from Russia to the Netherlands, 22 October 2013, Annex N-17; *Note Verbale* from Russia to ITLOS, 22 October 2013, Annex N-18.

[34] Statement of Claim, para. 13; Memorial, paras. 66–77.

Declaration leaves no doubt that, when it ratified the Convention, Russia was aware of these provisions and considered them to be important.

71. The Convention expressly permits a State party, by means of a written declaration, to exclude certain categories of disputes from the procedures in Section 2 of Part XV of the Convention. This is set out in article 298 as follows:

> 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 [of Part XV of the Convention] 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;
>
> […]

72. In the Tribunal's view, Russia's Declaration can only apply to an exception that is permitted under article 298. In this connection, the Tribunal notes that Russia stated that its Declaration was made "in accordance with article 298 [of the Convention]." Accordingly, the Declaration can only exclude "disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction" to which article 298(1)(*b*) applies. The Tribunal notes that Russia's Declaration does not precisely track the language of article 298(1)(*b*). For example, it does not include the words "excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3." Nevertheless, the Tribunal considers that Russia's Declaration cannot create an exclusion that is wider in scope than what is permitted by article 298(1)(*b*).

73. In the light of this conclusion, the Tribunal must determine whether the present dispute falls within the scope of the exception that is set out in article 298(1)(*b*) of the Convention; in other words, whether the present dispute is a dispute concerning "law enforcement activities in regard to the exercise of sovereign rights or jurisdiction" that is excluded from the "jurisdiction of courts and tribunals under article 297, paragraph 2 or 3."

74. Article 297 provides, in relevant parts, as follows:

> 2. (*a*) Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of:
>
> (i) the exercise by the coastal State of a right or discretion in accordance with article 246; or

(ii) a decision by a coastal State to order suspension or cessation of a research project in accordance with article 253.

(*b*) A dispute arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under articles 246 and 253 in a manner compatible with this Convention shall be submitted, at the request of either party, to conciliation under Annex V, section 2, provided that …

3. (*a*) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

(*b*) Where no settlement has been reached by recourse to section 1 of this Part, a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute, when it is alleged that: …

75. According to article 297 of the Convention, the disputes "concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction" that are excluded from the "jurisdiction of courts and tribunals under article 297, paragraph 2 or 3" are the following:

(i) disputes arising out of the exercise by the coastal State of a right or discretion with respect to marine scientific research in the exclusive economic zone and on the continental shelf (Articles 297(2)(*a*)(i) and 246);

(ii) disputes arising out of a decision by a coastal State to order suspension or cessation of a marine scientific research project (Articles 297(2)(*a*)(ii) and 253); and,

(iii) disputes related to a coastal State's sovereign rights with respect to living resources in the exclusive economic zone or the exercise of such rights (Article 297(3)(*a*)).

76. It has not been argued that the present dispute falls within any of these categories of disputes, and the Tribunal finds nothing in the documents in the case to suggest that the present dispute has any connection with the exercise by Russia of any sovereign rights or jurisdiction that falls within any of these categories. The actions of Russia involved in the present dispute are not "law enforcement activities in regard to the exercise of sovereign rights or jurisdiction" within the scope of article 298(1)(*b*). They do not relate to marine scientific research or fisheries, *i.e.*, the only areas in which the jurisdiction of a court or tribunal can validly be excluded pursuant to articles 297(2) and 297(3) read with 298(1)(*b*) of the Convention. In particular, the dispute does

not "arise out of the exercise [by Russia] of a right or discretion in accordance with article 246" of the Convention or "a decision [of Russia] to order suspension or cessation of a research project in accordance with article 253" of the Convention; nor does it relate to the "interpretation or application of the provisions of [the] Convention relating to [Russia's] sovereign rights with respect to the living resources in the exclusive economic zone or their exercise," including the discretionary powers [of Russia] for determining the allowable catch, [Russia's] investing capacity, the allocation of surpluses to other States and the terms and conditions established in [Russia's] conservation and management laws or regulations."

77. Accordingly, the Tribunal concludes that Russia's Declaration does not exclude the present dispute from the compulsory procedures of dispute settlement entailing binding decisions set out in Section 2 of Part XV of the Convention.

78. The Tribunal, therefore, does not consider that the Declaration excludes the present dispute from its jurisdiction.

V. Decision

79. For the above reasons, the Tribunal unanimously decides that:

1. The Declaration of Russia upon ratification of the Convention does not have the effect of excluding the present dispute from the procedures of Section 2 of Part XV of the Convention and, therefore, does not exclude the dispute from the jurisdiction of the Tribunal.
2. All issues not decided in this Award on Jurisdiction, including all other issues relating to jurisdiction, admissibility, and merits, are reserved for further consideration.

Award in the Arbitration regarding the *Arctic Sunrise*

Sentence arbitrale relative à l'affaire de l'*Arctic Sunrise*

Award on the Merits

Non-participation by one of the parties to a dispute does not constitute bar to proceedings, under Article 9 of Annex VII of UNCLOS—Despite non-participation in proceedings, the Russian Federation bound under international law by any awards rendered by the Tribunal—Submission of claims to the European Court of Human Rights by persons on board the *Arctic Sunrise* does not preclude Tribunal from considering claims.

Requirement of "exchange of views", in Article 283(1) of UNCLOS, satisfied by diplomatic exchanges between the Parties—Single exchange held day before the commencement of arbitration may not suffice in each case, but sufficient in present case owing to urgency.

The Netherlands has standing under UNCLOS to invoke international responsibility of the Russian Federation—Individuals on board the *Arctic Sunrise* at all relevant times "involved" or "interested" in the ship's operations for Greenpeace through protest at sea—All individuals on board considered part of the unit of the ship, thereby falling within flag State jurisdiction of the Netherlands—The Netherlands entitled to bring claims in respect of alleged violations of its rights under UNCLOS, which resulted in injury or damage to the ship, the crew, all persons and objects on board, as well as its owner and every person involved or interested in its operations, regardless of nationality and equally when the person in question is a national of the coastal State—The Netherlands not exercising diplomatic protection in classic sense, but acting in its capacity as the flag State with exclusive jurisdiction over the vessel within the Exclusive Economic Zone of the Russian Federation—Unnecessary to consider separately diplomatic protection claims brought on behalf of Dutch nationals—Unnecessary for Tribunal to consider whether the Netherlands enjoys standing *erga omnes* or *erga omnes partes* to invoke international responsibility of the Russian Federation with respect to its claims.

Article 293(1) of UNCLOS establishes as applicable law UNCLOS and other rules of international law not incompatible with UNCLOS—Some provisions of UNCLOS directly incorporate other rules of international law—Tribunal may have regard to general international law in relation to human rights in order to determine whether law enforcement action reasonable and proportionate—Tribunal may also have regard to rules of customary international law, including human rights standards, not incompatible with UNCLOS, in order to assist in interpretation and application of UNCLOS provisions that authorise arrest or detention of a vessel and persons.

All internationally wrongful acts alleged by the Netherlands attributable to the Russian Federation—Article 60 of UNCLOS applicable to the *Prirazlomnaya* as "artificial island, installation or structure"—The Russian Federation did not establish a safety zone of three nautical miles around the *Prirazlomnaya*, within the meaning of Article 60 of UNCLOS—Protest at sea an internationally lawful use of the sea related to the freedom of navigation—Right to protest not without limitations, and when protest occurs at sea limitations are defined, *inter alia*, by the law of the sea—Tribunal need not consider elements required to determine existence of piracy within meaning of Article 101 of UNCLOS—Boarding, seizure and detention of *Arctic Sunrise* not justified as exercise of right of visit on suspicion of piracy as per Article 110 of UNCLOS—Offences of hooliganism and unauthorised entry into safety zone does not provide basis under international law for boarding a foreign vessel in the Exclusive Economic Zone without consent of the flag State—Boarding, seizure and detention of vessel in Exclusive Economic Zone on suspicion of such offences finds basis under international law only if requirements of hot pursuit satisfied—Conditions for exercise of right of hot pursuit are cumulative—Since pursuit was interrupted, one necessary condition set out in Article 111 of UNCLOS was not met—Right of hot pursuit cannot serve as legal basis for boarding, seizure and detention of *Arctic Sunrise*—Actions taken not valid exercise of law enforcement powers in relation to possible terrorist offences—Coastal State has right to enforce laws in relation to non-living resources in Exclusive Economic Zone—Measures taken not lawful exercise of law enforcement powers concerning exploration and exploitation of non-living resources in the Exclusive Economic Zone—No grounds for belief that *Arctic Sunrise* committed violation of applicable international rules and standards for prevention, reduction and control of vessel-source pollution—Measures taken not lawful exercise of enforcement rights as coastal State under Articles 220 or 234 of UNCLOS—No legal basis justifying measures taken owing to dangerous manoeuvring—Not reasonable to expect that actions taken by the *Arctic Sunrise* and of the individuals on board it could have resulted in major harmful consequences.

Failure of a State to comply with provisional measure prescribed by International Tribunal on the Law of the Sea (ITLOS) is internationally wrongful act—The Russian Federation did not fail to comply with ITLOS Order as regard release of all detained persons—The Russian Federation did not meet requirement of promptness in permitting the detained persons to leave its territory after 27 day delay—Six month delay in releasing the *Arctic Sunrise* constituted a violation of the *dispositif* of the ITLOS Order—Further delay of eight months in permitting the *Arctic Sunrise* to leave Russian territory and maritime areas violated promptness requirement.

Failure to pay deposits for the arbitration constitutes breach of obligation under UNCLOS.

The Netherlands entitled to reparation on basis of general international law—Findings of Tribunal as well as declaratory judgment regarding the international wrongfulness of the Russian Federation's conduct constitute appropriate satisfaction—Formal apology not necessary—Order of restitution as most appropriate form of reparation with respect to objects belonging to the *Arctic Sunrise* and persons on board—Compensation most appropriate alternative in event that timely restitution should prove impossible—The Netherlands entitled to compensation for costs of arbitration, for damage to the *Arctic Sunrise*, including physical damage, costs incurred to prepare it for its return voyage, and lost profits—The Netherlands entitled to award of non-material damages in relation to the arrest, detention and prosecution of individuals on board the *Arctic Sunrise*—The Netherlands entitled to material damages for bail paid, as well as costs incurred during wrongful detention and during period between release and departure of detained persons—Interest awarded on all heads of compensation in order to achieve full reparation.

Sentence sur le fond

En vertu de l'article 9 de l'annexe VII de la Convention, le fait qu'une partie au différend ne participe pas à la procédure ne fait pas obstacle au déroulement de ladite procédure—bien qu'elle n'ait pas participé à la procédure, la Fédération de Russie est liée, en vertu du droit international, par toute sentence rendue par le Tribunal—la saisine de la Cour européenne des droits de l'homme par des personnes se trouvant à bord de l'*Arctic Sunrise* n'empêche pas le Tribunal d'examiner les griefs.

L'obligation de procéder à des échanges de vues prévue à l'article 283, paragraphe 1, de la Convention, a été satisfaite par les échanges diplomatiques entre les parties—si un seul échange de vues, mené la veille du début de la procédure, peut ne pas être toujours suffisant, il l'a été en l'espèce, compte tenu de l'urgence de la situation.

En vertu de la Convention, les Pays-Bas ont qualité pour invoquer la responsabilité internationale de la Fédération de Russie—les personnes qui se trouvaient à bord de l'*Arctic Sunrise* étaient à tout moment « impliquées » ou « intéressées » dans les opérations du navire menées aux fins de l'action de protestation en mer de Greenpeace—toutes les personnes se trouvant à bord sont considérées comme faisant partie intégrante du navire et relèvent, à ce titre, de la compétence de l'État du pavillon, les Pays-Bas—les Pays-Bas étaient fondés à intenter une action en alléguant des violations des droits que leur conférait la Convention, violations qui ont causé un préjudice ou des dommages au navire, à l'équipage, à toutes les personnes et à tous les objets se trouvant à son bord, ainsi qu'à son propriétaire et à toutes les personnes impliquées ou intéressées dans ses opérations, quelle que soit leur nationalité, y compris les personnes de la nationalité de l'État côtier—les Pays-Bas n'exercent pas la protection diplomatique strictement entendue, mais agissent en qualité d'État du pavillon jouissant d'une compétence exclusive sur le navire dans la zone économique exclusive de

la Fédération de Russie—il n'y a pas lieu d'examiner séparément les prétentions de protection diplomatique formulées dans l'intérêt des ressortissants néerlandais—il n'y a pas lieu pour le Tribunal d'examiner si les Pays-Bas avaient qualité *erga omnes* ou *erga omnes partes* pour invoquer la responsabilité internationale de la Fédération de Russie à l'égard de leurs griefs.

Selon l'article 293, paragraphe 1, de la Convention, le droit applicable comprend les dispositions de la Convention et les autres règles du droit international qui ne sont pas incompatibles avec celle-ci—certaines dispositions de la Convention intègrent directement d'autres règles du droit international—pour déterminer si l'acte d'exécution forcée était raisonnable et proportionné, le Tribunal peut tenir compte du droit international général relatif aux droits de l'homme—le Tribunal peut également tenir compte des règles du droit international coutumier, y compris les normes relatives aux droits de l'homme, qui ne sont pas incompatibles avec la Convention lorsqu'il interprète et applique les dispositions de la Convention qui autorisent l'arrestation ou la détention d'un navire ou de personnes.

Tous les faits internationalement illicites allégués par les Pays-Bas sont attribuables à la Fédération de Russie—l'article 60 de la Convention s'applique à la plateforme *Prirazlomnaya*, qui est une « île artificielle, [une] installation ou [un] ouvrage »—la Russie n'a pas établi de zone de sécurité de trois milles nautiques autour de la plateforme comme le prévoit l'article 60 de la Convention—la protestation en mer constitue une utilisation de la mer à des fins internationalement licites relevant de la liberté de navigation—le droit de protester n'est pas sans limites et, lorsque la protestation a lieu en mer, les limites sont définies, notamment, par le droit de la mer—le Tribunal n'a pas besoin de chercher à savoir s'il y a eu piraterie au sens de l'article 101 de la Convention—l'arraisonnement, l'immobilisation et la saisie de l'*Arctic Sunrise* ne se justifiaient pas au titre de l'exercice du droit de visite sur un navire suspect de piraterie ainsi que le prévoit l'article 110 de la Convention—les infractions d'hooliganisme et d'entrée sans autorisation dans une zone de sécurité ne permettent pas, en droit international, d'arraisonner un navire étranger dans une zone économique exclusive sans le consentement de l'État du pavillon—l'arraisonnement, l'immobilisation et la saisie dans une zone économique exclusive d'un navire suspect de telles infractions ne sont fondés en droit international que si les conditions d'une poursuite sont réunies—les conditions de l'exercice du droit de poursuite sont cumulatives—la poursuite ayant été interrompue, l'une des conditions nécessaires énoncées à l'article 111 de la Convention n'était pas remplie—le droit de poursuite ne peut servir de fondement juridique à l'arraisonnement, à l'immobilisation et à la saisie de l'*Arctic Sunrise*—les mesures prises ne s'inscrivaient pas dans l'exercice régulier des pouvoirs d'exécution forcée au regard d'éventuelles infractions de terrorisme—l'État côtier a le droit de faire appliquer ses lois eu égard aux ressources non biologiques dans la zone économique exclusive—les mesures prises ne s'inscrivaient pas dans l'exercice légitime des pouvoirs d'exécution forcée en ce qui concerne

l'exploration et l'exploitation des ressources non biologiques dans la zone économique exclusive—il n'y avait aucun motif de penser que l'*Arctic Sunrise* avait enfreint les règles et normes internationales visant à prévenir, réduire et maîtriser la pollution par les navires—les mesures prises ne s'inscrivaient pas dans l'exercice légitime des pouvoirs de l'État côtier définis aux articles 220 et 234 de la Convention—on ne saurait invoquer des manœuvres dangereuses pour justifier en droit les mesures prises—il n'est pas raisonnable de penser que les actes entrepris par l'*Arctic Sunrise* et les personnes qui se trouvaient à son bord auraient pu avoir des conséquences préjudiciables.

Dès lors qu'il ne se conforme pas à une mesure conservatoire du Tribunal international du droit de la mer, un État commet un fait internationalement illicite—la Fédération de Russie n'a pas manqué à l'obligation qui lui était faite par l'ordonnance du Tribunal de remettre en liberté toutes les personnes détenues—en n'autorisant les personnes détenues à quitter son territoire qu'après 27 jours, la Fédération de Russie n'a pas satisfait à son obligation de célérité—le fait qu'il ait fallu six mois pour lever l'immobilisation de l'*Arctic Sunrise* constitue une violation du dispositif de l'ordonnance rendue par le Tribunal international du droit de la mer—le fait que l'*Arctic Sunrise* n'ait été autorisé à quitter le territoire et les zones maritimes russes qu'après un délai supplémentaire de huit mois constitue un manquement à l'obligation de célérité.

Le fait de ne pas verser les consignations requises aux fins de l'arbitrage constitue une violation de la Convention.

Selon le droit international général, les Pays-Bas ont droit à réparation—les conclusions du Tribunal et le jugement déclaratoire établissant que la Fédération de Russie a eu un comportement illicite au regard du droit international constituent une satisfaction appropriée—il n'y a pas lieu d'exiger des excuses officielles—s'agissant des objets appartenant à l'*Arctic Sunrise* et aux personnes qui se trouvaient à son bord, la restitution est la meilleure forme de réparation—si une restitution rapide est impossible, l'indemnisation est la solution la plus appropriée—les Pays-Bas ont le droit d'être indemnisés des frais d'arbitrage, des dommages, y compris matériels, causés à l'*Arctic Sunrise*, des frais engagés afin de préparer son voyage de retour et du manque à gagner—les Pays-Bas ont le droit d'être indemnisés du préjudice moral subi en raison de l'arrestation et de la détention des personnes qui se trouvaient à bord de l'*Arctic Sunrise* et des poursuites engagées contre elles—les Pays-Bas ont le droit d'être indemnisés des dommages matériels tels que les cautions versées et les dépenses engagées au cours de la détention illégale des personnes détenues, ainsi qu'entre leur sortie de prison et leur départ de la Russie—aux fins d'une réparation intégrale, chaque chef de dommage est assorti d'intérêts.

* * * * *

In the matter of the *Arctic Sunrise* Arbitration

-before-

an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea

-between-

The Kingdom of the Netherlands

-and-

The Russian Federation

Award on the Merits

Arbitral Tribunal:

Judge Thomas A. Mensah (President)

Mr. Henry Burmester

Professor Alfred H.A. Soons

Professor Janusz Symonides

Dr. Alberto Székely

Registry:

Permanent Court of Arbitration

14 August 2015

Agents, Counsel, Advisers, and other Representatives of the Parties

The Netherlands

Agent

— Professor Dr. Liesbeth Lijnzaad, Legal Adviser of the Ministry of Foreign Affairs of the Kingdom of the Netherlands

Co-Agent

— Professor Dr. René Lefeber, Deputy Legal Adviser of the Ministry of Foreign Affairs of the Kingdom of the Netherlands

Counsel

— Professor Dr. Erik Franckx, Professor, Vrije Universiteit Brussel, Department of International and European Law, Centre for International Law

Party Representative

— Peter van Wulfften Palthe, Ambassador of the Kingdom of the Netherlands in Austria

Advisers

— Mr. Marco Benatar, Researcher, Vrije Universiteit Brussel, Department of International and European Law, Centre for International Law

— Ms. Anke Bouma, Legal Counsel, Ministry of Infrastructure and the Environment of the Kingdom of the Netherlands

— Mr. Tom Diederen, Legal Officer, Ministry of Foreign Affairs of the Kingdom of the Netherlands

— Mr. Peter Post, Transport Adviser, Ministry of Foreign Affairs of the Kingdom of the Netherlands

— Ms. Annemarieke Vermeer, Legal Counsel, Ministry of Foreign Affairs of the Kingdom of the Netherlands

The Russian Federation

No agents, counsel, advisers, or other representatives were appointed by the Russian Federation in this arbitration

TABLE OF CONTENTS

Glossary of Defined Terms and Abbreviations

1958 Convention	Convention on the High Seas, 1958
1995 Federal Law	Federal Law No. 187-F3 dated 20 November 1995 "On the Russian Federation continental shelf"
2013 Presidential Decree	Decree of the President of the Russian Federation No. 23 dated 14 January 2013 "On federal executive agencies responsible for determining measures to assure navigation safety within safety zones established around artificial islands, installations and structures located on the Russian Federation's continental shelf, as well as measures to assure security of such artificial islands, installations and structures"
2014 Order of the Ministry of Transport	Order of the Ministry of Transport No. 186 dated 16 June 2014 "On establishing a safety zone limit around MLSP *Prirazlomnaya* artificial installation"
Administrative Code	Administrative Offences Code of the Russian Federation
Arctic 30	The thirty persons who were on board the *Arctic Sunrise* on 14–24 September 2013
Articles on State Responsibility	ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001
Award on Jurisdiction	Award issued by this Tribunal on 26 November 2014 concerning the effect of the Declaration on the jurisdiction of this Tribunal
Convention	United Nations Convention on the Law of the Sea, 1982
Criminal Code	Criminal Code of the Russian Federation
Declaration	Declaration made by Russia upon ratification of the Convention
District Court	Leninsky District Court of Murmansk
EEZ	Exclusive economic zone
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950
ECtHR	European Court of Human Rights

FMS	Federal Migration Service of the Russian Federation
Gazprom Neft Shelf	Gazprom Neft Shelf LLC, a Russian entity and the operator of the *Prirazlomnaya*
Greenpeace International	Greenpeace International (Stichting Greenpeace Council)
Greenpeace International Statement of Facts	Statement of Facts by Greenpeace International dated 15 August 2014, filed by the Netherlands in this arbitration as Annex N-3
Greenpeace International Statement of Facts (Addendum and Corrigendum)	Addendum and Corrigendum to the Greenpeace International Statement of Facts, filed by the Netherlands in this arbitration as Annex N-44
ICCPR	International Covenant on Civil and Political Rights, 1966
ILC	International Law Commission of the United Nations
Investigation Committee	Investigation Committee of the Russian Federation
ITLOS	International Tribunal for the Law of the Sea
ITLOS Order	Order prescribing provisional measures issued by ITLOS on 22 November 2013 in *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation)*
Marchenkov Interrogation Report	Witness Interrogation Report of Nikolai Anatolievich Marchenkov (gunnery officer on the *Ladoga*) dated 24 September 2014, Investigation Committee
Memorial	Netherlands' Memorial dated 31 August 2014
the Netherlands	The Kingdom of the Netherlands, the claimant in this arbitration
PCA	Permanent Court of Arbitration
RHIB	Rigid hull inflatable boat
Parties	The Kingdom of the Netherlands and the Russian Federation
Prirazlomnaya	Offshore oil production platform located in the Pechora Sea at 69° 15'56.88" N 57° 17'17.34" E, in Russia's EEZ

Russia (or Russian Federation)	The Russian Federation, the respondent in this arbitration
Second Supplementary Submission	The Netherlands' Second Supplemental Written Pleadings (Replies to Questions Posed by the Arbitral Tribunal to the Netherlands pursuant to Section 2.1.4.1 of Procedural Order No. 2) dated 12 January 2015
Sokolov Interrogation Report	Witness Interrogation Report of Alexei Sergeevich Sokolov (master mechanic on the *Ladoga*) dated 24 September 2014, Investigation Committee
Solomakhin Interrogation Report	Witness Interrogation Report of Ivan Alexandrovich Solomakhin (warrant officer on the *Ladoga*) dated 24 September 2014, Investigation Committee
Statement of Claim	The Netherlands' Statement of the Claim and the Grounds on which it is Based dated 4 October 2013
SUA Convention	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988
SUA Fixed Platforms Protocol	Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988
Supplementary Submission	The Netherlands' Supplementary Written Pleadings on Reparation for Injury dated 30 September 2014
Third Supplementary Submission	The Netherlands' Third Supplemental Written Pleadings (Replies to Further Questions from the Arbitral Tribunal Arising out of the Netherlands' Second Supplemental Submission dated 12 January 2015) dated 25 February 2015

I. Introduction

1. The Kingdom of the Netherlands ("the Netherlands") is the claimant in this arbitration. It is represented by Professor Dr. Liesbeth Lijnzaad, Legal Adviser of the Netherlands' Ministry of Foreign Affairs, as Agent, and Professor Dr. René Lefeber, Deputy Legal Adviser of the Netherlands' Ministry of Foreign Affairs, as Co-Agent.

2. The Russian Federation ("Russian Federation" or "Russia") is the respondent. It has not appointed any agents, counsel, or other representatives.

3. The arbitration concerns measures taken by Russia against the *Arctic Sunrise*, a vessel flying the flag of the Netherlands, and the thirty persons on board that vessel ("Arctic 30"). On 18 September 2013, Greenpeace International (Stichting Greenpeace Council) ("Greenpeace International"), the charterer and operator of the *Arctic Sunrise*, used the vessel to stage a protest at the Russian offshore oil platform *Prirazlomnaya* ("*Prirazlomnaya*"), located in the Pechora Sea (the south-eastern part of the Barents Sea) within the exclusive economic zone ("EEZ") of Russia. On 19 September 2013, in response to the protest, the *Arctic Sunrise* was boarded, seized, and detained by the Russian authorities. The vessel was subsequently towed to Murmansk (a northern Russian port city). The *Arctic Sunrise* was held in Murmansk despite requests from the Netherlands for its release. The Arctic 30 were initially arrested, charged with administrative and criminal offences, and held in custody. They were released on bail in late November 2013 and subsequently granted amnesty by decree of the Russian State Duma on 18 December 2013. The non-Russian nationals were permitted to leave Russia shortly thereafter. On 6 June 2014, the arrest of the *Arctic Sunrise* was lifted. The ship departed from Murmansk on 1 August 2014 and arrived in Amsterdam on 9 August 2014.

4. The Netherlands claims that, in taking these measures against the *Arctic Sunrise* and the Arctic 30, Russia violated its obligations toward the Netherlands under the United Nations Convention on the Law of the Sea ("Convention")[1] and customary international law. The Netherlands also claims that Russia violated the Convention by failing to comply fully with the provisional measures prescribed by the International Tribunal for the Law of the Sea ("ITLOS") and by failing to participate in these arbitral proceedings. The Netherlands seeks, *inter alia*, a declaratory judgment stating that Russia's conduct is unlawful, a formal apology, appropriate assurances and guarantees of non-repetition of unlawful acts, and compensation for losses incurred as a result of the measures taken by Russia.

5. In a *Note Verbale* to the Netherlands dated 22 October 2013,[2] Russia referred to the declaration it made when ratifying the Convention ("Declaration"). In the Declaration, Russia stated that "it does not accept the proce-

[1] 1982, vol. 1833, UNTS, paras. 396–581.

[2] Annex N-17. All references to an Annex with a prefix N are references to an Annex to the Memorial of the Netherlands.

dures provided for in Section 2 of Part XV of the Convention entailing binding decisions with respect to disputes … concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction."

6. By another *Note Verbale* dated 27 February 2014 and addressed to the Permanent Court of Arbitration ("PCA"), Russia stated that "[t]he Russian side confirms its refusal to take part in this arbitration and abstains from providing comments both on the substance of the case and procedural matters."[3]

7. Russia has not participated in this arbitration at any stage. It did not submit written pleadings in response to those filed by the Netherlands; it did not attend the hearing held in Vienna on 10–11 February 2015; and it did not advance any of the funds requested by the Tribunal toward the costs of arbitration.

8. Under the Convention, non-participation in the proceedings by one of the parties to a dispute does not constitute a bar to proceedings in the case. Article 9 of Annex VII to the Convention provides that, if one of the parties to a dispute does not appear before the tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. At the first procedural meeting held on 17 March 2014 in Bonn, Germany, the Netherlands, referring to Article 9 of Annex VII to the Convention and to Article 25(1) of the Rules of Procedure of the Tribunal, requested the Tribunal "to continue with the proceedings and to make its award." This request was subsequently formalised by a letter dated 31 March 2014 from the Netherlands.

9. As requested by the Netherlands, the Tribunal has continued the proceedings. At the same time, it has taken measures to safeguard Russia's procedural rights. *Inter alia*, it has: (i) ensured that all communications and materials submitted in this arbitration have been promptly delivered, both electronically and physically, to the Russian Ministry of Foreign Affairs in Moscow and to the Ambassador of Russia to the Netherlands in The Hague; (ii) granted Russia adequate time to submit responses to the written pleadings submitted by the Netherlands; (iii) provided Russia adequate notice of procedural meetings and the hearing in the case; (iv) promptly provided Russia with copies of recordings and/or transcripts of procedural meetings and the hearing; and (v) reiterated the right of Russia to participate in the proceedings at any stage.

10. Further, non-participation by a State party in any of the compulsory procedures entailing binding decisions provided for in Section II of Part XV of the Convention, including arbitration, affects neither the jurisdiction of the tribunal in question nor the binding nature of any final decision rendered by that tribunal. Article 288(4) of the Convention states that "in the event of a dispute as to whether a court has jurisdiction, the matter shall be settled by decision of that court or tribunal." Article 296(1) of the Convention provides that "[a]ny decision rendered by a court or tribunal having jurisdiction under [Section II of Part XV] shall be final and shall be complied with by all the parties to the dispute." In addition, Article 11 of Annex VII provides: "[The] award

[3] Annex N-34.

shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute." Accordingly, the Tribunal concludes that, despite its non-participation in the proceedings, Russia is bound under international law by any awards rendered by the Tribunal.

11. However, Article 9 of Annex VII to the Convention states that, "[b]efore making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and in law."

12. The Netherlands has repeatedly maintained that the statement of Russia in its *Note Verbale* dated 22 October 2013 constituted a plea concerning the jurisdiction of the Tribunal over the dispute. Accordingly, the Netherlands requested the Tribunal to bifurcate the proceedings. In its comments on the draft Rules of Procedure and the draft Procedural Order No. 1, submitted on 27 February 2014, the Netherlands stated, *inter alia*, that it considered the statement of Russia in its *Note Verbale* dated 22 October 2013 to be "a plea concerning the jurisdiction of the Arbitral Tribunal." At the first procedural meeting held on 17 March 2014 in Bonn, Germany, the Netherlands requested the Tribunal to bifurcate the proceedings. In paragraph 59 of its Memorial, the Netherlands again requested the Tribunal to bifurcate the proceedings; specifically, it stated that it considered Russia's diplomatic notes of 22 October 2013 and 27 February 2014 as a plea concerning the jurisdiction of the Tribunal, and requested the Tribunal to rule on the plea as a preliminary question.

13. By letter dated 6 November 2014, the Tribunal invited Russia to comment on the request of the Netherlands for bifurcation of the proceedings. No response was received from Russia.

14. On 14 November 2014, the Tribunal sent to the Parties a draft Procedural Order No. 4 (Bifurcation), which stated, *inter alia*, that the Tribunal would rule on Russia's plea concerning jurisdiction as a preliminary question, without holding a hearing. The Tribunal invited the Parties' comments on the draft. By letter dated 18 November 2014, the Netherlands stated that it supported the draft Order. No comment or response was received from Russia.

15. On 21 November 2014, the Tribunal issued Procedural Order No. 4 (Bifurcation) which stated, *inter alia,* that the Tribunal would rule on Russia's plea concerning jurisdiction as a preliminary question, without holding a hearing.

16. On 26 November 2014, the Tribunal issued its Award on Jurisdiction ("Award on Jurisdiction"). The Tribunal unanimously decided that:

> 1. The Declaration of Russia upon ratification of the Convention does not have the effect of excluding the present dispute from the procedures of Section 2 of Part XV of the Convention and, therefore, does not have the effect of excluding the present dispute from the jurisdiction of the Tribunal.

2. All issues not decided in this Award on Jurisdiction, including all other issues relating to jurisdiction, admissibility, and merits, are reserved for further consideration.

17. The Award on Jurisdiction was sent by the PCA by e-mail and courier to the Parties. Hard copies of the Award on Jurisdiction were received by the Netherlands on 16 December 2014, by the Russian Ambassador to the Netherlands in The Hague on 28 November 2014, and by the Ministry of Foreign Affairs in Moscow on 18 December 2014.

18. Russia maintained its decision not to participate in the proceedings after the issuance of the Award on Jurisdiction.

19. Russia's non-participation in the proceedings has made the Tribunal's task more challenging than usual. In particular, it has deprived the Tribunal of the benefit of Russia's views on the factual issues before it and on the legal arguments advanced by the Netherlands. The Tribunal has taken measures to ensure that it has the information it considers necessary to reach the findings contained in this Award. These measures include the issuance, on three occasions, of further questions to the Netherlands on issues arising out of its written or oral pleadings. Members of the Tribunal also put questions to the witnesses presented by the Netherlands at the hearing.

20. In the present Award, the Tribunal will give its findings on matters of jurisdiction that were not decided in the Award on Jurisdiction, as well as on the admissibility and merits of the Netherlands' claims. Issues concerning the quantum of compensation will be reserved to a later phase of these proceedings, if necessary.

II. Procedural History

A. Initiation of the Arbitration

21. By Notification and Statement of the Claim and the Grounds on which it is Based dated 4 October 2013 ("Statement of Claim"),[4] the Netherlands initiated this arbitration against Russia pursuant to Article 287 and Annex VII to the Convention.

B. Application to ITLOS for Provisional Measures

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

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

[4] Annex N-1.

> The investigative activities related to the vessel *Arctic Sunrise* and its crew have been and are being conducted by the Russian authorities, since under the [Convention], as the authorities of the coastal State, they have jurisdiction, including criminal jurisdiction, to enforce compliance with the legislation of the Russian Federation.
>
> Upon ratification of the Convention on 26 February 1997 the Russian Federation drew up a declaration stating *inter alia* that it did not accept "the procedures provided for in Section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes … concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction."
>
> On the basis of the above, the Russian Federation does not accept the arbitration proceedings proposed by the Kingdom of the Netherlands under Annex VII [of the Convention] in the case of *Arctic Sunrise* and does not intend to participate in the hearing by the [ITLOS] of the request of the Kingdom of the Netherlands to prescribe provisional measures pursuant to article 290, paragraph 5 of the Convention.[5]

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

> (1) (*a*) The Russian Federation shall immediately release the vessel *Arctic Sunrise* and all persons who have been detained, upon the posting of a bond or other financial security by the Netherlands which shall be in the amount of 3,600,000 euros, to be posted with the Russian Federation in the form of a bank guarantee;
>
> (*b*) Upon the posting of the bond or other financial security referred to above, the Russian Federation shall ensure that the vessel *Arctic Sunrise* and all persons who have been detained are allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation;[6]

25. According to the Netherlands, Russia did not fully comply with the provisional measures prescribed by ITLOS.[7]

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

[6] https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/published/C22_Order_221113.pdf. Website last visited on 9 August 2015.

[7] Memorial, paras. 355–365.

C. Constitution of the Tribunal

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

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

28. On 13 December 2013, the President of ITLOS appointed Dr. Alberto Székely, a Mexican national, as a member of the Tribunal.[9]

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

30. On 10 January 2014, the President of ITLOS appointed Mr. Henry Burmester, an Australian national, Professor Janusz Symonides, a Polish national, and Judge Thomas A. Mensah, a Ghanaian national, as members of the Tribunal.[11] On the same day, the President of ITLOS designated Judge Thomas A. Mensah as President of the Tribunal.

D. First Procedural Meeting; Adoption of Terms of Appointment

31. By letter from the PCA to the Parties dated 11 February 2014, the Tribunal proposed to hold a first procedural meeting with the Parties in March 2014 and invited the Parties to comment on the draft Rules of Procedure and the draft Procedural Order No. 1 (Terms of Appointment) attached to the letter.

32. The first procedural meeting was held on 17 March 2014 in Bonn, Germany. At the meeting, the Tribunal adopted the Rules of Procedure and Procedural Order No. 1 (Terms of Appointment) as well as the initial procedural timetable for the proceedings. With the concurrence of the Netherlands, the Tribunal decided that Vienna would be the venue of the arbitration. It was also confirmed that the International Bureau of the PCA would act as Registry for the arbitral proceedings and that the Secretary-General of the PCA would appoint a legal officer of the PCA as Registrar.

33. The PCA subsequently circulated a full transcript of the meeting to the Tribunal and the Parties.

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[8] Letter from the Netherlands to ITLOS, 15 November 2013 (Annex N-26).

[9] Letter from the Netherlands to ITLOS, 13 December 2013 (Annex N-29); Letter from the President of ITLOS to the Netherlands, 10 January 2014 (Annex N-30).

[10] Letter from the Netherlands to ITLOS, 13 December 2013 (Annex N-29); Letter from the President of ITLOS to the Netherlands, 10 January 2014 (Annex N-30).

[11] Letter from the President of ITLOS to the Netherlands, 10 January 2014 (Annex N-30).

34. By letter dated 18 March 2014, the Secretary-General of the PCA appointed Dr. Aloysius P. Llamzon as Registrar for the proceedings. Upon the conclusion of Dr. Llamzon's term of employment with the PCA, the Secretary-General appointed Ms. Sarah Grimmer as Registrar by letter dated 16 October 2014.

35. By letter dated 21 March 2014, the PCA on behalf of the Tribunal forwarded to the Parties, *inter alia*, final signed copies of Procedural Order No. 1 (Terms of Appointment).

36. On 10 April 2014, pursuant to Article 4 of the Rules of Procedure, the Netherlands formally notified the Tribunal of the appointment of Professor Dr. Lijnzaad and Professor Dr. Lefeber as the Netherlands' Agent and Co-Agent, respectively, for the purposes of the arbitration.

37. On 14 May 2014, the PCA sent to the Parties "Declarations of Acceptance and Statements of Independence and Impartiality" duly completed and signed by each member of the Tribunal, together with the *curriculum vitae* of each member.

E. Adoption of Procedural Timetable and Written Submissions

38. By letter dated 21 March 2014, the PCA on behalf of the Tribunal forwarded to the Parties final signed copies of Procedural Order No. 2 (Rules of Procedure; Initial Procedural Timetable).

39. With respect to Russia's statement that it would not participate in the proceedings, Procedural Order No. 2 stated:

> 3.1 The Tribunal notes that Russia has expressed by *Note Verbale* to the PCA dated 27 February 2012 its "refusal to take part in this arbitration." The Tribunal also takes note of Russia's non-participation in the Tribunal's First Procedural Meeting in Bonn on 17 March 2014.
>
> 3.2 Nonetheless, it remains open to Russia to participate in these proceedings at any stage, in the manner that the Arbitral Tribunal deems appropriate to preserve the integrity and fairness of the proceedings.
>
> 3.3 Pursuant to Article 12(*2*) of the Rules of Procedure, Russia shall continue to receive a copy of all written communications between the Parties and the Tribunal in these proceedings. Russia will also receive a copy of the verbatim transcript of any hearing produced pursuant to Article 23(9) of the Rules of Procedure.

40. Procedural Order No. 2 provided that the Netherlands should submit a Memorial on "all issues including matters relating to jurisdiction, admissibility, and the merits of the dispute" by 31 August 2014 and that Russia should indicate within 15 days of receipt of the Memorial if it intended to sub-

mit a Counter-Memorial. In the event that Russia so indicated, it would have until 15 February 2015 to submit the Counter-Memorial.

41. Procedural Order No. 2 further stated that, if no such indication was forthcoming from Russia, or if Russia did not submit a Counter-Memorial by 15 February 2015, the Tribunal would pose to the Netherlands questions regarding any specific issues which it considered had not been canvassed, or had been inadequately canvassed, in the Memorial.

42. On 30 August 2014, at the request of the Netherlands and after having sought the views of Russia, the Tribunal granted the Netherlands an additional month to submit supplementary pleadings on reparations for injury, in addition to its Memorial.

43. On 1 September 2014, the Netherlands submitted its Memorial dated 31 August 2014 ("Memorial"), together with, as Annex N-3, a "Statement of Facts" prepared by Greenpeace International ("Greenpeace International Statement of Facts").

44. On 30 September 2014, the Netherlands filed its Supplementary Written Pleadings on Reparation for Injury ("Supplementary Submission").

45. On 8 October 2014, the Tribunal informed the Parties that due to the 30-day extension granted to the Netherlands to submit the Supplementary Submission "the 15-day time limit set in Procedural Order No. 2 for Russia to indicate whether it intends to submit a Counter-Memorial would expire on 14 October 2014." No such indication was made by Russia.

46. By letter dated 28 November 2014, pursuant to Section 2.1.4.1 of Procedural Order No. 2, the Tribunal posed 12 questions to the Netherlands to be addressed in a supplemental submission. The Tribunal stated that "[a]t this stage of the arbitration, the Tribunal does not consider it useful to pose any questions regarding compensation."

47. Pursuant to Sections 2.1.4.3 and 2.1.4.4 of Procedural Order No. 2, Russia had 15 days upon receipt of the Netherlands' supplemental submission, to indicate whether it intended to submit any comments on the supplemental submission. If Russia indicated that it intended to submit comments on the supplemental submission, it would have 30 days from the date of the indication to submit such comments.

48. By letter dated 19 December 2014, the Netherlands submitted the names of eight persons whom it wished to call as witnesses at a hearing.

49. By letter dated 7 January 2015, the PCA on behalf of the Tribunal advised the Parties, *inter alia*, that leave was granted to the Netherlands to call the eight individuals as witnesses and that, "in the event that Russia does not intend to submit comments on the Netherlands' supplemental submission pursuant to Section 2.1.4.3 of Procedural Order No. 2, or otherwise indicate an intention to participate in this arbitration," the Tribunal would be available for a hearing in the period 5–6 and 9–12 February 2015.

50. On 12 January 2015, the Netherlands submitted its Second Supplemental Written Pleadings (Replies to Questions Posed by the Tribunal to the Netherlands pursuant to Section 2.1.4.1 of Procedural Order No. 2) ("Second Supplementary Submission"), together with, as Annex N-44, an Addendum and Corrigendum to the Greenpeace International Statement of Facts ("Greenpeace International Statement of Facts (Addendum and Corrigendum)").

51. The following day, the Tribunal invited Russia to indicate within 15 days (*i.e.*, by 27 January 2015) whether it intended to submit any comments on the Second Supplementary Submission, noting that if it did, Russia would have 30 days to submit its comments.

52. The Tribunal also advised the Parties that it would shortly issue provisional hearing instructions that would apply in case Russia did not indicate, by 27 January 2015, an intention to submit comments on the Second Supplementary Submission or otherwise participate in the arbitration. The Tribunal clarified that, if Russia indicated an intention to submit comments on the Second Supplementary Submission, or participate in these proceedings, the Tribunal would, in consultation with the Parties, review any hearing instructions that it had provisionally issued.

53. By letter dated 23 January 2015, the PCA on behalf of the Tribunal issued the announced provisional hearing instructions to the Parties.

54. Russia did not indicate an intention to submit comments on the Second Supplementary Submission or to participate in the arbitration by the stipulated deadline of 27 January 2015. Accordingly, the Tribunal confirmed that a hearing would take place on 10–11 February 2015 in the Palais Niederösterreich in Vienna.

55. By letter dated 9 February 2015, the Tribunal posed nine further questions to the Netherlands arising out of its Second Supplementary Submission. The Tribunal invited the Netherlands to address the questions to the extent possible at the hearing, but indicated that the Netherlands was under no obligation to submit its full and final responses to the questions during the hearing and that it would have the opportunity to do so in writing thereafter.[12]

F. The Hearing and Post-Hearing Events

56. As announced, the hearing took place on 10–11 February 2015 in the Palais Niederösterreich in Vienna.[13]

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[12] *See* para. 65 above.

[13] With the exception of witnesses (see paras. 58 and 60), the complete list of persons attending the hearing is as follows:

Members of the Tribunal: Judge Thomas A. Mensah (President), Mr. Henry Burmester, Professor Alfred H. A. Soons, Professor Janusz Symonides, Dr. Alberto Székely.

For the Netherlands: Professor Dr. Liesbeth Lijnzaad (Agent); Professor Dr. René Lefeber (Co-Agent); Professor Dr. Erik Franckx (Counsel); H.E. Peter van Wulfften

57. On the first day of the hearing (10 February 2015), an opening statement on behalf of the Netherlands was made by the Agent for the Netherlands, Professor Dr. Lijnzaad, Counsel for the Netherlands, Professor Dr. Erik Franckx, and the Co-Agent for the Netherlands, Professor Dr. Lefeber.

58. The following witnesses were presented by the Netherlands and examined by the Netherlands and the Tribunal:

i. Mr. Daniel Simons (legal counsel at Greenpeace International);
ii. Mr. Andrey Suchkov (criminal defence lawyer retained by Greenpeace International in November 2013);
iii. Mr. Sergey Vasilyev (civil lawyer specialising in maritime law; associate at Sokolov, Maslov and Partners, retained by Greenpeace International);
iv. Mr. Peter Henry Willcox (master of the *Arctic Sunrise*);
v. Mr. Dmitri Litvinov (employee of Greenpeace Nordic, lead campaigner on board the *Arctic Sunrise*, September 2013);
vi. Mr. Frank Hewetson (actions coordinator on board the *Arctic Sunrise*, September 2013); and
vii. Mr. Philip Ball (cameraman, volunteer deckhand, and activist on board the *Arctic Sunrise*, September 2013).

59. After the conclusion of the first hearing day, the Tribunal requested the presence of Mr. Willcox at the hearing the following day to pose further questions to him.

60. On the second day of the hearing (11 February 2015), the following witnesses were presented by the Netherlands and examined by the Netherlands and the Tribunal:

i. Ms. Sini Annukka Saarela (volunteer deckhand and activist on board the *Arctic Sunrise*, September 2013), by video-link; and
ii. Mr. Willcox.

61. Following the examination of the witnesses, the Agent for the Netherlands, Professor Dr. Lijnzaad delivered a closing statement on behalf of the Netherlands.

62. At the end of the hearing, the Tribunal requested the Netherlands to submit by 25 February 2015:

i. official documentation pertaining to examples of recent practice of the Netherlands in response to Greenpeace actions at sea, both as flag State and as coastal State, as alluded to by the Co-

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Palthe (Ambassador of the Netherlands in Austria); Advisers: Mr. Marco Benatar, Ms. Anke Bouma, Mr. Tom Diederen, Mr. Peter Post, Ms. Annemarieke Vermeer; Ms. Elena Sakirko (interpreter); Ms. Rosanne Schardijn (Management Assistant); Mr. Luc Smulders (Alternate permanent representative of the Netherlands to the International Maritime Organization).

The Registry (PCA): Ms. Sarah Grimmer (Registrar), Ms. Evgeniya Goriatcheva (Legal Counsel).

Court reporter: Ms. Claire Hill.

Interpreters: Ms. Irina van Erkel, Mr. Sergei V. Mikheyev.

Agent for the Netherlands in the opening statement;[14] and

ii. an elaboration on its preliminary responses to the Tribunal's nine questions arising out of the Netherlands' Second Supplementary Submission.[15]

63. Russia did not attend the hearing.

64. On 17 February 2015, the PCA dispatched to the Parties copies of the transcripts from the hearing as well as USB flash drives containing the audio-recording of the hearing. These were received by the Russian Ambassador to the Netherlands in The Hague and the Agent for the Netherlands on 17 February 2015, and by the Ministry of Foreign Affairs in Moscow on 19 February 2015.

65. On 25 February 2015, the Netherlands filed its Third Supplemental Written Pleadings (Replies to Further Questions from the Tribunal Arising out of the Netherlands' Second Supplemental Submission dated 12 January 2015) ("Third Supplementary Submission") and official documentation pertaining to examples of recent practice of the Netherlands in response to Greenpeace actions at sea. The Netherlands also submitted comments on the transcripts of the hearing.

66. On 29 May 2015, the Tribunal circulated to the Parties certified English translations of certain Russian laws and regulations that it had considered useful to procure in the course of its deliberations.

67. On 9 June 2015, the Netherlands advised ITLOS, with this Tribunal in copy, that the bank guarantee that the Netherlands had caused to be issued pursuant to the ITLOS Order had ceased to be effective, as it was not collected by Russia within the relevant time period (*i.e.*, by 2 June 2014). The Netherlands indicated that it had informed the Dutch parliament of the Netherlands' potential liability in the amount of the bank guarantee and committed to implement any decision of this Tribunal that may require it to pay compensation in the amount of the bank guarantee.

68. On 7 August 2015, the Russian Federation delivered to the Tribunal and the PCA a letter notifying the publication by the Russian Ministry of Foreign Affairs of a position paper entitled "Certain Legal Issues Highlighted by the Action of the *Arctic Sunrise* against *Prirazlomnaya* Platform" ("Position Paper"), accompanied by a copy of the Position Paper. Russia's letter stated: "Please, note that this shall in no way be interpreted as the Russian Federation's acceptance of or participation in the arbitration." On 11 August 2015, the Tribunal notified the Netherlands of Russia's letter and Position Paper. The Netherlands made no application to the Tribunal in this regard. The Tribunal decided to take no formal action on Russia's Position Paper given that: (i) it was brought to the Tribunal's attention at a very late stage of this phase of the proceedings following Russia's consistent failure to participate in this

[14] Hearing Tr., 11 February 2015 at 36 (referring to Hearing Tr, 10 February 2015 at 33–48).

[15] Hearing Tr., 11 February 2015 at 37.

arbitration; and (ii) according to Russia, the Position Paper does not constitute a formal submission in this proceeding. Furthermore, the Tribunal is satisfied that the relevant issues are fully addressed in this Award.

G. Deposits for the Costs of Arbitration

69. Article 33 of the Rules of Procedure states that the PCA may from time to time request the Parties to deposit equal amounts as advances for the costs of arbitration. Should either Party fail to make the requested deposit within 45 days, the Tribunal may so inform the Parties in order that one of them may make the payment. The Tribunal requested the Parties to make payments toward the deposit on three occasions. While the Netherlands paid its share of the deposit within the time limit granted on each occasion, the Russian Federation made no payments toward the deposit. On each occasion, having been informed of Russia's failure to pay, the Netherlands paid Russia's share of the deposit.

III. Factual Overview

70. In this Section, the Tribunal sets out in outline the facts giving rise to the present dispute. Where relevant to the legal analysis, the specific timing and sequence of events are discussed in Sections V and VII below.

71. In approaching the facts, the Tribunal has at all times borne in mind that evidence has been presented by only one Party to the dispute. While the Tribunal has relied on the evidence presented to it, it has, as required by Article 9 of Annex VII to the Convention, also made use of the primary sources available to it, including:

i. documents produced in the context of the administrative and criminal proceedings instituted against the *Arctic Sunrise* and its crew in Russia, including charge sheets, search warrants, arrest orders, various petitions, and, notably, three witness interrogation reports of Russian Coast Guard officers dated 24 September 2013;
ii. 30 video clips filmed from the *Arctic Sunrise* and its rigid-hull inflatable boats ("RHIBs"), the Russian Coast Guard vessel *Ladoga*, the *Prirazlomnaya*, and the *Prirazlomnaya*'s support vessel *Iskatel*;
iii. over 1,000 photographs taken from the *Arctic Sunrise* and its RHIBs;
iv. six audio-recordings made on the *Arctic Sunrise*;
v. the logbook of the *Arctic Sunrise*; and
vi. the Russian laws and regulations referred to in paragraph 66 above and further described in paragraph 218 below.

72. The Tribunal has also had the benefit of evidence from the eight witnesses mentioned in paragraphs 58 and 60, namely the master of the *Arctic Sunrise*, four Greenpeace campaigners, and three legal counsel engaged in the Russian court proceedings.[16]

[16] *See* paras. 58 and 60 above.

73. The Tribunal appreciates that the evidence before it may not include all of the evidence that would have been put before it had both Parties participated in the proceedings.

A. The *Arctic Sunrise* and the Arctic 30

74. The *Arctic Sunrise* is an icebreaker that flies the flag of the Netherlands. According to the Netherlands, its details are as follows:

International Maritime Organization number:	7382902
Gross tonnage:	949
Category of Ice Strengthening:	IAI Icebreaker (for maximum draught 4.7 metres) EO Recyclable
Port of registry:	Amsterdam, the Netherlands
Type of ship:	Motor Yacht
Call sign:	PE 6851[17]

75. The *Arctic Sunrise* is owned by Stichting Phoenix, an entity registered in the Netherlands. Since 1995, it has been chartered and operated by Greenpeace International.[18]

76. According to its own description, Greenpeace is "an independent global campaigning organisation that acts to change attitudes and behaviour, to protect and conserve the environment and to promote peace."[19] It consists of "27 independent national and regional organisations with a presence in 40 countries worldwide, as well as Greenpeace International (Stichting Greenpeace Council, in Amsterdam) as a coordinating body."[20]

77. Since 2010, Greenpeace has been engaged in the campaign "Save the Arctic", the stated objective of which is to "secure international agreement to create a global sanctuary in the uninhabited area around the North Pole and a ban on offshore oil drilling and industrial fishing in Arctic waters."[21] The protest action at issue in this arbitration was a part of this campaign.

78. At the time of the protest action, in the second half of September 2013, the *Arctic Sunrise* had thirty persons on board, described by Greenpeace International as being "28 activists and two freelance journalists."[22] There were

[17] Memorial, para. 12.3.

[18] Memorial, paras. 12.1–12.2; Greenpeace International Statement of Facts, para. 4.

[19] Greenpeace International Statement of Facts, para. 2.

[20] Greenpeace International Statement of Facts, para. 2.

[21] Greenpeace International Statement of Facts, para. 5.

[22] Greenpeace International Statement of Facts, para. 14.

two Dutch and four Russian nationals, as well as nationals of Argentina, Australia, Brazil, Canada, Denmark, Finland, France, Italy, Morocco, New Zealand, Poland, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom, and the United States of America.[23] Mr. Peter Henry Willcox, a U.S. national, was the master of the vessel.[24]

B. The *Prirazlomnaya*

79. The *Prirazlomnaya* is an offshore oil production platform operated by the Russian company Gazprom Neft Shelf LLC ("Gazprom Neft Shelf"), a subsidiary of the State-controlled Gazprom group.[25] It is located in the Pechora Sea (the south-eastern part of the Barents Sea) at 69° 15'56.88" N 57° 17'17.34" E, within Russia's EEZ.[26]

80. In August 2012, the *Prirazlomnaya* was the target of a first Greenpeace protest action.[27] At the time of the protest action at issue in this case (September 2013), production at the *Prirazlomnaya* had not commenced and would not commence until December 2013.[28] The *Prirazlomnoye* oil field is presently the only field under development on the Russian Arctic shelf.

C. Chronology of Events (September 2013 to January 2015)

1. Greenpeace protest action at the *Prirazlomnaya*; detention of Ms. Saarela and Mr. Weber by the Russian authorities

81. On 14 September 2013, the *Arctic Sunrise* departed from Kirkenes, Norway, with the intention of staging a protest action at the *Prirazlomnaya*.[29]

82. This intention was known to the Russian Coast Guard.[30] On 16 September 2013, the Russian Coast Guard vessel *Ladoga* contacted the *Arctic Sunrise* by radio, warning it of the "impermissibility of violating Articles 60, 147

[23] Letter from Mr. Frits de Vink (Crew Manager, Greenpeace International), 3 October 2013 (Annex N-4). *See also* Memorial, para. 12.4.

[24] Willcox Statement, para. 3.

[25] http://www.gazprom-neft.com/. Website last visited on 9 August 2015. *See also* Greenpeace International Statement of Facts, para. 7.

[26] Notice to Mariners No. 51/2011 (Annex N-37); *see also* Greenpeace International Statement of Facts, para. 7.

[27] Greenpeace International Statement of Facts, paras. 10–11. *See also* E-mail from the Russian Ministry of Transport to the Netherlands, 5 December 2012 (Annex N-38).

[28] "Alexey Miller: Gazprom has pioneered the Russian Arctic shelf development," Gazprom website, Press Center, 20 December 2013, http://www.gazprom.com/press/news/2013/december/article181251/. Website last visited on 9 August 2015.

[29] Greenpeace International Statement of Facts, para. 14.

[30] Witness Interrogation Report of Nikolai Anatolievich Marchenkov (gunnery officer on the *Ladoga*), Investigation Committee, 24 September 2014, p. 9 (Appendix 8.a) ("Marchenkov Interrogation Report"). Any reference in this Award to a numbered "Appendix" is a reference to an appendix to the Greenpeace International Statement of Facts.

and 259 of the [Convention] governing the safety of navigation around artificial islands and structures and the impermissibility of causing damage to the [*Prirazlomnaya*]."[31] Early on 17 September 2013, the *Ladoga* transmitted a similar warning, additionally advising the *Arctic Sunrise* "that a 3-mile zone deemed dangerous to navigation and a 500-meter zone declared prohibited for navigation had been established around the [*Prirazlomnaya*]," and that "diving operations were underway in the vicinity of the [*Prirazlomnaya*]."[32]

83. The *Arctic Sunrise* arrived in the vicinity of the *Prirazlomnaya* on 17 September 2013, where it remained outside a three-nautical mile radius around the platform.[33]

84. At approximately 4:15[34] on 18 September 2013, the *Arctic Sunrise* hailed the *Prirazlomnaya* to inform it of its intention to stage a protest action at the platform.[35] At the same time, Greenpeace International faxed the following letter to the platform's management and the General Director of Gazprom Neft Shelf:

> Greenpeace International is currently conducting a non-violent direct action on your platform. The purpose of the action is to convince Gazprom to drop its plans to conduct oil drilling operations in the Arctic.
>
> The action we are taking consists of scaling the platform and the establishment of a camp in a survival capsule. Everything will be done safely and non-violently. A number of activists are determined to stay on in the capsule until such time as Gazprom promises to abandon its plans to drill for oil at *Prirazlomnaya*, or publishes its oil spill response plan in full and explains in a credible way how such drilling can be done without creating an unacceptable threat to the environment.
>
> The survival capsule is equipped to provide the activists with an ability to stay for an extended period of time. It also provides significant protection against the elements. I urge you to refrain from taking any action that may endanger the integrity of the capsule, since this will expose the activists to a very real risk.
>
> Oil drilling in the offshore Arctic presents unacceptable dangers. There is a high risk of a significant oil spill that would devastate the local environment. Disaster response in the Arctic is extremely challenging due

[31] Marchenkov Interrogation Report, p. 10 (Appendix 8.a); *Arctic Sunrise* logbook (Appendix 38). The Greenpeace International Statement of Facts, ostensibly on the basis of notes taken on the *Arctic Sunrise*, states that Article 260 rather than 259 of the Convention was mentioned. Greenpeace International Statement of Facts, para. 14; Hearing Tr., 10 February 2015 at 58:20–59:5 (examination of Mr. Daniel Simons).

[32] Audio 2 (recorded on the *Arctic Sunrise* bridge); Marchenkov Interrogation Report, pp. 10–11 (Appendix 8.a).

[33] Marchenkov Interrogation Report, p. 11 (Appendix 8.a); Witness Interrogation Report of Alexei Sergeevich Sokolov (master mechanic on the *Ladoga*), Investigation Committee, 24 September 2014, p. 25 (Appendix 8.b) ("Sokolov Interrogation Report").

[34] All times are in Moscow Standard Time (MST), the local time at the *Prirazlomnaya*.

[35] Greenpeace International Statement of Facts, para. 15; Hearing Tr., 10 February 2015 at 102:20–23 (examination of Mr. Dimitri Litvinov).

> to the harsh climactic conditions and remoteness; an oil spill could continue unchecked for a long time, and there is no effective technology to recover oil spilled in ice. Moreover, Arctic oil production will accelerate human-induced climate change. The carbon held in conventional reserves, if released into the atmosphere, is already far in excess of what the climate can afford.
>
> Gazprom aims for *Prirazlomnaya* to become the first operational production platform in the offshore Arctic. It is vital that these plans are dropped. Gazprom knows that it would be impossible to respond effectively to a major accident in this remote location; it is trying to conceal this fact by refusing to disclose its oil spill response plan in full.
>
> We have repeatedly alerted both Gazprom and the Russian government to the risks and demanded that the preparation for production of oil on the Arctic shelf in general and at *Prirazlomnaya* in particular is stopped. Last year, Gazprom rightly decided to suspend its plans to drill after Greenpeace exposed the safety issues at the platform. But this suspension has been lifted, even though drilling in this area remains completely irresponsible. We are now taking action in a peaceful and non-violent way to ensure that the operators of the platform and the government of the Russian Federation do what they should—stop all exploration and drilling for oil on the Arctic shelf.
>
> We are taking this action as a last resort, and with the intentions to prevent a grave danger that threatens all of us and future generations.
>
> Should you have any concerns about safety issues or wish to discuss our campaign demands you can contact us at any time on … or email … .[36]

85. Between 4:15 and 4:30, five RHIBs were launched from the *Arctic Sunrise* and headed toward the *Prirazlomnaya*; namely, the "Hurricane", the "Novi 1", the "Novi 2", the "Parker", and the "Suzie Q".[37] Each RHIB carried two or three persons. One RHIB towed what is referred to in the letter quoted above as a "survival capsule"—a foam tube, three metres long and two metres wide.[38] According to the campaigners, the survival capsule was to be hoisted up on the side of the platform to "offer the protestors protection from the fire hoses and the metal objects that had been thrown the year before."[39] To the *Ladoga*'s gunnery officer it appeared to be "an unidentified white capsule of considerable dimensions,"[40] while the *Prirazlomnaya* reported to the *Ladoga* at the time that one of the *Arctic Sunrise* RHIBs was towing "an unknown object

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[36] Appendix 2; Hearing Tr., 10 February 2015 at 102:23–103:2.

[37] Photos 872–875, 876–908 (taken from the *Arctic Sunrise*); Description of newly available information and a reconstruction of the sequence of events at the end of the protest, para. 6 (Annex N-47). *See also* Greenpeace International Statement of Facts (Addendum and Corrigendum), paras. 20–21.

[38] Photos 876–908, 924–945 (taken from the *Arctic Sunrise*).

[39] Hearing Tr., 10 February 2015 at 87:13–17 (examination of Mr. Peter Henry Willcox). *See also* 105:4–10 (examination of Mr. Dimitri Litvinov).

[40] Marchenkov Interrogation Report, p. 11 (Appendix 8.a).

resembling an explosive device or equipment designed for the performance of maritime research work."[41]

86. The capsule's towline snapped just inside the three-nautical mile area around the *Prirazlomnaya*.[42] It was immediately retrieved from this location by the *Arctic Sunrise*, against radioed orders from the *Ladoga* not to enter the three nautical mile zone around the platform.[43] The *Arctic Sunrise* left the zone as soon as the capsule was on board. Meanwhile, the RHIBs proceeded toward the platform.

87. Having arrived at the base of the *Prirazlomnaya*, the persons on board the *Arctic Sunrise*'s RHIBs endeavoured to attach lines to the platform in order to climb its outside structure. They were hampered by two RHIBs launched from the *Ladoga*, which removed a line that had been successfully attached to the *Prirazlomnaya* and chased the *Arctic Sunrise* RHIBs around the platform.[44] Each *Ladoga* RHIB had on board two officers of the Border Department of the Federal Security Service of the Russian Federation ("FSB"), in addition to a crewmember of the *Ladoga*.[45]

88. At one time, Greenpeace campaigner Ms. Sini Annuka Saarela succeeded in attaching herself to a mooring line on the eastern side of the platform, but her rope was cut by one of the *Ladoga*'s RHIBs, causing her to fall in the water.[46]

89. She was retrieved by an *Arctic Sunrise* RHIB, which then proceeded to the western side of the platform, where Greenpeace campaigner Mr. Marco Paulo Weber had begun climbing a rope attached to a mooring line under the spray of water cannons operated from the platform.[47] Ms. Saarela attached herself to Mr. Weber's rope and also began climbing.[48] However, some 20 minutes later, still being sprayed by the water cannons and with persons on the *Prira-*

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[41] Administrative Offense Report No. 2109.623–13, FSB Coast Guard Division for Murmansk Oblast, 24 September 2013 (Appendix 39).

[42] Video 2 at 8'35 (shot from the *Ladoga*); Marchenkov Interrogation Report, p. 11 (Appendix 8.a).

[43] Video 2 at 17'30–22'00 (shot from the *Ladoga*); Marchenkov Interrogation Report, p. 11 (Appendix 8.a).

[44] Video 17 at 4'20 (shot from the "Novi 2").

[45] Marchenkov Interrogation Report, p. 12 (Appendix 8.a); Sokolov Interrogation Report, p. 25 (Appendix 8.b); Witness Interrogation Report of Ivan Alexandrovich Solomakhin (warrant officer on the *Ladoga*), Investigation Committee, 24 September 2014, p. 37 (Appendix 8.c) ("Solomakhin Interrogation Report"); Order on the closure of criminal case No. 83543, Investigation Committee, 24 September 2014, p. 16 (Appendix 37).

[46] Video 17 at 4'58–5'33 (shot from the "Novi 2"); photos 191–231; Sokolov Interrogation Report, p. 27 (Appendix 8.b); Hearing Tr., 11 February 2015 at 4 (examination of Ms. Sini Annuka Saarela).

[47] Video 1 from 2'30 (compilation); video 3 from 5'30 (shot from the *Prirazlomnaya*); video 17 from 11'50 (shot from the "Novi 2"; photos 338–351 (taken from the "Parker"); Marchenkov Interrogation Report, p. 12 (Appendix 8.a).

[48] Video 1 at 3'36 (compilation); video 3 at 8'42 (shot from the *Prirazlomnaya*); video 6 from 0'35; video 10 from 0'13.

zlomnaya raising and dropping the mooring line, Ms. Saarela and Mr. Weber, realizing the danger of their position, decided to descend from the platform.[49]

90. While Ms. Saarela and Mr. Weber climbed the platform, the *Ladoga* and *Arctic Sunrise* RHIBs jostled nearby. In its Statement of Facts, Greenpeace International emphasises that the FSB officers slashed at the *Arctic Sunrise* RHIBs and pointed guns at the persons on board.[50] At the hearing, Mr. Willcox stated that the campaigners were "stunned by [the Russian authorities'] aggressive reaction."[51] At the same time, the pilot of one of the *Ladoga* RHIBs reported that the *Arctic Sunrise*'s RHIBs were "ramming ours, causing the inflatable tubes on one of ours to deflate."[52] The pilot of the other *Ladoga* RHIB noted that he "used [his] inflatable to begin pushing" one of the *Arctic Sunrise* RHIBs.[53]

91. When Ms. Saarela and Mr. Weber began their descent, the *Arctic Sunrise* RHIBs were repelled by water cannons from the platform, while the *Ladoga* RHIBs positioned themselves below the climbers. One of the FSB officers tugged at Ms. Saarela's rope, causing her to swing against the platform and hampering her descent.[54] *Arctic Sunrise* RHIBs approaching to assist Ms. Saarela were kept away by shots fired by the FSB officers.[55] In the end, the climbers descended into one of the *Ladoga*'s RHIBs.[56]

92. By 6:00, the protest action had come to an end. Ms. Saarela and Mr. Weber were brought to the *Ladoga* around that time.[57] The "Novi 1" began its return journey toward the *Arctic Sunrise*, advancing slowly due to the presence of an injured crewmember.[58] The "Suzie Q" and the "Hurricane" first followed the *Ladoga* RHIB carrying the climbers, while the "Novi 2" remained

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[49] Video 3 from 15'09 (shot from the *Prirazlomnaya*); Sokolov Interrogation Report, p. 27 (Appendix 8.b); Hearing Tr., 11 February 2015 at 4–5 (examination of Ms. Sini Annuka Saarela).

[50] Greenpeace International Statement of Facts, para. 26; video 17 from 12'15 (shot from the "Novi 2"); video 1 from 4'25 (compilation); video 3 from 7'20 (shot from the *Prirazlomnaya*).

[51] Hearing Tr., 10 February 2015 at 87:25–88:4, 88:20–21 (examination of Mr. Peter Henry Willcox). *See also* Hearing Tr., 10 February 2015 at 140:13–14 (examination of Mr. Frank Hewetson): "It was quite aggressive; I would say that we were slightly taken by surprise on the aggression."

[52] Marchenkov Interrogation Report, p. 12 (Appendix 8.a). *See also* Solomakhin Interrogation Report, p. 38 (Appendix 8.c).

[53] Sokolov Interrogation Report, p. 27 (Appendix 8.b).

[54] Video 3 from 19'10 (shot from the *Prirazlomnaya*); Marchenkov Interrogation Report, p. 12 (Appendix 8.a); Solomakhin Interrogation Report, p. 38 (Appendix 8.c).

[55] Video 3 from 19'55 (shot from the *Prirazlomnaya*); Marchenkov Interrogation Report, p. 12 (Appendix 8.a). *See also Note Verbale* from the Russian Federation to the Netherlands, 18 September 2013, p. 2 (Annex N-5).

[56] Video 3 at 23'35 and 25'20 (shot from the *Prirazlomnaya*); Marchenkov Interrogation Report, p. 12 (Appendix 8.a).

[57] Marchenkov Interrogation Report, p. 12 (Appendix 8.a).

[58] *See* Video 28a from 11'26 (shot from the "Hurricane"). *See also* Description of newly available information and a reconstruction of the sequence of events at the end of the protest, para. 17 (Annex N-47).

positioned between the *Prirazlomnaya* and the *Ladoga*.[59] Once the climbers had been taken on board the *Ladoga*, the "Hurricane," the "Novi 2" and the "Suzie Q" proceeded toward the *Arctic Sunrise*.[60] The "Parker" had left the *Prirazlomnaya* around 5:30 to deliver video and photo materials to the *Arctic Sunrise*.[61] Following delivery, it had headed again toward the *Prirazlomnaya*, but aborted the trip once it encountered the other RHIBs returning to the *Arctic Sunrise*.[62]

93. All five RHIBs arrived alongside the *Arctic Sunrise* sometime between 6:15 and 6:45.[63] Around the same time, the *Ladoga* began radioing the *Arctic Sunrise* with the order to stop, heave to, and admit an investigation team on board, threatening to open preventive fire should the *Arctic Sunrise* ignore these orders. The orders were repeated some six or seven times in the span of ten minutes.[64] The *Ladoga* stated that the *Arctic Sunrise*'s RHIBs had attacked the *Prirazlomnaya* and that the *Arctic Sunrise* was suspected of terrorism. The *Arctic Sunrise* refused to stop or receive the *Ladoga*'s boarding party, noting that it was in international waters, and requested the return of Ms. Saarela and Mr. Weber.[65] Meanwhile, the *Arctic Sunrise*'s RHIBs were hastily brought on board.[66]

94. In the following hours, the *Ladoga* repeatedly reiterated its orders to the *Arctic Sunrise*, stating that the *Arctic Sunrise* was suspected of piracy and terrorism[67] and firing green flares and four rounds of warning shots. Around 7:30, the *Ladoga* displayed an "SN" flag,[68] visible from the *Arctic Sunrise*. Shortly before 8:00, a RHIB from the *Ladoga* attempted to board the *Arctic Sunrise*, which undertook evasive manoeuvres. Around 9:00, the *Ladoga*

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[59] Video 28a at 2'23 (shot from the "Hurricane"); video 29c at 14'22 (shot from the "Suzie Q"). *See also* Description of newly available information and a reconstruction of the sequence of events at the end of the protest, para. 10 (Annex N-47).

[60] Video 28a at 5'45 (shot from the "Hurricane"); video 29c at 17:48–21'00 (shot from the "Suzie Q"). *See also* Description of newly available information and a reconstruction of the sequence of events at the end of the protest, paras. 12–16 (Annex N-47).

[61] Video 18 at 7'25 (shot from the "Parker"); photos 472–515 (taken from the "Parker"), 956–979 (taken from the *Arctic Sunrise*).

[62] Video 29c at 24'31 (shot from the "Suzie Q"); Hearing Tr., 10 February 2015 at 141 (examination of Mr. Frank Hewetson). *See also* Description of newly available information and a reconstruction of the sequence of events at the end of the protest, para. 18 (Annex N-47).

[63] Photos 535–541, 551, 1016–1030, 1048–1051 (taken from the *Arctic Sunrise*). The precise timing of the events described in this paragraph is discussed at paras. 263–266 below.

[64] Video 27 (shot from the *Arctic Sunrise* bridge) at 0'47, 2'07, 3'35, 6'04, 8'28. *See also Arctic Sunrise* logbook (Appendix 38); Administrative Offence Report, p. 8, paras. 3–4 (Appendix 39); Marchenkov Interrogation Report, pp. 12–13 (Appendix 8.a).

[65] Video 27 (shot from the *Arctic Sunrise* bridge).

[66] *See* video 27 at 4'00 and video 28b at 9'58 (shot from the *Arctic Sunrise* bridge), recording Mr. Willcox speaking to the last two RHIBs in the water: "Hey guys, the Russians are threatening to board so I want to get the 'Parker' and the 'Hurricane' up ASAP."

[67] Video 30; audio 5 at 1'18; audio 6 at 2'16 (shot from and recorded on the *Arctic Sunrise* bridge).

[68] Pursuant to the International Code of Signals, "SN" means: "You should stop immediately. Do not scuttle. Do not lower boats. Do not use the wireless. If you disobey I shall open fire on you."

threatened to open direct fire on the stern of the *Arctic Sunrise* should the latter continue to ignore orders, at which point the *Arctic Sunrise* informed the *Ladoga* that there were petroleum stores on the stern of the ship.[69] Although the *Arctic Sunrise* continued to refuse to stop, the *Ladoga* did not open direct fire, and a period of radio silence ensued.

95. Around 11:00, the *Arctic Sunrise* and the *Ladoga* agreed to a delivery of clothing, food, and medicine for Ms. Saarela and Mr. Weber, which was carried out around noon.[70] Immediately thereafter, at the *Ladoga*'s request, the *Arctic Sunrise* moved 20 nautical miles north of the *Prirazlomnaya*, in the hope of "cooling the whole situation down" and because the *Ladoga* "had hinted" that it would then be possible to discuss the return of Ms. Saarela and Mr. Weber to the *Arctic Sunrise*.[71]

96. At about 16:00 and again around 17:30, the *Ladoga* radioed that it was awaiting instructions regarding Ms. Saarela and Mr. Weber.[72]

97. After 20:30, having received no further communications from the *Ladoga*, the *Arctic Sunrise* returned to the *Prirazlomnaya*, circling it at a distance of four nautical miles, while the *Ladoga* positioned itself between the *Arctic Sunrise* and the platform.[73] The two vessels remained in these positions without significant communication until the evening of 19 September 2013.[74]

98. In a *Note Verbale* delivered by the Russian Ministry of Foreign Affairs to the Dutch Ambassador in Moscow on 18 September 2013, the Greenpeace protest action was described as "aggressive and provocative" and bearing, "to outward appearances," the characteristics of "terrorist activities which could put lives in danger and have serious consequences for the platform," and "exposed the Arctic region to the threat of an ecological disaster of unimagin[a]ble consequences." The *Note Verbale* asserted that the *Arctic Sunrise* crew had attempted to "gain admittance" to the *Prirazlomnaya* and "force entry using special equipment." It noted that the *Arctic Sunrise*'s RHIBs, in advancing toward the platform, had "trailed an unidentified, barrel-shaped object." It further stated that in view of the "genuine danger" posed to the platform and the "activists' refusal to follow the coastguard's instructions … to cease their unlawful activities," the decision was made to seize the *Arctic Sunrise*.

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[69] Video 16 (shot from the *Arctic Sunrise* bridge); audio files 5 and 6 (shot from and recorded on the *Arctic Sunrise* bridge); *Arctic Sunrise* logbook (Appendix 38); photos 664–695 (taken from the *Arctic Sunrise*; showing attempted boarding); Marchenkov Interrogation Report, p. 14 (Appendix 8.a); Hearing Tr., 10 February 2015 at 108–110 (examination of Mr. Dimitri Litvinov). *See also* Greenpeace International Statement of Facts, paras. 32–36.

[70] *Arctic Sunrise* logbook (Appendix 38).

[71] *Arctic Sunrise* logbook (Appendix 38); Hearing Tr., 10 February 2015 at 88:18–89:2 (examination of Mr. Peter Henry Willcox).

[72] Videos 20 and 21 (shot from the *Arctic Sunrise* bridge). *See also* Greenpeace International Statement of Facts, para. 40.

[73] *Arctic Sunrise* logbook (Appendix 38); photos 703–715 (taken from the *Arctic Sunrise*).

[74] Greenpeace International Statement of Facts, para. 40; Greenpeace International Statement of Facts (Addendum and Corrigendum), para. 33.

The Netherlands was urged to take immediate measures to avoid the repeat of such actions.[75]

99. According to the Russian news agency RIA Novosti, the *Prirazlomnaya* issued a report that evening of a terrorist attack, mentioning five small boats towing an "unidentified object resembling a bomb."[76]

2. Boarding of the *Arctic Sunrise* by the Russian authorities and subsequent measures taken against the vessel and the persons on board; diplomatic exchanges between the Parties and commencement of this arbitration

100. At sunset on 19 September 2013, the *Ladoga* radioed the *Arctic Sunrise*, once again ordering it to stop, heave to, and receive an inspection team.[77] At the same time, a helicopter approached the Greenpeace vessel.[78] As seen on the photos and videos taken by the crew of the *Arctic Sunrise*, the helicopter was unmarked save for a red star on its bottom side.[79] The same photos and videos show the helicopter hovering over the ship with a line lowered to the rear deck from which several men with guns in unmarked uniforms and balaclavas descend, with some crewmembers of the *Arctic Sunrise* standing on the deck with their arms in the air, while other crewmembers attempt to film or photograph the events.[80]

101. Although the helicopter was unmarked and the men descending from it did not, in the recollection of the crew of the *Arctic Sunrise*, identify themselves, the Tribunal is satisfied, in context, that the vessel was boarded by Russian officials. This is apparent from their subsequent actions, which included allowing the Russian Coast Guard vessel *Ladoga* to tow the *Arctic Sunris*e to Murmansk and deliver the persons on board to the Investigation Committee of the Russian Federation ("Investigation Committee"), as well as from contemporaneous Russian statements. In an article published on 20 September 2013, the Russian news agency ITAR-TASS quotes a source at the FSB Public Relations Centre as specifying that the *Arctic Sunrise* was boarded by the coast guard service of the FSB.[81] The *Ladoga*'s gunnery officer similarly reported that the *Arctic Sunris*e was boarded by "officers of the special forces division."[82]

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[75] *Note Verbale* from the Russian Federation to the Netherlands, 18 September 2013 (Annex N-5).

[76] http://ria.ru/eco/20130919/964386631.html. Website last visited on 9 August 2015.

[77] Audio 1 from 8'00 (recorded on the *Arctic Sunrise*).

[78] Audio 1 from 9'40 (recorded on the *Arctic Sunrise*).

[79] Videos 22, 23, 25; photos 1–7, 750–799 (recorded on and shot from the *Arctic Sunrise*).

[80] Videos 22, 23, 25; photos 1–7, 750–799 (recorded on and shot from the *Arctic Sunrise*).

[81] http://en.itar-tass.com/greenpeace-ship-arctic-sunrise-case/701021. Website last visited on 9 August 2015.

[82] Marchenkov Interrogation Report, p. 15 (Appendix 8.a).

102. According to the Greenpeace International Statement of Facts, a total of about 15 or 16 persons boarded the ship.[83] They rounded up the *Arctic Sunrise* crew, breaking down the door to the radio room, where three crewmembers had taken refuge to continue reporting ongoing events to Greenpeace International and the media. Radio equipment was destroyed, while devices such as telephones, computers, and cameras were seized. Shortly after the *Arctic Sunrise* was boarded, Ms. Saarela and Mr. Weber were returned to the *Arctic Sunrise*, having spent a day and a half on the *Ladoga*. At the hearing, Ms. Saarela described her time on the *Ladoga* as follows:

> … there was all the time somebody guarding me, … we were not free to move on the ship. So if I, for example, needed to go to the restroom, I had to ask that, and then somebody would come with me there, and guard me all the way there. So I was not able to move freely on the ship. We didn't have any connection to the outer world. I couldn't see what was happening.[84]
>
> … we did not want to go on board the Russian coastguard vessel at all, so we were taken there by force. And we had all the time soldiers guarding us with guns, so there were soldiers with us on the boat with guns. And then as soon as we got to the coastguard vessel, we were taken apart from each other, me and Mr Weber, and then we were put into separate rooms, where there was all the time a soldier guarding us. I was not free to move freely on board of the ship, and I was trying to—I was asking, "What is happening? Can you please let me go back to my own ship?" And I was denied to go out on the deck, because I stayed there for one day and a half, so at some point I was also asking that I really need fresh air, can I please go out, and I was not let out. I was treated like being under arrest. But when I was asking what is going on, why am I here, there were no people able to speak English well enough to tell me what was going on.[85]

103. After being subjected to a thorough search, the crewmembers of the *Arctic Sunrise* were allowed to return to the cabins.[86] Mr. Willcox was held separately on the bridge and requested to set sail for Murmansk, which he refused to do unless allowed to contact Greenpeace International.[87]

104. On 20 September 2013, the commanding officer of the *Ladoga* signed an "Official Report of Transfer," recording the decision to move the *Arctic Sunrise* to the port of Murmansk to allow for the institution of adminis-

[83] Greenpeace International Statement of Facts, para. 48.

[84] Hearing Tr., 11 February 2015 at 6:8–15 (examination of Ms. Sini Annuka Saarela).

[85] Hearing Tr., 11 February 2015 at 8:14–9:6 (examination of Ms. Sini Annuka Saarela).

[86] Hearing Tr., 10 February 2015 at 114–120 (examination of Mr. Dimitri Litvinov). *See also* Greenpeace International Statement of Facts, paras. 51–53.

[87] Hearing Tr., 10 February 2015 at 119:8–120:10 (examination of Mr. Dimitri Litvinov).

trative proceedings against Mr. Willcox.[88] Following this decision, the *Ladoga* proceeded to tow the *Arctic Sunrise* to Murmansk.

105. By *Note Verbale* dated 23 September 2013, the Netherlands requested information from Russia regarding the factual circumstances of the boarding of the *Arctic Sunrise* and that the vessel and its crew be released immediately.[89]

106. In the morning of 24 September 2013, the Investigation Committee opened a criminal case against the Arctic 30 on the ground of suspicion of the offence provided for in Article 227(3) of the Criminal Code of the Russian Federation ("Criminal Code")—piracy committed by an organised group.[90] The *Ladoga* and the *Arctic Sunrise* arrived at Murmansk around midday. A consular delegation (comprised of 18 people of 9 nationalities) was first allowed to meet for two hours with the non-Russian crewmembers of the *Arctic Sunrise*, after which the Arctic 30 were brought before the Investigation Committee, which presented each of them with a written protocol of arrest on suspicion of piracy.[91] Mr. Willcox was also presented with an administrative offence report stating that he had committed an offence under Part 2 of Article 19(4) of the Administrative Offences Code of the Russian Federation ("Administrative Code").[92]

107. On 25 September 2015, the media outlet Russia Today reported that the Russian President, Mr. Vladimir Putin, had publicly stated that the Arctic 30 were "obviously not pirates," while also stating that their actions presented "a danger to lives and people's health." [93]

108. By *Note Verbale* to the Russian Federation dated 26 September 2013, the Netherlands reiterated the request, initially made on 23 September 2013, for information and the release of the *Arctic Sunrise* and its crew.[94]

109. By detention orders of 26, 27, and 29 September 2013, the Leninsky District Court of Murmansk ("District Court") granted a petition of the Investigation Committee to remand the Arctic 30 in custody until 24 November 2013.[95] The Arctic 30 remained in detention centers in Murmansk and Apatity, a town 185 kilometres south of Murmansk.[96]

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[88] Official Report of Transfer, FSB Coast Guard Division for Murmansk Oblast, 20 September 2013 (Appendix 6).

[89] *Note Verbale* from the Netherlands to the Russian Federation, 23 September 2013 (Annex N-6).

[90] Decision on the opening of criminal case No. 83543 and the initiation of related proceedings, Investigation Committee, 24 September 2013 (Appendix 7).

[91] Greenpeace International Statement of Facts, paras. 61–64, 67.

[92] Administrative Offense Report No. 2109.623–13, FSB Coast Guard Division for Murmansk Oblast, 24 September 2013 (Appendix 39).

[93] http://rt.com/news/putin-greenpeace-pirates-arctic-323/. Website last visited on 9 August 2015.

[94] *Note Verbale* from the Netherlands to the Russian Federation, 26 September 2013 (Annex N-7).

[95] *See e.g.* Order on the imposition of interim measures in the form of detention, District Court, 26 September 2013 (Appendix 9).

[96] Hearing Tr., 10 February 2014 at 63:19–21 (examination of Mr. Andrey Suchkov).

110. On 28 September 2013, the District Court authorised a search by the Investigation Committee of the "living quarters" on the *Arctic Sunrise*.[97] This decision was upheld on appeal on 12 November 2013.[98] The vessel was searched in the presence of Mr. Willcox and his lawyer on 28 and 30 September 2013. Various items, including documents, were seized.[99]

111. By *Note Verbale* to the Russian Federation dated 29 September 2013, the Netherlands formally lodged its protest "over the boarding and investigation of the 'Arctic Sunrise' that commenced on 28 September 2013."[100]

112. By *Note Verbale* dated 1 October 2013, Russia provided information to the Netherlands regarding the circumstances of the boarding of the *Arctic Sunrise* and the criminal investigation opened against its crew. Russia asserted that on 19 September 2013 at 21:50 a "visit" of the *Arctic Sunrise* had been carried out on the basis of Articles 56, 60, and 80 of the Convention.[101]

113. On 2 and 3 October 2013, each of the Arctic 30 was brought before the Investigation Committee and charged with piracy committed by an organised group under Article 227(3) of the Criminal Code.[102]

114. By *Note Verbale* dated 3 October 2013, the Netherlands informed Russia that it did not consider that Articles 56, 60, and 80 of the Convention justified Russia's actions against the *Arctic Sunrise* and its crew and again requested their release. The Netherlands indicated that, due to the urgency of the matter, it was considering to initiate arbitration "as soon as feasible."[103]

115. On 4 October 2013, as stated above, the Netherlands commenced the present arbitration.

116. On 7 October 2013, the District Court granted the Investigation Committee's application for the seizure of the *Arctic Sunrise*, relying in part on the ground that the preliminary investigation had established that the vessel had been used as a "criminal instrument."[104] This decision was upheld on appeal on 21 November 2013.[105]

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[97] Decision authorizing a search of living quarters, District Court, 28 September 2013 (Appendix 11).

[98] Appellate Ruling, Murmansk Regional Court, 12 November 2013 (Appendix 21).

[99] Greenpeace International Statement of Facts, paras. 74, 77.

[100] *Note Verbale* from the Netherlands to the Russian Federation, 29 September 2013 (Annex N-9).

[101] *Note Verbale* from the Russian Federation to the Netherlands, 1 October 2013 (Annex N-10).

[102] *See e.g.* Decision on being charged as an accused, Investigation Committee, 2 October 2013 (Appendix 12). *See also* Investigation Committee website, 3 October 2013, https://sledcom.ru/news/item/520650/. Website last visited on 9 August 2015.

[103] *Note Verbale* from the Netherlands to the Russian Federation, 3 October 2013 (Annex N-21).

[104] Order for the seizure of property, District Court, 7 October 2013 (Annex N-13/Appendix 13).

[105] Appellate Ruling, Murmansk Regional Court, 21 November 2013 (Appendix 23).

117. On 8 October 2013, the FSB Coast Guard Division for the Murmansk region imposed a fine of RUB 20,000 on Mr. Willcox, in his official capacity as master of the *Arctic Sunrise*, for the commission of an administrative offence under Part 2, Article 19(4) of the Administrative Code. The decision explained that this provision sanctions:

> … non-compliance with the legitimate demands of an officer of the security agency for the [Russian Federation] Continental Shelf or the security agency for the [Russian Federation] Exclusive Economic Zone (EEZ) for a ship to stop and, equally, for obstructing the official in the execution of powers vested in him, including inspection of the ship.[106]

118. The decision stated that on 18 September 2013 an attempt had been made by the *Arctic Sunrise*'s RHIBs to board the *Prirazlomnaya*, "thereby creating a real threat to the Russian Federation oil and gas facility, including to the persons engaged at the time in diving operations near the platform," and further asserted that when asked to stop, the *Arctic Sunrise* had failed to comply, "gathered speed, altering its course, manoeuvring dangerously and creating a real danger to the safety of the military vessel and members of its crew."[107]

119. By 30 individual decisions rendered between 8 and 24 October 2013, the Regional Court of Murmansk rejected the appeals of the Arctic 30 against the detention orders of 26, 27, and 29 September 2013 remanding them to custody until 24 November 2013.[108]

120. The *Arctic Sunrise* was officially seized and transferred for safekeeping to the Murmansk branch of the Federal Unitary Enterprise "Rosmorport" on 15 October 2013.[109]

121. By *Note Verbale* to the Russian Federation dated 18 October 2013, the Netherlands formally lodged its protest against the seizure of the *Arctic Sunrise*.[110]

122. On 21 October 2013, the Netherlands submitted an application to ITLOS for the prescription of provisional measures in the context of this arbitration.

123. By letter of the same day, Lieutenant General of Justice Mr. A. I. Mayakov informed the lead investigator in charge of the case against the Arctic 30, Mr. O. R. Torvinen, that "[a]s of today, it has been established that [*Prirazlomnaya*] is not a vessel," which "circumstance excludes the possibility of criminal responsibility in the sense of Article 227 of the [Criminal Code]."

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[106] Resolution in Case No. 2109/623–13 of Administrative Offense, FSB Coast Guard Division for Murmansk Oblast, 8 October 2013 (Annex N-16/Appendix 14).

[107] Resolution in Case No. 2109/623–13 of Administrative Offense, FSB Coast Guard Division for Murmansk Oblast, 8 October 2013, p. 9 (Annex N-16/Appendix 14).

[108] *See e.g.* Appellate Ruling, Murmansk Regional Court, 23 October 2013 (Appendix 15); Greenpeace International Statement of Facts, paras. 84, 96.

[109] Official report of seizure of property, 15 October 2013 (Annex N-14/Appendix 16).

[110] *Note Verbale* from the Netherlands to the Russian Federation, 18 October 2013 (Annex N-15).

Mr. Mayakov proposed that the "crime in question" be instead qualified under Article 213(2)—the hooliganism provision of the Criminal Code.[111]

124. By a decision dated 23 October 2013 and signed by Mr. Torvinen, the Investigation Committee resolved to "continue the investigation" on the basis that the conduct of the Arctic 30 could be qualified as hooliganism under Article 213(2) of the Criminal Code.[112] The Arctic 30 were informed of this decision and presented with charge sheets for the commission of a crime under Article 213(2) of the Criminal Code between 24 and 30 October 2013.[113] *Inter alia*, the charge sheets stated that the Arctic 30, "pretending to be environmental activists," had threatened the staff of the *Prirazlomnaya* with violence, and had "actively resisted the authority representatives."[114]

125. On 11–12 November 2013, the Arctic 30 were moved to detention centres in St. Petersburg.[115]

3. Release of the Arctic 30 and the *Arctic Sunrise*; end of legal proceedings in Russia; commencement of related international legal proceedings

126. In mid-November, the Investigation Committee sought a further three-month prolongation of the detention of the Arctic 30. Although this petition was granted on 18 November 2013 in respect of one crewmember of the *Arctic Sunrise*, the Primorsky District Court of St. Petersburg, by subsequent decisions of 18–22 November 2013, ordered the release on bail of the other 29 members of the Arctic 30.[116] 28 of them were released on 20–22 November 2013.[117]

127. On 22 November 2013, ITLOS issued its Order requiring: (i) the Russian Federation to immediately release the *Arctic Sunrise* and its crew upon the posting of a bond in the amount of EUR 3,600,000 by the Netherlands; and (ii) both Parties to report on the implementation of the ITLOS Order.

128. One additional member of the *Arctic Sunrise* crew was released on bail on 25 November 2013. The decision extending the detention of the sole

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[111] Written instructions per Article 39 of the Criminal Procedure Code of the Russian Federation from Mr. A. I. Mayakov to Mr. S. O. Torvinen, 21 October 2013 (Appendix 17).

[112] Decision on qualification, Investigation Committee, 23 October 2013 (Appendix 18).

[113] *See e.g.* Ruling on bringing an accusation, Investigation Committee, 28 October 2013 (Appendix 19).

[114] *See e.g.* Ruling on bringing an accusation, Investigation Committee, 28 October 2013 (Appendix 19).

[115] Greenpeace International Statement of Facts, para. 100.

[116] *See e.g.* Decision, Primorsky District Court of St. Petersburg, 19 November 2013 (Appendix 22); Overview of key dates in proceedings against the 30 persons on board the *Arctic Sunrise* (Appendix 29); Greenpeace International Statement of Facts, paras. 103–104.

[117] Overview of key dates in proceedings against the 30 persons on board the *Arctic Sunrise* (Appendix 29).

crewmember of the *Arctic Sunrise* who remained in detention was overturned on appeal on 28 November 2013, and he was released in the following days.[118]

129. By *Note Verbale* dated 2 December 2013, the Netherlands informed the Russian Federation that it had arranged for a bank guarantee in accordance with the ITLOS Order.[119] The Netherlands also reported to ITLOS in this respect.[120]

130. On 18 December 2013, the Russian State Duma issued a resolution "[o]n amnesty in connection with the 20th Anniversary of the Adoption of the Constitution of the Russian Federation," providing *inter alia* for the termination of the investigation and prosecution of persons suspected or accused of crimes under Article 213(2) of the Criminal Code.[121]

131. By individual decisions dated 24 and 25 December 2013, the Investigation Committee issued orders to "terminate the criminal prosecution" of the Arctic 30 on charges under Article 213(2) of the Criminal Code, and their bail was lifted.[122]

132. On 26–27 December 2013, the Russian Federal Migration Service rendered decisions in respect of the 26 non-Russian national crewmembers of the *Arctic Sunrise*, stating that no proceedings would be initiated against them for failure to hold an entry visa, given that they had not entered Russia of their own volition but were rather remanded to the Russian territory by the FSB Coast Guard Service.[123]

133. By 29 December 2013, all of the non-Russian nationals had left the country.[124]

134. On 16 March 2014, the Arctic 30 filed individual applications in the European Court of Human Rights ("ECtHR"), asking for a finding that their apprehension and detention by the Russian authorities constituted a violation

[118] Greenpeace International Statement of Facts, para. 112; Overview of key dates in proceedings against the 30 persons on board the *Arctic Sunrise* (Appendix 29).

[119] *Note Verbale* from the Netherlands to the Russian Federation, 2 December 2013 (Annex N-27).

[120] Netherlands' Report on Compliance with the ITLOS Order, 2 December 2013 (Annex N-28). By letter dated 9 June 2015, the Netherlands advised ITLOS, with this Tribunal in copy, that the bank guarantee had ceased to be effective as it was not collected by Russia within the relevant time period, *i.e.*, by 2 June 2014. The Netherlands indicated that it had informed the Dutch parliament of the Netherlands' potential liability in the amount of the bank guarantee and committed to implement any decision of this Tribunal that may require it to pay compensation in the amount of the bank guarantee.

[121] Article 6(5), http://www.rg.ru/2013/12/18/amnistia-dok.html. Website last visited on 9 August 2015.

[122] *See e.g.* Resolution on termination of proceedings following the act of amnesty, Investigation Committee, 24 December 2013 (Appendix 27).

[123] *See e.g.* Decision on the refusal to initiate administrative proceedings, FMS, 25 December 2015 (Appendix 28).

[124] Greenpeace International Statement of Facts, para. 120.

of their rights under Articles 5 and 10 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR").[125]

135. Meanwhile, Stichting Phoenix's legal representatives in Russia unsuccessfully sought the release of and access to the *Arctic Sunrise*.[126] By a decision of 24 March 2014, the Primorsky District Court of St. Petersburg rejected a petition for the review of the Investigation Committee's decision not to allow representatives of Stichting Phoenix to inspect the *Arctic Sunrise* for the purpose of assessing and preventing damage.[127]

136. On 6 June 2014, the Investigation Committee lifted the seizure of the *Arctic Sunrise* and handed the ship over to representatives of Stichting Phoenix.[128]

137. On 1 August 2014, having undergone a professional damage assessment and essential maintenance and received the port authorities' permission to leave Murmansk, the *Arctic Sunrise* set sail for Amsterdam, where it arrived on 9 August 2014.[129]

138. On 24 September 2014, the Investigation Committee formally terminated the criminal case commenced on 24 September 2013 against the Arctic 30.[130] The Investigation Committee noted that, while the Arctic 30 had no doubt committed the crime envisaged under Article 213(2) of the Criminal Code (hooliganism), they had benefited in this respect from the amnesty granted by the State Duma on 18 December 2013 and did not appear to have committed any other crimes.[131]

139. Between October 2014 and January 2015, the Investigation Committee returned a number of items that had been seized on the *Arctic Sunrise*.[132] Among these were video and photo materials that were later submitted by the Netherlands with its Second and Third Supplementary Submissions as evidence in this proceeding.[133]

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[125] *See e.g.* Application forms of Ms. Sini Annuka Saarela, Mr. Kieron John Bryan, and Mr. Gizem Akhan (Appendices 41–43). *See* other forms at http://greenpeace.org/international/en/campaigns/climate-change/arctic-impacts/Peace-Dove/Arctic-30/European-Court-of-Human-Rights/. Website last visited on 9 August 2015.

[126] Hearing Tr., 10 February 2015 at 81, 83 (examination of Mr. Sergey Vasilyev).

[127] Ruling, Primorsky District Court of St. Petersburg, 14 March 2014 (Appendix 32). *See also* Letter from the Investigation Committee to Stichting Phoenix, 24 March 2014 (Appendix 33).

[128] Transfer-Acceptance Act of a Vessel, Investigation Committee, 6 June 2014 (Appendix 34). *See also* Greenpeace International Statement of Facts, para. 130; *Note Verbale* from the Russian Federation to the Netherlands, 12 June 2013 (Annex N-32).

[129] Greenpeace International Statement of Facts, paras. 131–139.

[130] Order on the closure of criminal case no. 83543, Investigation Committee, 24 September 2014 (Appendix 37).

[131] Order on the closure of criminal case No. 83543, Investigation Committee, 24 September 2014, p. 22 (Appendix 37).

[132] Greenpeace International Statement of Facts (Addendum and Corrigendum), paras. 13–17.

[133] Greenpeace International Statement of Facts (Addendum and Corrigendum), pp. 4–5; Third Supplementary Submission, p. 5, para. 2; Description of newly available information and a reconstruction of the sequence of events at the end of the protest, paras. 1–3 (Annex N-47).

IV. The Netherlands' Requests for Relief

140. The Netherlands requests the Tribunal to adjudge and declare that:

i. The Russian Federation:

a) In boarding, investigating, inspecting, arresting, detaining and seizing the *Arctic Sunrise* without the prior consent of the Kingdom of The Netherlands, … breached its obligations to the Kingdom of the Netherlands, in its own right, in the exercise of its right to protect a ship flying its flag, and as a non-injured State with a legal interest, in regard to the freedom of navigation as provided by Articles 58.1 and 87.1(*a*) UNCLOS, and under customary international law;

b) In boarding, investigating, inspecting, arresting, detaining and seizing the *Arctic Sunrise* without the prior consent of the Kingdom of The Netherlands, breached its obligations to the Kingdom of the Netherlands, in regard to the exercise of jurisdiction by a flag State as provided by Articles 56.2 and 58 UNCLOS, and Part VII of the 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 persons on board the ship, and initiating judicial proceedings against them, 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, in the exercise of its right to seek redress on behalf of the persons on board a ship flying the flag of the Kingdom of the Netherlands, irrespective of their nationality, and as a non-injured State with a legal interest, in regard to the right to liberty and security of the persons on board a ship and their right to leave the territory and maritime areas under the jurisdiction of a coastal State as provided by Articles 9 and 12.2 ICCPR, and customary international law;

d) In applying national legislation related to artificial islands, installations and structures in the exclusive economic zone vis-a-vis the Netherlands, including ships flying its flag, extending the breadth of safety zones around artificial islands, installations and structures in its exclusive economic zone beyond the extent allowed under the UNCLOS, breached its obligations to the Kingdom of the Netherlands:

i. in its own right, in the exercise of its right to protect a ship flying its flag, in regard to freedom of protest at sea as provided by Articles 56.2, 58.1, and 60.4 UNCLOS, and Part VII of the UNCLOS, and under customary international law; and

ii. as a non-injured State with a legal interest in regard to freedom of navigation;

e) In bringing serious criminal charges against the persons on board the *Arctic Sunrise*, that is piracy and hooliganism, and keeping them in pre-trial detention for an extended period, breached its obligations to the Kingdom of the Netherlands in its own right, in the exercise of its right to protect a ship flying its flag, in the exercise of its right to diplomatic protection of its nationals, in the exercise of its rights to seek redress on behalf of the persons on board a ship flying the flag of the Kingdom of the Netherlands, irrespective of their nationality, and as a non-injured State with a legal interest, in regard to the freedom of protest at sea as provided by Articles 56.2 and 58.1 UNCLOS, and Part VII of the UNCLOS, and under customary international law;

f) In not timely and fully implementing the ITLOS Order, breached its obligations to the Kingdom of the Netherlands in its own right, in regard to the compliance with provisional measures as provided for by Articles 290.6 and 296.1 UNCLOS, and Part XV and Article 300 of the Convention;

g) In not making the required payments to contribute to the Tribunal's expenses, breached its obligations to the Kingdom of the Netherlands in its own right, in regard to the equal sharing of the Tribunal's expenses as provided for by Article 7 of Annex VII to the Convention, Articles 31 and 33 of the Tribunal's Rules of Procedure, Paragraph 7 of the Tribunal's Procedural Order No. 1, and Part XV and Article 300 of the Convention;

ii. The aforementioned violations constitute internationally wrongful acts entailing the international responsibility of the Russian Federation;

iii. Said internationally wrongful acts involve legal consequences requiring the Russian Federation to:

a) Cease, forthwith, the internationally wrongful acts continuing in time, as specified in Section V.2.7. of the Memorial;

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 ii above, as specified in Section V.2.7 of the Memorial;

c) Provide the Kingdom of the Netherlands full reparation for the injury caused by all the internationally wrongful acts referred to in subparagraph ii above, as specified in Section V.2.7 of the Memorial.[134]

141. With respect to reparation, the Netherlands requests that the Tribunal award:

i. In the form of satisfaction, a declaratory judgment on the wrongfulness of the conduct of the Russian Federation in re-

[134] Statement of Claim, para. 37; Memorial, para. 397; Supplementary Submission, para. 55.

spect of all five internationally wrongful acts indicated in the Memorial, and a formal apology from the Russian Federation for its wrongful conduct in respect of all five internationally wrongful acts indicated in the Memorial;

ii. In the form of restitution, an order to the Russian Federation to issue a Notice to Mariners revoking existing Notices to Mariners relating to the *Prirazlomnaya*, including in particular Notices to Mariners No. 51/2011, and Notices to Mariners No. 21/2014, and replacing them by Notices to Mariners that are in accordance with the Law of the Sea Convention; and the return of the objects belonging to the *Arctic Sunrise* which have not yet been returned; and the return of personal belongings of the persons on board the *Arctic Sunrise* which have not yet been returned; and also the formal dismissal of the charges of piracy and hooliganism brought against the persons who were on board the *Arctic Sunrise*;

iii. In the form of compensation for material damages suffered by the Kingdom of the Netherlands due to the issuance of the bank guarantee, and due to the non-participation of the Russian Federation in the present proceedings, and for material and non-material damage suffered as a result of the law enforcement acts against the *Arctic Sunrise* and the persons on board the ship.[135]

V. Jurisdiction and Admissibility

142. In this Section, the Tribunal addresses issues of jurisdiction and admissibility that were not decided in the Award on Jurisdiction.

A. Existence and Scope of the Dispute

143. The Tribunal considers that there is an ongoing dispute between the Parties concerning the interpretation and application of the Convention.[136] This is apparent from the Parties' exchange of diplomatic notes immediately preceding the Netherlands' filing of its Notification and Statement of Claim (described in paragraph 61 of the Award on Jurisdiction), and from the fact that although Russia has since released the *Arctic Sunrise* and granted amnesty to the Arctic 30, the Netherlands does not consider that the dispute between the Parties has been fully resolved.[137]

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[135] Hearing Tr., 11 February 2015 at 30–35 (closing statement of the Netherlands); Supplementary Submission; Memorial, paras. 391–396.

[136] *See also* Award on Jurisdiction, paras. 61–62.

[137] Hearing Tr., 10 February 2015 at 7–9 (opening statement of the Netherlands). According to the Netherlands, "the release of the *Arctic Sunrise* and the persons who have been on board, as well as their return to their respective home countries, did not provide an adequate resolution of the dispute. Not all claims, as reflected in the Statement of Claim, had been satisfied by the Russian Federation." Furthermore, since the commencement of these proceedings, the Netherlands claims that the Russian Federation "aggravated and extended the dispute" by: (i) bringing

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

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

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

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

147. The Netherlands has noted that there could potentially be "overlap" in some of the respective claims for reparation for injury submitted by the Arctic 30 to the ECtHR and the Netherlands to this Tribunal.[139] It submits, however, that neither international law in general, nor the Convention contains "prohibitions on parallel proceedings resulting from partially overlapping claims."[140] The Netherlands states that: (i) the claims before this Tribunal and the ECtHR are based on different legal instruments; (ii) the Arctic 30 assert breaches of their respective individual rights, whereas the Netherlands asserts breaches of obligations owed by Russia to it; and (iii) the parties and the claims for reparation are not identical.[141]

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serious criminal charges against the persons on board the *Arctic Sunrise*; (ii) keeping them in pre-trial detention for an extended period of time; (iii) failing to timely and fully implement the order of ITLOS; and (iv) failing to participate in the present arbitral procedure.

[138] *See* discussion of the unity of the ship at paras. 170–172 below.

[139] Second Supplementary Submission, p. 4, para. 8.

[140] Second Supplementary Submission, p. 5, para. 12.

[141] Second Supplementary Submission, pp. 3–6.

148. The Tribunal considers that the fact that the Arctic 30 have submitted claims to the ECtHR does not preclude the Tribunal from considering the Netherlands' claims brought under the Convention in these proceedings.

B. Exchange of Views—Article 283(1) of the Convention

149. The Tribunal must consider whether the requirement for an "exchange of views" set out in Article 283(1) of the Convention was satisfied prior to the commencement of these proceedings.

150. Article 283(1) provides:

> 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.

151. The Tribunal understands this provision to require that the Parties exchange views regarding the means by which a dispute that has arisen between them may be settled. Negotiation is evoked as one such means. Arbitration is another. Article 283(1) does not require the Parties to engage in negotiations regarding the subject matter of the dispute.[142]

152. In the view of the Tribunal, the requirement of Article 283(1) was satisfied by the diplomatic exchanges between the Parties of 3 October 2013. According to the Netherlands, in the morning of 3 October 2013, it informed the Ambassador of the Russian Federation to the Netherlands that it was considering submitting the dispute to arbitration on 4 October 2013 at the latest.[143] The Netherlands then sent the Russian Federation a *Note Verbale*, stating:

> 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 [EEZ]. Accordingly, there seems to be merit in submitting this dispute to arbitration under the [Convention]. In view of the urgency of the matter, resulting from the detention of the vessel and its crew, the Kingdom of the Netherlands is considering to initiate such arbitration as soon as feasible. In this respect, the Kingdom of the Netherlands reiterates its request that the vessel and its crew be immediately released and would like to stress the urgent nature of this request.[144]

153. This was the only communication between the Parties that specifically pertained to the means by which their dispute might be resolved. Earlier diplomatic exchanges (described at paragraphs 98, 105, 108, 111, and 112 above) focused on establishing the factual circumstances of the dispute

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[142] *See Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award of 18 March 2015, para. 378, http://www.pca-cpa.org.

[143] Hearing Tr., 10 February 2015 at 8:21–25 (opening statement of the Netherlands).

[144] *Note Verbale* from the Netherlands to the Russian Federation, 3 October 2013 (Annex N-11).

and setting out the Parties' positions regarding its subject matter. Thus, the exchange of views regarding the settlement of the dispute was brief, one-sided (in the sense that Russia did not make any counter-proposal or accept the proposal to arbitrate) and took place only a day before the commencement of arbitration. Such an exchange of views may not suffice in every case.

154. However, it is sufficient here because of the urgency, from the perspective of the Netherlands, of securing the release of the *Arctic Sunrise* and its crew. By 3 October 2013, the Netherlands had requested the release of the ship and its crew by two *Notes Verbales*,[145] as well as in the course of consultations "at the level of Ministers, Ambassadors and other senior officials," including two meetings, on 25 September and 1 October 2013, between the Ministers of Foreign Affairs of the Netherlands and the Russian Federation.[146] Despite this, by *Note Verbale* dated 1 October 2013, Russia maintained the view that the Arctic 30 were lawfully detained.[147] In this context, it was reasonable for the Netherlands to conclude, as they did, that "the possibilities to settle the dispute by negotiation or otherwise ha[d] been exhausted."[148] As noted by ITLOS in the *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor*, a party is "not obliged to continue with an exchange of views when it [has] concluded that this exchange could not yield a positive result."[149] Notably, Article 283(1) provides that the Parties shall engage in an exchange of views "expeditiously," which suggests that this provision was intended to facilitate recourse to peaceful dispute settlement (including compulsory procedures) by encouraging parties to consider different procedures as soon as a dispute arises, and not to preclude or unduly delay the resolution of the dispute.

155. Having failed to persuade the Russian Federation to release the ship and its crew voluntarily, and having received no indication from Russia of any intention or interest in engaging in further discussions as to how to resolve the dispute, the necessary next step for the Netherlands was urgently to seek an order to this effect from ITLOS. This required, as a prerequisite, the commencement of arbitration.

156. Accordingly, the Tribunal finds that the requirement for an "exchange of views" set out in Article 283(1) of the Convention was satisfied

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[145] *Note Verbale* from the Netherlands to the Russian Federation, 23 September 2013 (Annex N-6); *Note Verbale* from the Netherlands to the Russian Federation, 26 September 2013 (Annex N-7).

[146] Hearing Tr., 10 February 2015 at 8:3–8 (opening statement of the Netherlands).

[147] *Note Verbale* from the Russian Federation to the Netherlands, 1 October 2013 (Annex N-10).

[148] Memorial, para. 87.

[149] *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, para. 48. *See also MOX Plant (Ireland* v. *United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, para. 60; *ARA Libertad (Argentina* v. *Ghana)*, Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 332, para. 71.

in the present case. The Tribunal notes that the same conclusion was reached in the ITLOS Order.[150]

C. Standing

157. The Netherlands claims standing to invoke the international responsibility of Russia on four grounds, articulated as follows:

i. the Netherlands claims that under the law of the sea it is entitled as a flag State to invoke Russia's responsibility for injury caused by breaches of the Convention;
ii. the Netherlands claims that it is entitled to invoke Russia's responsibility for injury caused to all persons on board the ship flying its flag, the *Arctic Sunrise*, regardless of nationality;
iii. the Netherlands claims that it is entitled to exercise diplomatic protection on behalf of the individual members of the crew having Dutch nationality; and
iv. the Netherlands claims that it may invoke the international responsibility of Russia for breaches of its obligations held *erga omnes partes* and/or *erga omnes*.[151]

158. Each of these will be discussed in turn.

1. The Netherlands' standing under the law of the sea as a flag State to invoke Russia's responsibility for injury caused by breaches of the Convention

159. The Netherlands claims that it has standing under the law of the sea to invoke Russia's responsibility for injury caused by breaches of the Convention. Specifically, it invokes the obligations under the Convention owed by Russia as a coastal State to the Netherlands as a flag State in Russia's EEZ.[152]

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

> The Convention considers the ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus

[150] ITLOS Order, paras. 73–77.

[151] Memorial, paras. 89, 137.

[152] Memorial, para. 89.

[153] Memorial, para. 90.

> the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State.[154]

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

162. Further, the Netherlands submits that ITLOS treated the *Arctic Sunrise* as a unit when it ordered Russia to "immediately release the vessel *Arctic Sunrise* and all persons who have been detained, upon the posting of a bond or other financial security by the Netherlands" and to "ensure that the vessel *Arctic Sunrise* and all persons who have been detained are allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation."[158]

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

164. Article 42 of the Articles on Responsibility of States for Internationally Wrongful Acts ("Articles on State Responsibility")[160] of the International Law Commission of the United Nations ("ILC") addresses the invocation, by an injured State, of the responsibility of another State:

> *Article 42*
> *Invocation of responsibility by an injured State*
>
> A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:
>
> (*a*) that State individually; or
>
> (*b*) a group of States including that State, or the international community as a whole, and the breach of the obligation:

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[154] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10 at para. 106.

[155] Memorial, para. 93.

[156] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10 at para. 106.

[157] Memorial, para. 93.

[158] Memorial, para. 92; ITLOS Order, *dispositif*, para. 105(1)(*a*) and (*b*), respectively.

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

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

(i) specially affects that State;

(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

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

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

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

168. The above provisions set out some of the rights conferred upon and obligations owed to States under the Convention. Although it is characteristic of multilateral treaties such as the Convention to establish a framework of rules that apply to all State parties, in certain cases its performance in a given situation involves a relationship of a bilateral character between two parties.[161] That is the case here. Russia owed certain obligations to the Netherlands under the Convention. It had to ensure that any law enforcement measures taken by it against a vessel within the EEZ under the exclusive jurisdiction of the Netherlands complied with the requirements of the Convention. It was also obligated to comply with the compulsory dispute settlement regime contained in the Convention. The Netherlands also owed obligations to Russia. However, for the present purposes of assessing the standing of the Netherlands to bring claims against Russia, the Tribunal need only be satisfied that obligations were owed by Russia to the Netherlands under the Convention.

169. The Tribunal is satisfied that under the Convention the Netherlands has standing to invoke the international responsibility of Russia for breaches of obligations owed by Russia to the Netherlands under the Convention.

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

170. The Tribunal turns now to the question of whether the *Arctic Sunrise* and all persons on board the ship at the relevant times should be considered as part of the unit of the ship. In *M/V "SAIGA" (No. 2)* and *M/V "Virginia G"*, ITLOS held that "every person involved or interested" in a vessel's operations should be considered as part of the unit of the ship and thus treated as an entity linked to the flag State.[162]

171. On 3 October 2013, the Crew Manager from the Ships Unit of Greenpeace International issued a list of all persons who were on board the *Arctic Sunrise* when it left the port of Kirkenes, Norway. That list contained the names of the Arctic 30.[163] Not all of the persons on board the *Arctic Sunrise* were, strictly speaking, crewmembers. Notwithstanding this, the Tribunal is satisfied that all thirty individuals on board the *Arctic Sunrise* at the relevant times were "involved" or "interested" in the ship's operations. Even if some did not engage directly in the functioning of the vessel as would a crewmember, they were all closely involved or interested in the ship's campaigning operations for Greenpeace through protest at sea. As such, they are properly considered part of the unit of the ship, and thus fall under the jurisdiction of the Netherlands as the flag State.

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

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

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

[163] Letter from Mr. Frits de Vink (Crew Manager, Greenpeace International), 3 October 2013 (Annex N-4).

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

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

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

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

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

177. The Netherlands pleads that "[s]hould this Tribunal consider that the Netherlands cannot invoke the responsibility of the Russian Federation for violations of international law *vis-à-vis* all persons on board the *Arctic Sunrise*, then the Netherlands wishes to invoke the responsibility of the latter for breaches of international law *vis-à-vis* its nationals."[167]

178. The Tribunal observes that, in accordance with international law, the exercise of diplomatic protection by a State in respect of its nationals is to be distinguished from claims made by a flag State for damage in respect of natural and juridical persons involved in the operation of a ship who are not nationals of that State.[168]

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[164] Memorial, paras. 89, 103–107.

[165] Memorial, paras. 89, 108–115.

[166] Memorial, para. 108.

[167] Memorial, paras. 109, 115.

[168] *See* Article 18 of the Draft Articles on Diplomatic Protection adopted by the ILC in 2006, which refers to the right of the State of nationality of a ship to seek redress on behalf

179. However, the Tribunal understands that the Netherlands claims diplomatic protection for the two individuals identified *in the alternative*. Given that the Tribunal has found that the Netherlands has standing to invoke the responsibility of Russia in respect of injury to all persons on board the *Arctic Sunrise* at the relevant times, it is unnecessary for the Tribunal to consider separately the Netherlands' diplomatic protection claims brought on behalf of its two nationals in the alternative.

4. The Netherlands' standing to invoke the international responsibility of Russia for breaches of its obligations held *erga omnes partes* and/or *erga omnes*

180. The Netherlands claims that, "[i]n addition, but not subsidiarily, to standing based on direct and indirect injury, the Netherlands also has standing *erga omnes (partes)* to invoke the international responsibility of the Russian Federation."[169]

181. It refers to Article 48(1)(*a*) of the Articles on State Responsibility, which provides:

> *Article 48*
> *Invocation of responsibility by a State other than an injured State*
>
> Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
>
> (i) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
>
> (ii) The obligation breached is owed to the international community as a whole.

182. The position of the Netherlands is that the freedom of navigation has an *erga omnes (partes)* character.[170] It is "in the interest of all States collectively that the seas beyond a coastal State's territorial waters remain open for navigation and that such navigation be enjoyed peacefully and without unlawful impediment."[171] The obligation to respect the freedom of navigation,

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of crewmembers, irrespective of their nationality: "The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crewmembers, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act." As stated by ITLOS in *M/V "SAIGA" (No. 2)*, "[a]ny of these ships could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such person is a national, undue hardship would ensue" *(M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10 at para. 107).

[169] Memorial, para. 116.

[170] Memorial, paras. 121–128.

[171] Memorial, para. 123.

including the right to peaceful protest at sea, is owed by Russia in its EEZ to all States, including the Netherlands.[172]

183. In addition, the Netherlands contends that basic human rights—including the right to freedom of expression, the right not to be arbitrarily detained, and the freedom to leave a country—have an *erga omnes (partes)* character.[173] The Netherlands submits that as "a party to the ICCPR, [it] is therefore entitled to invoke the international responsibility of the Russian Federation, also a party to the ICCPR, for breaches of the Covenant."[174] It argues that:

> … the violations of the relevant rules of the law of the sea are reasonably related to violations of human rights under customary international law and the ICCPR, which are both binding on the Netherlands and the Russian Federation. The breach of the individual human rights as claimed in the present case was caused by the breach of the right to freedom of navigation and the right to exercise exclusive jurisdiction over the *Arctic Sunrise*. Since the claim concerning the breaches of the latter rights is admissible, the Netherlands also has standing to claim the former.[175]

184. It is the Netherlands' view that the invocation of responsibility *erga omnes (partes)* is subject to only two criteria: (1) whether the norm breached applies *erga omnes*; and (2) whether the State invoking responsibility *erga omnes (partes)* is part of the *omnes*.[176] The Netherlands submits that it and Russia are parties to the ICCPR and with respect to human rights are also bound by customary international law. As such, the Netherlands claims it is part of the *omnes* to which the norms breached by Russia apply.[177] Therefore, the Netherlands has standing to invoke Russia's international responsibility for alleged breaches of basic human rights.[178]

185. The Tribunal will address the extent to which international human rights law is applicable in the following Section. The Tribunal has already concluded that the Netherlands has standing to invoke the international responsibility of Russia for alleged breaches owed directly to the Netherlands under the Convention. This standing applies with respect to all violations of the Netherlands' exclusive flag-State jurisdiction over the *Arctic Sunrise* claimed under the Convention as indicated in paragraph 172 above.

186. Having found that the Netherlands enjoys standing under the Convention for the above alleged breaches, it is not necessary for the Tribunal also to consider whether the Netherlands enjoys standing *erga omnes* or *erga*

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[172] Memorial, para. 126.

[173] Memorial, paras. 129–135, 137.

[174] Memorial, para. 130.

[175] Memorial, para. 131.

[176] Memorial, para. 133.

[177] Memorial, para. 134.

[178] Memorial, para. 135.

omnes (partes) to invoke the international responsibility of the Russian Federation with respect to its claims.

VI. Applicable Law

187. Article 293(1) of the Convention provides that: "A court or tribunal having jurisdiction under this Section shall apply this Convention and other rules of international law not incompatible with this Convention."

188. Article 293(1) does not extend the jurisdiction of a tribunal.[179] Rather, it ensures that, in exercising its jurisdiction under the Convention, a tribunal can give full effect to the provisions of the Convention. For this purpose, some provisions of the Convention directly incorporate other rules of international law.[180]

189. The Convention also provides at Article 311(2) that: "[t]his Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention."

190. In order properly to interpret and apply particular provisions of the Convention, it may be necessary for a tribunal to resort to foundational or secondary rules of general international law such as the law of treaties[181] or the rules of State responsibility.[182]

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

> In considering the force used by Guinea in the arrest of the Saiga, the Tribunal must take into account the circumstances of the arrest in the

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

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

[181] As reflected in the Vienna Convention on the Law of Treaties, 1969, for example.

[182] As reflected in the Articles on State Responsibility, for example.

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

192. Article 293 is not, however, a means to obtain a determination that some treaty other than the Convention has been violated, unless that treaty is otherwise a source of jurisdiction,[184] or unless the treaty otherwise directly applies pursuant to the Convention.[185]

193. At times, the Netherlands appears to invite the Tribunal directly to determine that there has been a breach by Russia of Articles 9 and 12(2) of the ICCPR, to which both States are parties.[186] For example, in its Memorial the Netherlands submits:

> The Russian Federation, through its law-enforcement actions, exercised a level of control over the *Arctic Sunrise* and the persons on board that required it to respect and ensure the rights laid down in the ICCPR. Therefore, pursuant to Article 293 UNCLOS and Article 13 of the Tribunal's Rules of Procedure, the Tribunal is required to apply international human rights law, in particular the ICCPR, to review the lawfulness of these law-enforcement actions under the UNCLOS.
>
> In the alternative, should the Tribunal decide that international human rights law, or parts thereof, do not form part of the applicable law in the present case, the Netherlands requests the Tribunal to interpret the relevant provisions of the UNCLOS in light of international human rights law, in conformity with Article 31.3f(*c*) of the 1969 Vienna Convention on the Law of Treaties. The latter provides that for the purposes of the interpretation of a treaty, there shall be taken into account, together with the context, '[a]ny relevant rules of international law applicable in the relations between the parties.'[187]

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

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

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

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

[187] Memorial, paras. 175–176.

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

> … the determination of the breaches of Articles 9 and 12.2 ICCPR by the Russian Federation involves the interpretation and application of any provision of the UNCLOS that may be invoked to justify the arrest and detention of as well as the initiation of judicial proceedings against the persons on board the *Arctic Sunrise*.
>
> In particular, in exercising such rights in its exclusive economic zone, a coastal State must have "due regard to the rights and duties of other States" in accordance with Articles 56.2 UNCLOS. This obligation is not limited to the rights and duties of other States under the UNCLOS, but extends to other rules of international law, including human rights law. This is corroborated by Article 58.2 UNCLOS pursuant to which "other pertinent rules of international law" apply in respect of the rights and duties of other States in the exclusive economic zone. Accordingly, the determination of the breaches of Articles 9 and 12.2 ICCPR by the Russian Federation involves the interpretation and application of Articles 56.2 and 58.2 UNCLOS.[189]

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

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

196. By contrast, the Netherlands has not invited the Tribunal to determine whether Russia breached the ECHR.[191]

197. The Tribunal considers that, if necessary, it may have regard to general international law in relation to human rights in order to determine whether law enforcement action such as the boarding, seizure, and detention of the *Arctic Sunrise* and the arrest and detention of those on board was reasonable and proportionate. This would be to interpret the relevant Convention provisions by reference to relevant context. This is not, however, the same as,

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[188] Second Supplementary Submission, p. 6, para. 1.

[189] Second Supplementary Submission, pp. 7–8, paras. 3–4.

[190] Hearing Tr., 11 February 2015 at 23:25–24:12; Third Supplementary Submission, p. 2, para. 1.

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

nor does it require, a determination of whether there has been a breach of Articles 9 and 12(2) of the ICCPR as such. That treaty has its own enforcement regime and it is not for this Tribunal to act as a substitute for that regime.

198. In determining the claims by the Netherlands in relation to the interpretation and application of the Convention, the Tribunal may, therefore, pursuant to Article 293, have regard to the extent necessary to rules of customary international law, including international human rights standards, not incompatible with the Convention, in order to assist in the interpretation and application of the Convention's provisions that authorise the arrest or detention of a vessel and persons. This Tribunal does not consider that it has jurisdiction to apply directly provisions such as Articles 9 and 12(2) of the ICCPR or to determine breaches of such provisions.

VII. Merits: Alleged Internationally Wrongful Acts of Russia

199. Having found that it has jurisdiction over the dispute and that the Netherlands' claims are admissible, the Tribunal now turns to the merits of the Netherlands' allegations of breaches by Russia of its international obligations.

200. Below, the Tribunal addresses the Netherlands' allegations in the order in which they were presented in the Memorial, as they relate to: (*A*) Russia's establishment of a safety zone around the *Prirazlomnaya*; (*B*) the lawfulness of the measures taken by Russia against the *Arctic Sunrise* and its crew; (*C*) compliance with the ITLOS Order; and (*D*) Russia's failure to pay deposits in this arbitration.

201. Before dealing with the specific allegations, the Tribunal concludes that all of the internationally wrongful acts alleged by the Netherlands are attributable to the Russian Federation.

A. Russia's Establishment of a Safety Zone Around the *Prirazlomnaya*

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

Article 60
Artificial islands, installations and structures in the exclusive economic zone

> 1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:
>
> (*a*) artificial islands;

> (*b*) installations and structures for the purposes provided for in article 56 and other economic purposes;
>
> (*c*) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.
>
> 2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.
>
> […]
>
> 4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.
>
> 5. The breadth of the safety zones shall be determined by the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extent of safety zones.
>
> 6. All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.
>
> […]

203. The Netherlands submits that Russia breached its obligations toward the Netherlands under the Convention by applying national legislation establishing a zone of three nautical miles around the *Prirazlomnaya* "in which navigation without prior authorization of the Russian Federation is prohibited."[192] According to the Netherlands, this three-nautical mile zone is in contravention of Article 60(5) of the Convention, pursuant to which the maximum allowed breadth of a safety zone around an artificial island, installation, or structure is 500 metres.[193]

204. On this basis, the Netherlands requests that the Tribunal, *inter alia*, "order the Russian Federation to issue a notice to mariners revoking the existing notices to mariners relating to the *Prirazlomnaya*, including in particular Notices to Mariners No. 51/2011 and Notices to Mariners 21/2014, and replacing them by notices to mariners that are in accordance with the [Convention]."[194]

205. The Tribunal agrees with the Netherlands that the *Prirazlomnaya* is an "artificial island, installation or structure" to which Article 60 of the

[192] Memorial, paras. 181, 183, 189, 197.

[193] Memorial, paras. 190–196.

[194] Supplementary Submission, para. 55.

Convention applies. This conclusion is also in line with the apparent views of the Russian authorities.[195]

206. The Tribunal notes, however, that the Netherlands' argument that the establishment of a three-nautical mile zone by Russia around the *Prirazlomnaya* violates the Convention's rules regarding safety zones in the EEZ assumes that Russia in fact established a three-nautical mile "safety zone" within the meaning of the Convention. This assumption requires further examination.

207. Insofar as the Tribunal is aware, at the time of the events at issue, Notice to Mariners No. 51/2011 was in effect, by which Russia had declared an area with a radius of three nautical miles around the *Prirazlomnaya* to be "dangerous to navigation," with the following "caution note": "Vessels should not enter a safety zone of the marine ice-stable platform without permission of an operator of the platform."[196]

208. The Tribunal further understands that the "caution note" of Notice to Mariners No. 51/2011 was modified on 24 May 2014 by Notice to Mariners No. 21/2014 to read: "Vessels are not recommended to enter a safety zone of the offshore ice-resistant platform (OIRP) (69° 15'56.9" N 57° 17'17.3" E) without the platform operator permission."[197]

209. The Tribunal is not aware of any other Russian law, regulation, or notice, setting forth any special rules applicable to an area with a radius of three nautical miles around the *Prirazlomnaya*. The question therefore appears to be whether Notices to Mariners Nos. 51/2011 and 21/2014 create a "safety zone" within the meaning of the Convention. The Tribunal does not think so.

210. First, on their face, Notices to Mariners Nos. 51/2011 and 21/2014 label the three-nautical mile zone around the *Prirazlomnaya* only as "dangerous to navigation." They do not expressly indicate that this zone constitutes a safety zone within the meaning of the Convention.

211. Second, as stated in Article 60(4) of the Convention, a safety zone is an area in which the coastal State "may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures." In the view of the Tribunal, this provision allows the coastal State to take, in the safety zone, appropriate measures in the nature of the enactment of laws or regulations, and of the enforcement of such laws and regulations, provided that such measures are aimed at ensuring the safety of both navigation and the artificial islands, installations, or structures. These rights of the coastal State go beyond its rights in the EEZ at large.

212. Russia's Notices to Mariners Nos. 51/2011 and 21/2014, however, do not purport to create a zone in which Russia may enact safety laws and

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

[196] Notice to Mariners No. 51/2011 (Annex N-37).

[197] Notice to Mariners No. 21/2014 (Annex N-39).

regulations and enforce them, nor do they themselves impose mandatory rules on foreign ships. The Notices' "caution note" does not bear a mandatory character; it is, rather, in the nature of a recommendation, the thrust of which is to inform ships that a danger to navigation may exist in a three-nautical mile area surrounding the platform and that it would be *preferable* for ships to seek the permission of the platform operator before entering this zone. Although slightly different language is used in the English version of the two Notices, the Notice to Mariners No. 51/2011 stating that ships "should not enter"[198] without permission and the Notice to Mariners No. 21/2014 stating that ships "are not recommended to enter"[199] without permission, in the Russian original of the Notices the exact same phrase appears, using the word "recommended."[200]

213. It thus appears that the Notices to Mariners Nos. 51/2011 and 21/2014 are not issued in the exercise of Russia's jurisdiction over a safety zone within the meaning of Article 60 of the Convention, but rather as an encouragement to ships to communicate with the platform in an effort to reduce the risk of collision or any other accident.

214. Third, although Russia is not entirely consistent in its statements in this respect,[201] it does appear to believe that its Notices to Mariners do not have the effect of prohibiting navigation within three nautical miles of the *Prirazlomnaya* (as the Netherlands asserts). Thus, over the radio on 17 September 2013, the *Ladoga* advised the *Arctic Sunrise* that Notice to Mariners No. 51/2011 established "a 3-mile zone deemed dangerous to navigation and a 500-meter zone declared prohibited for navigation."[202] When it contacted the *Arctic Sunrise* with orders to stop on 18 September 2013, the *Ladoga* similarly only complained that the Greenpeace RHIBs had entered the 500-metre zone around the *Prirazlomnaya*, without mentioning the three-nautical mile zone.[203] These communications suggest that, in Russia's own view, only a 500-metre zone around the platform is prohibited to navigation and that enforcement action is permissible in respect of this zone only.

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

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

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[198] Notice to Mariners No. 51/2011 (Annex N-37).

[199] Notice to Mariners No. 21/2014 (Annex N-39).

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

[201] *See* E-mail from the Russian Ministry of Transport to the Netherlands, 5 December 2012 (Annex N-38).

[202] Marchenkov Interrogation Report, p. 10 (Appendix 8.a).

[203] Video 27 (shot from the *Arctic Sunrise* bridge) at 2'00, 3'30.

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

218. The Tribunal is also aware of the following relevant Russian laws and regulations:[205]

- the Federal Law No. 187-F3 dated 20 November 1995 "On the continental shelf of the Russian Federation" ("1995 Federal Law"), Article 16 of which provides that:
  - safety zones shall be established around artificial islands, installations, and structures located on the continental shelf, which shall extend not more than 500 metres from each point of their outer edge;
  - the limits of these safety zones shall be established by the federal executive agencies responsible in the sphere of transportation;
  - measures in safety zones for the safety of both navigation and the artificial islands, installations, or structures shall be established by the federal executive agencies identified by the President of the Russian Federation; and
  - information regarding safety zones shall be published in "Notices to Mariners";
- the Decree of the President of the Russian Federation No. 23 dated 14 January 2013 "On federal executive agencies responsible for determining measures to assure navigation safety within safety zones established around artificial islands, installations and structures located on the Russian Federation's continental shelf, as well as measures to assure security of such artificial islands, installations and structures" ("2013 Presidential Decree"), which identifies the Ministry of Transport as the agency in charge of measures for the safety of navigation, and the Ministry of Transport, the FSB, and the Ministry of Defence as the agencies in charge of measures for the safety of artificial islands, installations, and structures;
- the Order of the Ministry of Transport No. 186 dated 16 June

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

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

2014 "On establishing a safety zone limit around MLSP *Prirazlomnaya* artificial installation" ("2014 Order of the Ministry of Transport"), ordering, in accordance with the 1995 Federal Law, that "a safety zone limit be established along the line created by the arch of circle with a 569.5 meter radius centered on the point with coordinates 69º 15'56.88" North, 57º 17'17.3" East around MLSP *Prirazlomnaya* artificial installation located on the Russian Federation's continental shelf"; and

– the Federal Law No. 35-F3 dated 8 March 2015 "On amendments to the Russian Federation Code of Administrative Offences" (not yet in force), which introduces penalties for non-compliance with measures taken for the safety of navigation in safety zones established around artificial islands, installations, or structures on the Russian continental shelf.

219. The 1995 Federal Law clearly expresses Russia's understanding that safety zones around artificial islands, installations, and structures on the Russian continental shelf should not exceed 500 metres in radius. It follows that it is unlikely that Russia would have established a safety zone of more than 500 metres.

220. The 1995 Federal Law also sets forth the procedure for the establishment of safety zones. It foresees that the Russian President will determine the responsible governmental agency, which will then establish the safety zone in question, information about which will be published in a Notice to Mariners. The 2013 Presidential Decree and the 2014 Order of the Ministry of Transport illustrate how this procedure is put into practice. It thus appears that, under Russian law, a notice to mariners could not in and of itself create a safety zone. The Tribunal has found no evidence that a three-nautical mile safety zone was established by the Russian authorities in accordance with the stated procedure (or otherwise).

B. The Lawfulness of the Measures Taken Against the *Arctic Sunrise* and its Crew

1. The applicable legal test

221. According to the Netherlands, a coastal State may respond to protest actions in its EEZ, provided that any law enforcement actions are taken in accordance with international law, which can be measured on the basis of a three-pronged test: first, the response actions to prevent or end a protest action must have a legal basis in international law; second, such response action must be carried out in accordance with international law; third, any subsequent law enforcement actions related thereto must also be carried out in accordance with international law.[206] Under the second prong, the Netherlands argues that the

[206] Hearing Tr., 10 February 2015 at 5:11–6:5, 17:19–18:14, 34:7–16, 49:2–10 (opening statement of the Netherlands); Hearing Tr., 11 February 2015 at 23:13–24 (answers of the Netherlands to questions posed by the Tribunal); Third Supplementary Submission, p. 1, para. 1.

response actions must be reasonable and where they involve the use of force, they are subject to the customary law principles of necessity and proportionality.[207]

222. To assess the lawfulness of measures taken by a coastal State in response to protest actions within its EEZ, the Tribunal considers it necessary to determine whether: (i) the measures had a basis in international law; and (ii) the measures were carried out in accordance with international law, including with the principle of reasonableness. Where such measures involve enforcement measures they are subject to the general principles of necessity and proportionality.

223. The Netherlands submits that the boarding, seizure, and detention of the *Arctic Sunrise*, as well as all subsequent enforcement actions taken by Russia, lacked a legal basis.[208] The Netherlands also submits that the following specific actions taken by Russia did not meet the requirements of reasonableness:

i. the deprivation of liberty, outside formal arrest and detention, of Ms. Saarela and Mr. Weber on 18 and 19 September 2013;
ii. the deprivation of liberty, outside formal arrest and detention, of the 30 persons on board the *Arctic Sunrise* since 19 September 2013 and, subsequently, the unlawful detention of these persons in the Russian Federation;
iii. the failure to provide immediate information to these persons on the reasons for their arrest and the nature of the charges;
iv. the failure to bring them promptly before a judge;
v. the bringing of serious criminal charges (piracy and hooliganism) against them disproportionate to their actions in the exercise of their right to peaceful protest at sea; and
vi. the length of their pre-trial detention.[209]

224. The Tribunal will now examine whether the applicable law provides a legal basis for Russia's measures, and if such a basis exists, whether Russia's measures were carried out in accordance with general principles of reasonableness, necessity, and proportionality.

2. The boarding, seizure, and detention of the *Arctic Sunrise*

225. The legal regime that applied to the *Arctic Sunrise*, under the flag of the Netherlands, in the EEZ of Russia, is governed by Part V of the Convention, which sets out the rights and duties of coastal and flag States in the EEZ.

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[207] Hearing Tr., 10 February 2015 at 18:8–19:14 (opening statement of the Netherlands), relying on *M/V "Virginia G" (Panama* v. *Guinea-Bissau),* Judgment of 14 April 2014, ITLOS Reports 2014, to be published, para. 270 and *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea),* Judgment of 1 July 1999, ITLOS Reports 1999, p. 10 at para. 155.

[208] Memorial, para. 265; Hearing Tr., 10 February 2015 at 25;2, 31:5–11 (opening statement of the Netherlands).

[209] Third Supplementary Submission, p. 2, para. 2.

226. According to Articles 58 and 87 of the Convention, within the EEZ all States enjoy the freedom of navigation and other internationally lawful uses of the sea related to that freedom.

227. Protest at sea is an internationally lawful use of the sea related to the freedom of navigation. The right to protest at sea is necessarily exercised in conjunction with the freedom of navigation. The right to protest derives from the freedom of expression and the freedom of assembly, both of which are recognised in several international human rights instruments to which the Netherlands and Russia are parties, including the ICCPR.[210] The right to protest at sea has been recognised by resolutions of international organisations.[211]

228. The right to protest is not without its limitations, and when the protest occurs at sea its limitations are defined, *inter alia*, by the law of the sea. Article 88 of the Convention provides that "[t]he high seas shall be reserved for peaceful purposes" and Article 58(2) makes that applicable to the EEZ. Article 58(3) of the Convention requires that in exercising their rights and performing their duties in the EEZ, states shall have "due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with this Convention and other rules of international law in so far as they are not incompatible with [Part V of the Convention]."

229. Pursuant to Article 56 of the Convention, coastal States have "sovereign rights for the purpose of exploring and exploiting, conserving and

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[210] Article 19 of the ICCPR provides:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (*a*) For respect of the rights or reputations of others; (*b*) For the protection of national security or of public order (*ordre public*), or of public health or morals."

Article 21 of the ICCPR provides:

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

See also Articles 19 and 20 of the Universal Declaration of Human Rights and Articles 10 and 11 of the ECHR.

[211] International Maritime Organization, Resolution, "Assuring Safety during Demonstrations, Protests or Confrontations on the High Seas," Res. MSC303(87), 17 May 2010: "Affirming the rights and obligations relating to legitimate and peaceful forms of demonstration, protest, or confrontation and noting that there are international instruments that may be relevant to these rights and obligations"; International Whaling Commission, "Safety at Sea", Res. 2011–2: "the Commission and Contracting Governments support the right to legitimate and peaceful forms of protest and demonstration."

managing the natural resources whether living or non-living". According to Articles 56 and 60 of the Convention, coastal States have, *inter alia*, exclusive jurisdiction with regard to the establishment and use of artificial islands, installations, and structures in the EEZ.[212] The coastal State is empowered to take certain law enforcement measures with regard to artificial islands, installations, and structures in its EEZ. Article 60(2) provides that: "The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations." Article 60(4) stipulates that: "The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures."

230. In exercising their rights and duties under the Convention in the EEZ, coastal States must have "due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention."[213]

231. Articles 92(1) and 58(2) of the Convention provide for the exclusive jurisdiction of a State over ships flying its flag in the EEZ, which include ships used for the exercise of the right to protest. As a result of the exclusive jurisdiction of the flag State over ships in the EEZ, a coastal State may only exercise jurisdiction, including law enforcement measures, over a ship, with the prior consent of the flag State. This principle is subject to exceptions, some of which are discussed below.

232. The Tribunal accepts that the Netherlands did not consent to the measures taken by Russia against the *Arctic Sunrise*.

233. In its diplomatic note to the Netherlands of 1 October 2013, Russia provided grounds for its boarding of the *Arctic Sunrise* and in doing so invoked Articles 56, 60, and 80 of the Convention.[214] At other moments, the Russian authorities provided other explanations for their actions.[215]

234. Given the non-participation of Russia in these proceedings, the Tribunal considers below both the legal bases invoked by Russia at one time or another and other possible legal bases for the boarding, seizure, and detention of a vessel under the Convention without the prior consent of the flag State, to assess whether any of these legal bases could have been relied upon by Russia in the present case.

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[212] Article 80 of the Convention extends the jurisdiction of the coastal State as found in Article 60 to artificial islands, installations, and structures on the continental shelf.

[213] Article 56(2) of the Convention.

[214] *Note Verbale* from the Russian Federation to the Netherlands, 1 October 2013 (Annex N-10).

[215] *See especially* video 27 (shot from the *Arctic Sunrise* bridge), in which the *Ladoga* mentions the alleged violation of the 500-metre zone prohibited to navigation around the *Prirazlomnaya*, as well as suspicions of terrorism and piracy.

235. The Tribunal shall examine the law enforcement measures that may have been available to Russia under the Convention, or otherwise, as well as any other possible legal bases for its measures not involving law enforcement in the strict sense, but more broadly related to the protection of its rights and interests as the coastal State in the EEZ.

(a) Law enforcement measures

i. Right of visit on suspicion of piracy

236. On 18 September 2013, in the hours following Greenpeace's protest action at the *Prirazlomnaya*, the *Ladoga* repeatedly stated that the *Arctic Sunrise* was suspected of piracy.[216] On 20 September 2013, the first allegations of piracy were made by the Investigation Committee under Article 227 of the Criminal Code.[217] An order was signed on 24 September 2013 by the Investigation Committee stating that there was sufficient evidence to suspect piracy in the sense of Article 227(3) of the Criminal Code.[218] The following day, those who had been on board were presented with a written protocol of their arrest on suspicion of piracy.[219] In a *Note Verbale* dated 1 October 2013, the Russian Federation advised the Netherlands, *inter alia*, that it had commenced criminal proceedings against those on board.[220] The official charges of piracy against those on board were made on 2 and 3 October 2013.[221] The vessel itself was seized by order of the Leninsky District Court of Murmansk on 7 October 2013.[222]

237. Article 110 of the Convention provides that any duly authorised ship or aircraft clearly marked and identifiable as being on government service may board a foreign ship where there is reasonable ground for suspecting that the foreign ship is engaged in piracy. Piracy is defined at Article 101 of the Convention as follows:

Article 101
Definition of Piracy

Piracy consists of any of the following acts:

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[216] Video 30 at 1'27, 2'48, 4'04; audio 5 at 1'18–1'28; audio 6 at 0'03–0'10 (shot from and recorded on the *Arctic Sunrise* bridge).

[217] Memorial, para. 292; Hearing Tr., 10 February 2015 at 27:13–23 (opening statement of the Netherlands).

[218] Decision on the opening of criminal case No. 83543 and the initiation of related proceedings, Investigation Committee, 24 September 2013 (Appendix 7). *See also* Greenpeace International Statement of Facts, para. 59.

[219] Greenpeace International Statement of Facts, para. 68.

[220] *Note Verbale* from the Russian Federation to the Netherlands, 1 October 2013 (Annex N-10).

[221] *See e.g.* Decision on being charged as an accused, Investigation Committee, 2 October 2013 (Appendix 12). *See also* Greenpeace International Statement of Facts, para. 78.

[222] Order for the seizure of property, District Court, 7 October 2013 (Annex N-13/Appendix 13).

> (*a*) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (*a*) or (*b*).

238. An essential requirement of Article 101 is that the act of piracy be directed "against another ship." The *Prirazlomnaya* is not a ship. It is an offshore ice-resistant fixed platform.[223] This appears also to be the view of the Russian authorities. Both the Russian version of the Notice to Mariners No. 21/2014 and the 2014 Order of the Ministry of Transport specify that the *Prirazlomnaya* is a "fixed" platform.[224] In a communication to Greenpeace dated 5 December 2012, the Russian Ministry of Transport described the *Prirazlomnaya* as a "fixed platform."[225] The understanding that the *Prirazlomnaya* is not a ship was the reason for the requalification of the charges against the Arctic 30 as hooliganism.[226]

239. In addition, contemporaneous reported statements indicate that there existed doubts as to the propriety of the piracy charges high within the Russian government. On 25 September 2015, in Russia Today, President Putin was reported as stating that the Greenpeace activists are "obviously not pirates."[227] President Putin's human rights adviser, Mikhail Fedotov, was reported by Bloomberg as urging prosecutors to drop the piracy charges, stating that "there isn't the slightest justification for accusing the crew of the *Arctic*

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[223] http://www.gazprom-neft.com/. Website last visited on 9 August 2015. *See also* Greenpeace International Statement of Facts, para. 7 and Hearing Tr., 10 February 2015 at 64 (testimony of Mr. Andrey Suchkov): "There were no indicia of piracy. Article 227 of the Criminal Code of the Russian Federation envisages responsibility for actions against a vessel, but the drill platform was not a vessel."

[224] Notice to Mariners No. 21/2014 (Annex N-39); *see* para. 218 (third bullet point) above.

[225] E-mail from the Russian Ministry of Transport to the Netherlands, 5 December 2012 (Annex N-38).

[226] Decision on qualification, Investigation Committee, 23 October 2013 (Appendix 18), English Translation, p. 4: "…it has been established that OIFP '*Prirazlomnaya*' is not in fact a vessel but rather a port facility, thereby excluding the elements of the crime envisioned by Part 3 of Article 227 of the [Criminal Code]."

[227] *Putin: Greenpeace activists not pirates, but they violated intl law.* RT News. 25 September 2013. http://rt.com/news/putin-greenpeace-pirates-arctic-323/. Webpage last visited on 9 August 2015; Greenpeace International Statement of Facts, para. 69.

Sunrise of piracy."[228] The Tribunal notes that after a certain point the charges of piracy were no longer pursued, but were not formally dropped.[229]

240. Having concluded that the *Prirazlomnaya* is not a ship, the Tribunal need not consider the other elements required to show piracy within the meaning of Article 101.

241. The Tribunal concludes that the boarding, seizure, and detention of the *Arctic Sunrise* cannot be justified as an exercise of the right of visit to the *Arctic Sunrise* on the suspicion of piracy as provided under Article 110 of the Convention.

ii. Violation of coastal State laws applicable to artificial islands, installations, and structures and their safety zones in the EEZ (e.g. prohibition of hooliganism and entry into safety zones): right of hot pursuit

242. On 24–30 October 2013, the Russian authorities charged the Arctic 30 with the offence of hooliganism under Article 213(2) of the Criminal Code. This law enforcement measure was taken on the basis of the actions of the Arctic 30 on 18 September 2013 within a 500-metre zone around the *Prirazlomnaya* (and, to the extent that the climbers were attached to it, on the platform).[230]

243. Although the Russian authorities did not bring charges for the violation of a prohibition to enter a 500-metre safety zone around the platform, the Russian Coast Guard vessel *Ladoga* invoked this alleged violation as a ground for ordering the *Arctic Sunrise* to stop.[231]

244. As noted above, Article 60 of the Convention provides that coastal States shall, in the EEZ, have exclusive jurisdiction over artificial islands, installations, and structures and may in their safety zones take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations, and structures. However, the alleged commission of the offences of hooliganism and unauthorised entry into a safety zone, unlike the alleged commission of the crime of piracy discussed above, does not provide a basis under international law for boarding a foreign vessel in the EEZ without the consent of the flag State. The boarding, seizure, and detention of a vessel in the EEZ on suspicion of such offences finds a basis under international law only if the requirements of hot pursuit are satisfied.

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[228] *Kremlin Adviser Likens Greenpeace Piracy Charge to Gang Rape*. Bloomberg. 11 October 2013. http://www.bloomberg.com/news/articles/2013–10–11/kremlin-adviser-likens-greenpeace-piracy-charges-to-gang-rape. Webpage last visited on 9 August 2015; Greenpeace International Statement of Facts, para. 89.

[229] Greenpeace International Statement of Facts, para. 103.

[230] *See e.g.* Ruling on bringing an accusation, Investigation Committee, 28 October 2013 (Appendix 19).

[231] Video 27 at 1'57, 3'24 (shot from the *Arctic Sunrise* bridge).

245. In broad terms, the right of hot pursuit is the right of a coastal State to pursue outside of territorial waters, and take enforcement action against, a foreign ship that has violated the laws and regulations of that State. It serves to prevent foreign ships that have violated the laws and regulations of a coastal State from evading responsibility by fleeing to the high seas. The parameters of the right of hot pursuit are set out in Article 111 of the Convention, which provides, in relevant part:

Article 111
Hot Pursuit

> 1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.
>
> 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.
>
> […]
>
> 4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.
>
> 5. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.
>
> 6. Where hot pursuit is effected by an aircraft:
>
> (*a*) the provisions of paragraphs 1 to 4 shall apply *mutatis mutandis*;

> (*b*) the aircraft giving the order to stop must itself actively pursue the ship until a ship or another aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest outside the territorial sea that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.
>
> […]

246. As stated by the ITLOS in *M/V "SAIGA" (No. 2)*, the conditions set out in Article 111 for the exercise of the right of hot pursuit are "cumulative; each of them has to be satisfied for the pursuit to be legitimate under the Convention."[232] The Tribunal considers below whether each condition was fulfilled in the present case.

(a) Violation of the laws of the coastal State

247. The first prerequisite for the legitimate exercise of the right of hot pursuit, set out in Article 111(1) of the Convention, is that the competent authorities of the coastal State must have good reason to believe that the vessel being pursued has violated the laws or regulations of that State. The laws and regulations in question are those applicable under the Convention in the area at hand. In the present case, the applicable laws and regulations are those applicable in safety zones established around artificial islands, installations, and structures in the EEZ.

248. The Russian laws and regulations concerning safety zones around artificial islands, installations, and structures in the EEZ and on the continental shelf of which the Tribunal is aware are described in paragraphs 217–218 above. In light of the procedure for the establishment of safety zones set out in the 1995 Federal Law, the 2014 Order of the Ministry of Transport establishing a safety zone around the *Prirazlomnaya*, and the absence of any similar order (or any other legislative or executive act of the Russian State) pre-dating the events of 18–19 September 2013, the question arises of whether any safety zone in fact existed around the *Prirazlomnaya* at that time. Pursuant to Article 60(4) of the Convention, a coastal State "may, where necessary, establish reasonable safety zones." This provision does not automatically create a 500-metre safety zone around every artificial island, installation, and structure in the EEZ of every State. Rather, for a safety zone to exist, a coastal State must take steps, in accordance with the applicable procedures under its domestic law, to establish the safety zone and give due notice of its establishment. The Tribunal understands that Article 16 of the 1995 Federal Law, similarly, permits the establishment of, but does not itself establish, safety zones.

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[232] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, ITLOS, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10 at para. 146.

249. However, during the events at issue in this case, Russia unequivocally stated the view that a 500-metre zone prohibited to navigation existed around the *Prirazlomnaya*.[233] In addition, in one of the audio files presented by the Netherlands, the support ship of the *Prirazlomnaya* can be heard requesting permission from the platform operator to enter the 500-metre zone around the platform.[234] Moreover, while the Netherlands argues that the absence of sanctions under Russian law for the violation of safety zones "calls into question whether the Russian Federation had the legal basis to even commence hot pursuit,"[235] it also states that it "recognizes the safety zone around the *Prirazlomnaya* up until a breadth of 500 metres, as Article 60(5) of the Convention and present applicable international standards permit."[236] Accordingly, the Tribunal proceeds on the assumption that a safety zone had been validly established around the platform and that navigation was prohibited in that zone.

250. In such case, on the available evidence, the Russian authorities would have had good reason to believe, as they plainly did,[237] that the RHIBs of the *Arctic Sunrise* violated the aforementioned prohibition in the morning of 18 September 2013. This violation would have constituted sufficient reason to commence pursuit under Article 111 of the Convention.

251. In the light of this conclusion, the Tribunal need not examine whether the Russian authorities also would have had good reason to believe (on the assumption made of the existence of a safety zone) that the *Arctic Sunrise* RHIBs had committed in the safety zone any of the other violations of Russian laws and regulations invoked in the later administrative and criminal proceedings in Russia. Nor is it relevant in the view of the Tribunal whether or not any consequence (*i.e.*, punishment) was foreseen at the time under Russian law for a violation of the prohibition to enter the 500-metre safety zone.[238]

(b) Commencement of pursuit: location of the pursued ship and signal to stop

252. The second and third conditions for the lawful exercise of the right of hot pursuit address the signal after which and the location where pursuit may be commenced. These conditions are best examined together, as the time at which the signal is given determines the time at which the location of the pursued ship must be pinpointed.

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[233] Marchenkov Interrogation Report, p. 10 (Appendix 8.a); Video 27 at 2'00, 3'30 (shot on the *Arctic Sunrise* bridge).

[234] Audio 4.

[235] Hearing Tr., 10 February 2015 at 24:11–15 (opening statement of the Netherlands).

[236] Hearing Tr., 10 February 2015 at 20:2–5 (opening statement of the Netherlands).

[237] Video 27 at 1'57, 3'24 (shot on the *Arctic Sunrise* bridge), in which the *Ladoga* justifies its order to stop to the *Arctic Sunrise* by referring, *inter alia*, to the violation of the 500-metre zone prohibited to navigation.

[238] *See* Hearing Tr., 10 February 2015 at 23–24 (opening statement of the Netherlands).

253. Under Article 111(4), pursuit may only be commenced "after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship." Further, pursuant to Articles 111(1) and 111(4), the pursuit must be commenced when the foreign ship or, in application of the doctrine of constructive presence incorporated in Article 111(4), its boats or other craft working as a team and using the pursued ship as a mother ship, are within the relevant area. In the present case, to be lawful, the pursuit of the *Arctic Sunrise* had to commence while at least one of its RHIBs was within the 500-metre safety zone around the *Prirazlomnaya*.

254. Accordingly, with regard to the commencement of the pursuit, the two questions for determination by the Tribunal are whether the requisite signal to stop was given and, if so, whether the *Arctic Sunrise* RHIBs were within the 500-metre safety zone around the *Prirazlomnaya* when that signal was given.

255. The Tribunal considers that any order to stop given to the RHIBs of the *Arctic Sunrise* during their scuffle with the RHIBs of the *Ladoga* within the 500-metre safety zone of the *Prirazlomnaya* would not have been valid under the Convention, as the Convention requires that stop orders be given to the main ship that is to be pursued. In any event, on the evidence before it, the Tribunal finds that no order to stop was given to the *Arctic Sunrise* RHIBs.[239]

256. However, the evidence does show that orders to stop were given directly to the *Arctic Sunrise*. The *Ladoga* first repeatedly gave the *Arctic Sunrise* the order to stop by VHF radio. The *Ladoga* then also conveyed the order to stop by hoisting an "SN" flag, in accordance with the International Code of Signals.

257. Were the "SN" flag determined to have been the first signal to stop given to the *Arctic Sunrise*, this would mean that the pursuit was not in accordance with the Convention, as, by all accounts, the flag was hoisted only after all of the *Arctic Sunrise* RHIBs had returned to the vessel and were therefore clearly outside the 500-metre safety zone of the *Prirazlomanaya*.[240]

258. As regards the VHF radio messages by which the order to stop was first transmitted, the Netherlands argues that they do not constitute a "visual

[239] The Greenpeace campaigners on the *Arctic Sunrise* RHIBs testified that they did not receive any oral order to stop from the *Ladoga* RHIBs. Hearing Tr., 10 February 2013 at 141:25–142:18 (examination of Mr. Frank Hewetson); Hearing Tr., 10 February 2013 at 150:14–151:4 (examination of Mr. Philip Edward Ball). The pilots of the *Ladoga* RHIBs and the *Ladoga* gunnery officer also did not, in the context of the Russian administrative proceedings, testify to having been instructed to transmit any order to stop to the *Arctic Sunrise* RHIBs. Rather, their instructions appear to have been to prevent the *Arctic Sunrise* RHIBs from approaching, climbing, or otherwise endangering the *Prirazlomnaya* and, at the end of the protest, to try to seize at least one *Arctic Sunrise* RHIB. Sokolov Interrogation Report, p. 27 (Appendix 8.b); Solomakhin Interrogation Report, p. 37 (Appendix 8.c). While recognising that the available videos do not cover every moment of the protest action, and have imperfect sound (particularly due to the background noise of the RHIB propellers), the Tribunal also notes that no order to stop can be heard in these videos.

[240] *Arctic Sunrise* logbook (Appendix 38); Marchenkov Interrogation Report, p. 13 (Appendix 8.a).

or auditory signal … given at a distance which enables it to be seen or heard by the foreign ship" within the meaning of Article 111(4) of the Convention.[241]

259. The Tribunal cannot agree with this interpretation of the Convention. The parameters of the right of hot pursuit must be interpreted in the light of their object and purpose, having regard to the modern use of technology. The principal object of the rule regarding signals contained in Article 111(4) is to ensure that the pursued ship is made aware of the pursuit. It is the Tribunal's understanding that VHF messages presently constitute the standard means of communication between ships at sea and can fulfil the function of informing the pursued ship. The 1974 International Convention for the Safety of Life at Sea (SOLAS), as amended in 1988, in fact requires ships to constantly monitor the international VHF distress channel 16.[242] In the present case, it is indisputable that the *Arctic Sunrise* was actually made aware of the pursuit, as at least some of the radio messages to stop were received and acknowledged.[243]

260. The Netherlands refers to the commentary of the ILC to the draft of the 1958 Convention on the High Seas ("1958 Convention") (Article 23 of which provided the basis for Article 111 of the 1982 Convention), which suggests that another goal of the signals rule might be to "prevent abuse" by "exclud[ing] signals given at a great distance."[244] The Tribunal is not convinced that this concern, expressed before the 1982 Convention had extended some aspects of coastal State jurisdiction to the EEZ and the continental shelf (*i.e.*, within 200 miles of the shore and in some cases beyond), carries the same weight today. Given the large areas that must now be policed by coastal States and the availability of more reliable advanced technology (sea-bed sensors, satellite surveillance, over-the-horizon radar, unmanned aerial vehicles), it would not make sense to limit valid orders to stop to those given by an enforcement craft within the proximity required for an audio or visual signal that makes no use of radio communications. The Tribunal notes that municipal courts have recognised that radio messages may constitute valid signals under the 1958 Convention.[245] In any event, in the case at hand, at the time when the radio messages were transmitted, the *Arctic Sunrise* and the *Ladoga* were within approximately three nautical miles of each other, precluding any possibility for abuse.[246] For these reasons, the Tribunal finds that the *Ladoga* gave the *Arctic Sunrise* a valid "auditory signal," which allowed the commencement of the pursuit, when it transmitted its first radio message to stop.

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[241] Memorial, para. 278.

[242] 1184 UNTS 278.

[243] Video 27 (shot on the *Arctic Sunrise* bridge).

[244] Memorial, para. 278, referring to ILC, "Articles concerning the law of the sea with commentaries," (1956) Yearbook of the ILC, vol. II, Article 47, p. 285.

[245] *See e.g. R.* v. *Mills* (UK), 1995, Unreported, Croydon Crown Court, Devonshire J., summarised in (1995) 44 International Comparative & Legal Quarterly 949 at 956–957; *R* v. *Sunila and Soleyman* (Canada), 1986, 28 Dominion Law Reports (4th) 450 133, 216.

[246] For an estimate of the distance, see Hearing Tr., 10 February 2015 at 25 (opening statement of the Netherlands).

261. The remaining question is whether, at the time of the first radio message to stop, at least one of the *Arctic Sunrise* RHIBs was still within the 500-metre zone around the *Prirazlomnaya*. This factual determination is not easy to make, as both the time when the first radio message was transmitted and the time when the last RHIB of the *Arctic Sunrise* left the 500-metre zone can only be estimated.

262. The best estimate of the Netherlands is that the last RHIB, the "Suzie Q", left the 500-metre zone at 6:12, while the first stop order was given at 6:24.[247] The Netherlands bases its estimates on videos shot by Greenpeace campaigners from the "Hurricane", the "Suzie Q", and the bridge of the *Arctic Sunrise*.

263. Having reviewed these video materials, the Tribunal finds itself in agreement with the Netherlands' estimate of the time when the last RHIB left the 500-metre zone. In particular, the videos show that:

- at 6:02, the "Hurricane" and the "Suzie Q" were positioned within a short distance of the *Ladoga*, filming Ms. Saarela and Mr. Weber being taken on board, while the "Novi 2" was positioned between the *Ladoga* and the *Prirazlomnaya*;[248]
- at 6:05, the "Hurricane," followed by the "Novi 2," passed the *Prirazlomnaya* on its way from the *Ladoga* to the *Arctic Sunrise*;[249]
- at 6:09, the "Suzie Q" passed the *Prirazlomnaya* in the direction of the *Arctic Sunrise*;[250]
- at 6:11, the "Hurricane," now outside the 500-metre zone, met the "Novi 1," which was also headed in the direction of the *Arctic Sunrise*;[251] and
- at 6:13, the "Suzie Q" met the "Parker," after which they both proceeded toward the *Arctic Sunrise*.[252]

264. From the videos showing the moment when the last three RHIBs, the "Hurricane", the "Novi 2", and the "Suzie Q", pass by the platform heading from the *Ladoga* to the *Arctic Sunrise*, it is possible to estimate, within a margin of error, the moment when they exit the 500-metre zone. Additionally, photos ostensibly taken from the *Arctic Sunrise* show that the "Parker", the "Novi 2", and the "Hurricane" had arrived alongside the *Arctic Sunrise* by 6:23–6:24,[253] and the "Novi 1" and the "Suzie Q", by 6:29–6:30.[254] The times of these events are derived by cross-referencing the events the videos and photos record and their timestamps to events shown in video 27, which at one point shows the clocks on the bridge of the *Arctic Sunrise*.[255]

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[247] Third Supplementary Submission, p. 5, para. 2.

[248] Video 28a at 2'23 (shot from the "Hurricane"); video 29c at 14'22 (shot from the "Suzie Q").

[249] Video 28a at 5'45 (shot from the "Hurricane"); video 29c at 17'48 (shot from the "Suzie Q").

[250] Video 29c at 20'46 (shot from the "Suzie Q").

[251] Video 28a from 11'26 (shot from the "Hurricane").

[252] Video 29c at 24'31 (shot from the "Suzie Q").

[253] Photos 551, 1048–1051 (taken from the *Arctic Sunrise*).

[254] Photos 535–541, 1016–1030 (taken from the *Arctic Sunrise*).

[255] *See* video 27 at 1'12 (shot on the *Arctic Sunrise* bridge).

265. There is less certainty in the record regarding the timing of the first stop order. As the Netherlands points out, a video taken on the *Arctic Sunrise* bridge shows a stop order being given by radio at 6:23–6:24, followed by several more in the following minutes.[256] Yet from the video it is not possible to determine whether this was the first stop order given by the *Ladoga* or whether it was preceded by one or several others. Mr. Nikolai Anatolievich Marchenkov, the *Ladoga* gunnery officer, who was the person radioing the *Arctic Sunrise*, suggested in his interrogation by the Investigation Committee that the first order was given at or shortly after 6:13.[257] In its Administrative Offense Report, the Murmansk FSB Coast Guard Division concluded on the basis of a report from the captain of the *Ladoga* (which is not part of the record in this arbitration) that the first order was given at 6:15, followed by a second stop order at 6:21 and a third at 6:32.[258] This conclusion to some extent contradicts the video evidence before this Tribunal, which shows that between 6:23 and 6:30, the order to stop was repeated no less than five times.[259]

266. Having taken these different elements into account, the Tribunal finds that the first stop order was given in the period between 6:13 and 6:24. Accordingly, on all of the evidence before it, the Tribunal concludes that the first stop order was probably given (if only a minute or two) after the last of the *Arctic Sunrise* RHIBs exited the 500-metre zone around the *Prirazlomnaya*.

267. The Tribunal notes, however, that, while Article 111(1) provides that the foreign ship "must be" in the relevant area at the commencement of the pursuit, the test is set out slightly less stringently in Article 111(4), which states that the pursuit is not deemed to have commenced unless "the pursuing ship has satisfied itself by such practicable means as may be available" that the pursued ship is within the relevant area. The latter formulation suggests that the location of the foreign ship at the time of the first stop order should not be evaluated with the full benefit of hindsight, but rather looked at from the perspective of the pursuing ship. The Tribunal is also conscious that, in the present case, the relevant maritime area within which the foreign ship or its boats must have been located for the commencement of the pursuit—the 500-metre safety zone—is small enough that leaving it may have been a matter of only a few minutes. It may therefore be that, given the closeness in time of the first stop order and the departure of the *Arctic Sunrise* RHIBs from the relevant zone, and the fact that the *Ladoga* ostensibly began radioing the stop order as soon as it realised that the *Arctic Sunrise* RHIBs were returning to their ship,[260]

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[256] Video 27 at 0'30 (shot on the *Arctic Sunrise* bridge).

[257] Marchenkov Interrogation Report, p. 12 (Appendix 8.a).

[258] Administrative Offense Report No. 2109.623–13, FSB Coast Guard Division for Murmansk Oblast, 24 September 2013 (Appendix 39).

[259] Video 27at 0'47, 2'07, 3'35, 6'04, 8'28 (shot from the *Arctic Sunrise* bridge).

[260] *See* Marchenkov Interrogation Report, p. 12 (Appendix 8.a): "… the Greenpeace inflatables turned away from the platform and began heading back to the 'Arctic Sunrise'. At that point, our ship [the *Ladoga*] began heading toward the 'Arctic Sunrise' as well, simultaneously calling them on the radio with orders to stop … ."

the *Ladoga* should be seen as having "satisfied itself by such practicable means as [were] available" that the *Arctic Sunrise* RHIBs were in the correct zone.

268. In any case, the question of whether pursuit was lawfully commenced is not the only consideration to be taken into account to determine the lawfulness of the hot pursuit of the *Arctic Sunrise*.

(c) Continuity of pursuit

269. The fourth condition for a lawful exercise of the right of hot pursuit, set forth in Article 111(1) of the Convention, is that a pursuit continued outside the maritime area where it was lawfully commenced—here, the 500-metre zone around the *Prirazlomnaya*—must not have been interrupted. Therefore, the question for determination is whether the pursuit of the *Arctic Sunrise* remained uninterrupted from the time of the first stop order until the boarding of the *Arctic Sunrise* at approximately 18:30 on 19 September 2013, some 36 hours later.

270. In the view of the Tribunal, this question must be answered in the negative. During the three hours following the first stop order, the *Ladoga*'s conduct was consistent with the notion of pursuit. The order to stop, heave to, and admit an inspection on board was repeated time after time. Threats were issued that warning shots would be fired should the *Arctic Sunrise* fail to comply. Eventually, as the *Arctic Sunrise* refused to comply, several rounds of warning shots were fired. A RHIB was sent by the *Ladoga* to attempt (unsuccessfully) the boarding of the *Arctic Sunrise*. [261]

271. However, after the initial flurry of orders, threats, and warning shots, from approximately 9:30 on 18 September 2013 the *Ladoga*'s behaviour changed. After threatening to open direct fire at the stern of the *Arctic Sunrise* and preparing its guns, the *Ladoga* unloaded its gun mounts and ceased issuing orders to the *Arctic Sunrise*. For the following 33 hours, the *Ladoga* shadowed the *Arctic Sunrise*, positioning itself between the *Arctic Sunrise* and the *Prirazlomnaya* when the *Arctic Sunrise* circled the platform at a distance of approximately four nautical miles, and following the *Arctic Sunrise* when it retreated 20 nautical miles north of the platform. During this time, the *Ladoga* engaged in intermittent and limited discussion of what to do regarding Ms. Saarela and Mr. Weber. Around noon on 18 September 2013, it allowed an *Arctic Sunrise* RHIB to deliver clothing, food, and medicine for their use. When contrasted with the *Ladoga*'s behaviour between 6:30 and 9:30 on 18 September 2013, it is apparent that its later conduct is not consistent with continuous pursuit, the final objective of which would have been to board, as soon as possible, the pursued ship. The conduct of the *Arctic Sunrise* was also not consistent with that of a pursued ship, as it remained in the area and did not try to flee.

[261] For a complete description, see paras. 93–94 above.

272. The Tribunal has considered the possibility that the *Ladoga* may have, after the unsuccessful attempt of its RHIB to board the *Arctic Sunrise*, concluded that it was not in a position to stop the *Arctic Sunrise* on its own, and thereafter simply awaited the availability of the helicopter that ultimately carried out the boarding. However, having reviewed the evidence, the Tribunal concludes that the *Ladoga* remained in proximity to the *Arctic Sunrise* not as part of an ongoing pursuit, but rather to ensure that the Greenpeace ship did not undertake any further actions at the platform and in the expectation of further instructions from a higher authority. Mr. Marchenkov, the *Ladoga*'s gunnery officer, described the moment when the *Ladoga*'s conduct changed as follows:

> … It was about this time that our ship's commanding officer received the order to unload our gun mounts … . At this point, we continued shadowing the vessel beyond the 3-mile zone around the platform. We ceased these manoeuvres at the point when, on 19.09.2013, a helicopter arrived which, at 18:21, took up position (hovering) over the vessel "Arctic Sunrise."[262]

273. It is noteworthy that, after recording both the initial authorisation to fire warning shots[263] and the order to unload the gun mounts received by the *Ladoga*, Mr. Marchenkov does not refer to any further orders received after 9:30 on 18 September 2013.

274. Additionally, in discussing the status of Ms. Saarela and Mr. Weber with the *Arctic Sunrise*, the *Ladoga* several times indicated that it was awaiting instructions.[264] On 18 September, a Russian news outlet reported that a Coast Guard spokesperson had stated that Ms. Saarela and Mr. Weber were "guests" on the *Ladoga*.[265] According to Greenpeace International, a similar assurance was received by the Finnish consulate.[266] Given the indeterminacy of their status, the detention of Ms. Saarela and Mr. Weber on the *Ladoga* could not provide the requisite continuity to the pursuit.

275. Having concluded that the pursuit was interrupted, and that therefore one of the necessary conditions set out in Article 111 for a lawful exercise of the right of hot pursuit was not met, the Tribunal concludes that the right of hot pursuit cannot serve as the legal basis for the boarding, seizure, and detention of the *Arctic Sunrise*.

iii. Commission of terrorist offences

276. Although the Arctic 30 were never charged with terrorism offences, the Russian authorities accused the *Arctic Sunrise* of terrorism in connection with the events of 18 September 2013.

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[262] Marchenkov Interrogation Report, p. 14 (Annex 8.a).

[263] Marchenkov Interrogation Report, p. 12 (Annex 8.a).

[264] Videos 20 and 21 (shot on the *Arctic Sunrise* bridge).

[265] http://7x7-journal.ru/item/32389?r=murmansk. Website last visited on 9 August 2015.

[266] Second Supplementary Submission, p. 13, para. 1, referring to Greenpeace International Statement of Facts, para. 39.

277. When the *Ladoga* radioed the *Arctic Sunrise* with stop orders on the morning of 18 September 2013, it stated that the vessel was suspected of terrorism.[267] In a *Note Verbale* dated 18 September 2013, the Russian Federation informed the Netherlands that the decision had been made to seize the *Arctic Sunrise*. [268] It advised the Netherlands that four speedboats crewed by unidentified individuals had approached the *Prirazlomnaya* trailing an "unidentified, barrel-shaped object," that their conduct was "aggressive and provocative," and "[t]o outward appearances … bore the characteristics of terrorist activities which could put lives in danger and have serious consequences for the platform."[269]On 19 September 2013, an article published by the RIA Novosti news agency quoted officials as saying that the *Prirazlomnaya* issued a report about a threat of a "terrorist attack" mentioning five boats towing "an unidentified object resembling a bomb."[270]

278. The Tribunal considers that a coastal State is entitled to take law enforcement measures in relation to possible terrorist offences committed within a 500-metre zone around an installation or structure in the same way that it can enforce other coastal State laws applicable in such a zone. This can include measures taken within the zone, including the boarding, seizure, and detention of a vessel, where the coastal State has reasonable grounds to suspect the vessel is engaged in terrorist offences against an installation or structure on the continental shelf. The Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf ("SUA Fixed Platforms Protocol") recognises this.[271] However, there is no right to seize or board vessels in the EEZ in relation to such offences where such action would not otherwise be authorised by the Convention.[272] A coastal State can, for instance, engage in hot pursuit of a vessel in relation to such offences.

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[267] Video 12 at 0'16 (shot on the *Arctic Sunrise* bridge); Video 27 at 5'43 (shot on the *Arctic Sunrise* bridge).

[268] *Note Verbale* from the Russian Federation to the Netherlands, 18 September 2013 (Annex N-5).

[269] *Note Verbale* from the Russian Federation to the Netherlands, 18 September 2013 (Annex N-5).

[270] Greenpeace International Statement of Facts, para. 45.

[271] Article 1 of the SUA Fixed Platforms Protocol incorporates, *inter alia*, Article 7 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("SUA Convention"). Article 7 of the SUA Convention empowers a State to take an offender into custody or take other measures to ensure his or her presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted, when the State is satisfied that the circumstances so warrant. Such circumstances include when an offender is suspected of committing terrorist offences on board or against a fixed platform located on the continental shelf (see Article 2 of the SUA Fixed Platforms Protocol). Both the SUA Convention and Fixed Platforms Protocol were revised in 2005 (entry into force: 28 July 2010). The Netherlands signed each of the 2005 treaties on 31 January 2007 and deposited its instruments of acceptance on 1 March 2011 (entry into force: 30 May 2011). The Russian Federation is not a party to either of the 2005 treaties.

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

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

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

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

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

> *Article 73*
> *Enforcement of Laws and Regulations of the Coastal State*
>
> 1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with laws and regulations adopted by it in conformity with this Convention.

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

282. The activity of the *Arctic Sunrise* and the law enforcement actions taken by the Russian Federation did not concern living resources within Russia's EEZ. The actions taken by the Russian Federation were triggered by Greenpeace's protest actions in relation to the *Prirazlomnaya*, which was con-

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

structed for the exploitation of non-living resources. Accordingly, Article 73(1) could not serve as a legal basis for the measures of the Russian Federation.

283. The absence of any express enforcement provision in the Convention dealing with the right to enforce the coastal State's laws regarding non-living resources in the EEZ[274] makes it necessary to recall that its Article 77, which deals with non-living resources in the continental shelf, largely reproduces the 1958 Convention on the Continental Shelf. That convention was itself based on draft articles prepared by the ILC. The commentary of the ILC in relation to the draft provision now reflected in Article 77 of the Convention says that the words setting out the rights of the coastal State in relation to the continental shelf:

> … leave no doubt that the rights conferred upon the coastal state cover all rights necessary for and connected with the exploration and exploitation of the resources of the continental shelf. Such rights include jurisdiction in connexion with the prevention and punishment of violations of the law.[275]

284. Although the Tribunal does not find it necessary to reach a view on the extent of the coastal State's right to enforce its laws in relation to non-living resources in the EEZ, it is clear that such a right exists. However, there is no basis to conclude on the evidence that the *Arctic Sunrise* had violated any Russian laws in relation to exploration and exploitation activities on non-living resources in the EEZ.[276]

285. The Tribunal concludes that the measures taken by Russia against the *Arctic Sunrise* on 19 September 2013 did not constitute a lawful exercise of Russia's law enforcement powers concerning the exploration and exploitation of its non-living resources in the EEZ.

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

286. Under certain circumstances, the Convention allows coastal States to take enforcement action against foreign vessels in the EEZ that have committed serious violations of applicable laws of the coastal State related to the protection of the marine environment.

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

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

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

287. Although the Arctic 30 were not charged with such violations, the Tribunal notes that in a *Note Verbale* dated 18 September 2013, Russia referred to the actions of Greenpeace as a provocation that "exposed the Arctic region to a threat of an ecological disaster of unimagin[a]ble consequences."[277] On 1 November 2013, the Interfax News Agency reported that the Prime Minister of the Russian Federation, Mr. Dmitry Medvedev, had stated at a news conference that his country "cannot support activities which may cause damage to the environment and which may be dangerous for people on the whole."[278]

288. Accordingly, the Tribunal shall examine whether the measures taken by Russia could have been based on the enforcement jurisdiction of the coastal State with respect to the protection of the marine environment.

(a) Article 220 of the Convention

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

Article 220
Enforcement by coastal States

> […]
>
> 3. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards, that State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.
>
> […]
>
> 5. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a substantial discharge causing or threatening significant pollution of the marine environment, that State may undertake physical inspection of the vessel for matters relating to the violation if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.

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[277] *Note Verbale* from the Russian Federation to the Netherlands, 18 September 2014 (Annex N-5).

[278] Memorial, para. 312, referring to the *Verbatim record of the public sitting at the International Tribunal for the Law of the Sea in the "Arctic Sunrise" Case on 6 November 2013*, ITLOS/PV.13/C22/1/Rev.1, pp. 19–20.

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

290. Under these provisions, where there are "clear grounds" for believing that a vessel navigating in the EEZ has committed a violation of applicable international rules and standards for the prevention, reduction, and control of vessel-source pollution in the EEZ, the coastal State may require the vessel to provide information. Where there are "clear grounds" for believing that such a violation has occurred, resulting in a substantial discharge causing or threatening significant pollution of the marine environment, and the vessel has refused to provide information or has provided manifestly untrustworthy information, the coastal State may undertake a physical inspection of the vessel.[279] Where there is "clear objective evidence" for believing that such a violation has occurred, resulting in a discharge causing major damage or threat of major damage to the interests of the coastal State, the coastal State may institute proceedings and detain the vessel.

291. The Tribunal considers that there were no grounds for Russia to believe that the *Arctic Sunrise* had committed a violation of applicable international rules and standards for the prevention, reduction, and control of vessel-source pollution in Russia's EEZ. There is also no evidence of a discharge from the *Arctic Sunrise* or its RHIBs causing pollution or major damage (or a threat thereof). This conclusion is confirmed, in particular, by a review of the video evidence before the Tribunal. It is also confirmed by the fact that at no time during the events in question did Russia accuse the *Arctic Sunrise* or any of its RHIBs of vessel-source pollution.

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[279] Article 226(1) of the Convention sets out the parameters of such an inspection:

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

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

(b) Article 234 of the Convention

293. Article 234 of the Convention provides:

> *Article 234*
> *Ice-Covered Area*
>
> Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

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

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

[280] Memorial, para. 316.

[281] Memorial, para. 317.

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

296. The Tribunal is not satisfied that the boarding, seizure, and detention of the *Arctic Sunrise* by Russia on 19 September 2013 constituted enforcement measures taken by Russia pursuant to its laws and regulations adopted in accordance with Article 234 of the Convention. There is evidence before the Tribunal that indicates that the regulations adopted by Russia in accordance with Article 234 of the Convention apply to an area that does not include the Barents Sea, where the *Prirazlomnaya* is located.[283] Further, at no time did Russia invoke its laws and regulations adopted under Article 234 of the Convention as the impetus for its boarding, seizure, and detention of the *Arctic Sunrise* on 19 September 2013. This contrasts with at least one previous instance in which the Russian Federation did expressly invoke rules of navigation adopted in accordance with Article 234 of the Convention after the *Arctic Sunrise* entered the "water area of the Northern Sea Route, ice-covered for most part of the year" without permission.[284]

297. The Tribunal concludes that the measures taken by Russia against the *Arctic Sunrise* on 19 September 2013 did not constitute a lawful exercise of Russia's enforcement rights as a coastal State under Articles 220 or 234 of the Convention.

vi. Dangerous manoeuvering

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

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

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

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

> During the next day the vessel continued dangerous maneuvering on the boundary of the area adjacent to the platform. The captain of the vessel had not reacted to lawful requests by the officials of the coast guard authorities to stop, nor to signals as provided under the International Code of Signals (ICS 1965). In contravention of the International Regulations for Preventing Collisions at Sea, 1972, the vessel carried out dangerous maneuvers, not allowing on board an inspection team from the coast guard ship, thus endangering the life and health of members of both the crew and the vessel itself. [285]

299. In its decision of 8 October 2013, the FSB Coast Guard Division for the Murmansk region imposed a fine of RUB 20,000 on Mr. Willcox in his official capacity as master of the *Arctic Sunrise*, for the commission of an administrative offence under Part 2, Article 19(4) of the Administrative Code.[286] Referring to the period 18 to 19 September 2013, the decision stated that when asked to stop, the *Arctic Sunrise* had failed to comply, "gathered speed, altering its course, manoeuvring dangerously and creating a real danger to the safety of the military vessel and members of its crew."[287]

300. The Netherlands submits that the regulations to which the Russian Federation refers in its *Note Verbale* do not permit States to board a foreign ship, let alone take other enforcement measures.[288] It states that Article 97(3) of the Convention corroborates this.

301. The Tribunal finds that the international rules and standards referred to by Russia in its *Note Verbale* do not provide a legal basis for the boarding, seizure, and detention of the *Arctic Sunrise* for dangerous manoeuvring.

302. The 1965 International Code of Signals and the 1972 International Regulations for Preventing Collisions at Sea do not permit States other than the flag State to board a vessel within the EEZ or commence judicial proceedings.

303. Article 97 of the Convention provides:

> *Article 97*
> *Penal Jurisdiction in Matters of Collision or any other Incident of Navigation*
>
> 1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary

[285] *Note Verbale* from the Russian Federation to the Netherlands, 1 October 2013 (Annex N-10); Memorial, para. 328.

[286] Resolution in Case No. 2109/623–13 of Administrative Offense, FSB Coast Guard Division for Murmansk Oblast, 8 October 2013 (Annex N-16/Appendix 14).

[287] Resolution in Case No. 2109/623–13 of Administrative Offense, FSB Coast Guard Division for Murmansk Oblast, 8 October 2013, p. 9 (Annex N-16/Appendix 14). In the Decision on qualification, Investigation Committee, 23 October 2013 (Appendix 18) and the Ruling on bringing an accusation, Investigation Committee, 28 October 2013 (Appendix 19), reference is also made to resistant conduct of the *Arctic Sunrise*'s RHIBs to the *Ladoga* RHIBs around the base of the *Prirazlomnaya* the morning of 18 September 2013.

[288] Memorial, para. 328.

responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licence shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.

3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.

304. Under this provision, only the flag State may institute penal or administrative proceedings against a person, or arrest and detain a vessel, for any incident of navigation.

305. The Tribunal concludes that, even if the *Arctic Sunrise*'s conduct from 18–19 September 2013 could be characterised as dangerous manoeuvring (and the Tribunal makes no factual finding on this point), this would not provide the Russian Federation with a legal basis to board, seize, and detain the vessel as it did on 19 September 2013.

(b) Other possible legal bases for taking measures to protect coastal State rights and interests in the EEZ

306. Having addressed the possible violations of Russia's legislation that could have provided a legal basis for Russia's boarding, seizure, and detention of the *Artic Sunrise*, the Tribunal now turns to examine other possible legal bases for the measures taken by Russia that do not involve law enforcement in the strict sense, but more broadly concern the coastal State's protection of its rights and interests in the EEZ. These include the prevention of adverse ecological/environmental consequences, the prevention of terrorism, and the prevention of interference with the coastal State's sovereign rights over the exploration and exploitation of the non-living resources of the EEZ.

i. Prevention of adverse ecological/environmental consequences

307. Article 221 of the Convention provides:

Article 221
Measures to Avoid Pollution Arising from Maritime Casualties

1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.

> 2. For the purposes of this article, "maritime casualty" means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.

308. Article 221 of the Convention allows coastal States to take preventive action against foreign vessels and their crews with respect to marine pollution. The enforcement measures are to be "proportionate to the actual or threatened damage" to protect the coastal State's interests from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may "reasonably be expected to result in major harmful consequences."

309. As previously mentioned,[289] in a *Note Verbale* dated 18 September 2013, Russia referred to the actions of Greenpeace as exposing "the Arctic region to a threat of an ecological disaster of unimagin[a]ble consequences."[290] Further, on 1 November 2013, the Prime Minister of the Russian Federation was reported as stating that Russia "cannot support activities which may cause damage to the environment and which may be dangerous for people on the whole."[291]

310. The Tribunal considers that even if it were to accept that the actions of the *Arctic Sunrise* constituted an "occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo," the threatened damage to Russia's interests could not reasonably have been expected to result in major harmful consequences.

311. As discussed earlier, the Russian authorities were familiar with the nature and scale of Greenpeace protest actions in the Arctic, having witnessed the Greenpeace action at the *Prirazlomnaya* of August 2012.[292] The earlier protest action would have informed the Russian authorities of what was reasonable to expect in September 2013. There is no evidence before this Tribunal that the earlier protest action had an adverse ecological or environmental impact, let alone one of unimaginable consequences, or that it resulted in major harmful consequences. In September 2013, the *Arctic Sunrise* provided the *Prirazlomnaya* with an indication of what the protest action would entail.[293] The scale was limited. As it was, the protest action involved approximately 10 to 15 individuals transported by RHIBs, two of whom managed to climb some way up the side of the fixed platform with ropes. The Tribunal does not consider that it is reasonable to expect that such actions could have resulted in major harmful consequences.

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[289] *See* paras. 98, 287 and 292 above.

[290] *Note Verbale* from the Russian Federation to the Netherlands, 18 September 2014 (Annex N-5).

[291] Memorial, para. 312, referring to the *Verbatim record of the public sitting at the International Tribunal for the Law of the Sea in the "Arctic Sunrise" Case on 6 November 2013*, ITLOS/PV.13/C22/1/Rev.1, pp. 19–20.

[292] *See* paras. 80, 84 above.

[293] *See* para. 84 above.

312. In any event, Russia boarded, seized, and detained the *Arctic Sunrise* approximately 36 hours after the protest action at the *Prirazlomnaya*. During this period, the Russian authorities knew that the protest actions of 18 September 2013 *had not* resulted in any ecological or environmental adverse consequences. At the time of Russia's actual boarding, seizure, and detention of the *Arctic Sunrise*, the vessel was at a distance of at least three nautical miles from the *Prirazlomnaya* and not engaged in any protest action. Accordingly, there was no "maritime casualty" of the kind envisaged by Article 221—*i.e.*, a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo—that could have justified Russia taking measures to protect its interests in the EEZ at that time.

313. The Tribunal concludes that Article 221 of the Convention did not provide Russia with a legal basis for the boarding, seizure, and detention of the *Arctic Sunrise*.

ii. Prevention of terrorism

314. One of the rights of a coastal State in its EEZ that may justify some form of preventive action against a vessel would derive from circumstances that give rise to a reasonable belief that the vessel may be involved in a terrorist attack on an installation or structure of the coastal State. Such an attack, if allowed to occur, would involve a direct interference with the exercise by the coastal State of its sovereign rights to exploit the non-living resources of its seabed. It is not, however, necessary for this Tribunal to determine the extent of any power to take such preventive action. This is because on the facts here there was no reasonable basis for Russia to suspect that the *Arctic Sunrise* was engaged in or likely to engage in terrorist acts.

315. The Tribunal considers that the conduct of the *Arctic Sunrise* both before and on 18 September 2013 is relevant in assessing whether there was any reasonable basis for Russia to take preventive action on 19 September 2013 against any possible future terrorist attack. The protest actions on 18 September 2013 followed previous protest actions by the *Arctic Sunrise* in the Arctic region, and, specifically, in relation to the *Prirazlomnaya*. As previously mentioned, in August 2012, the *Arctic Sunrise* staged a similar protest against the *Prirazlomnaya* during which activists arrived at the platform by speedboat and suspended themselves from its side.[294] According to Greenpeace International, that protest action passed peacefully and, despite being present during the protest action, the Russian coastguard did not intervene.[295] In the summer of 2013,

[294] Greenpeace International Statement of Facts, para. 10; *see* para. 80 above; E-mail from the Russian Ministry of Transport to the Netherlands, 5 December 2012 (Annex N-38); Hearing Tr., 10 February 2015 at 87:25–88:2 (examination of Mr. Peter Henry Willcox): "During [the 18 September 2013 protest], the reaction of the Russian forces was dramatically more aggressive than we had anticipated or experienced the year before."

[295] Greenpeace International Statement of Facts, para. 11.

the *Arctic Sunrise* protested in the Barents Sea against seismic surveying by the Rosneft-contract vessel *Akademik Lazarev*.[296] According to Greenpeace International, this protest action also passed peacefully and without incident.[297] Thereafter, the *Arctic Sunrise* headed toward the Northern Sea Route with the intention of conducting "peaceful and legal protests" against oil drilling.[298] However, it was denied permission to enter the Northern Sea Route by Russian authorities on three occasions.[299] Notwithstanding this, on 24 August 2013, the *Arctic Sunrise* entered the Northern Sea Route.[300] Two days later the Russian coast guard ordered the *Arctic Sunrise* to stop and accept an inspection, failing which the coast guard would open "preventive fire". The *Arctic Sunrise* allowed an inspection under protest. The boarding party informed the *Arctic Sunrise* that the coast guard would open fire if it did not immediately leave the Northern Sea Route. The *Arctic Sunrise* then left the area.[301]

316. What the above events demonstrate to the Tribunal is that the Russian authorities were familiar with the *Arctic Sunrise*, its objectives, and the manner in which it staged protest actions.

317. The Russian authorities were also aware of the *Arctic Sunrise*'s movements and intentions in the days leading up to the protest action at the *Prirozlomnaya*. According to Greenpeace International:

> In the evening of 16 September, the Russian Coast Guard was spotted in the vicinity of the [*Arctic Sunrise*]. At about 19:00, the *Ladoga* hailed the [*Arctic Sunrise*] and read out a statement warning the vessel not to breach articles 60, 17 and 260 of UNCLOS, not to enter Russian territorial waters or the Northern Sea Route and not to cause damage to the *Prirazlomnaya*. The [*Arctic Sunrise*] responded stating its intention was to bear witness to and protest peacefully against oil development in the Arctic. A similar exchange occurred in the morning of 17 September at about 4:30. The [*Arctic Sunrise*] arrived near the platform later that day and began to circle it at a distance of more than 3 nautical miles.[302]

318. As previously noted, at approximately 4:15 on 18 September 2013, the *Arctic Sunrise* hailed the *Prirazlomnaya* to inform it of its intention to

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[296] Greenpeace International Statement of Facts, para. 12. *See* http://news.windowstorussia.com/greenpeace-ends-2-day-protest-against-rosneft-in-arctic.html. Webpage last visited on 9 August 2015.

[297] Greenpeace International Statement of Facts, para. 12.

[298] Greenpeace International Statement of Facts, para. 13.

[299] Greenpeace International Statement of Facts, para. 13; Memorial, para. 317; *see also* website of the Administration of the Northern Sea Route, http://www.arctic-lio.com. Webpage last visited on 9 August 2015.

[300] Memorial, para. 317.

[301] Greenpeace International Statement of Facts, para. 13. *See also Russia shuts Greenpeace out of Arctic Sea route, stifles criticism of oil industry*, press release, 21 August 2013, *Greenpeace ship to leave Kara Sea under threat of force from Russian Coast Guard,* press release, 26 August 2013.

[302] Greenpeace International Statement of Facts, para. 14; *see also* Marchenkov Interrogation Report, pp. 9–10 (Appendix 8.a).

stage a protest action at the platform.[303] At the same time, Greenpeace International faxed a letter to the platform's management and the General Director of Gazprom Neft Shelf notifying them of its intentions.[304] Several aspects of that message are particularly relevant to the Russian authorities' claim that they suspected the *Arctic Sunrise* of terrorism: first, Greenpeace International repeatedly stated that it was conducting a non-violent action on the platform; second, it gave precise details as to what it intended to do ("[t]he action we are taking consists of scaling the platform and the establishment of a camp in a survival capsule … [a] number of activists are determined to stay on in the capsule"); and third, as just noted, Greenpeace International identified that it intended to make use of a "survival capsule".

319. In light of the above, the Tribunal considers that the Russian authorities were aware of the likelihood of a protest action by the *Arctic Sunrise* at the *Prirazlomnaya* (indeed, the presence of the *Ladoga* in the vicinity of the platform is evidence of the fact that the Russian authorities anticipated protest action) and of the kind of protest action that it would be, *i.e.*, non-violent and in keeping with the kind of protest action Greenpeace had staged before as part of its campaign to "Save the Arctic". Given this background, the Tribunal does not accept that there were reasonable grounds for the Russian authorities to consider that, on this particular occasion, the *Arctic Sunrise* intended to resort to terrorism to achieve its ends.

320. In its *Note Verbale* of 18 September 2013 to the Netherlands, the Russian authorities referred to an "unidentified, barrel-shaped object,"[305] which was characterised as resembling a bomb in a later media report.[306] The Tribunal appreciates that the appearance of an unidentifiable object being towed by one of the RHIBs toward the platform may have caused some alarm to the Russian authorities. However, the Tribunal does not accept that it gave the Russian authorities reasonable grounds to suspect the *Arctic Sunrise* of terrorism. The *Arctic Sunrise* had informed the platform's management in its fax of 18 September 2013 that the object was a survival capsule to be used in the context of a non-violent protest action. Further, when the survival capsule broke free from its towline, the *Ladoga*'s commanding officer decided to move toward it and attempt to hoist it on board.[307] Such conduct is not consistent with a reasonable suspicion on the part of the Russian authorities that the object was a bomb.

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[303] Greenpeace International Statement of Facts, para. 15; Hearing Tr., 10 February 2015 at 102:20–23 (examination of Mr. Dimitri Litvinov); *see* para. 84 above.

[304] Letter from Ben Ayliffe (Greenpeace International) to Artur Akopov (Chief of the *Prirazlomnaya*), with a copy to Alexander Mandel (General Director of Gazprom Neft Shelf), 18 September 2013 (Appendix 2); Hearing Tr., 10 February 2015 at 102:23–103:2 (examination of Mr. Dimitri Litvinov).

[305] *Note Verbale* from the Russian Federation to the Netherlands, 18 September 2013 (Annex N-5).

[306] Greenpeace International Statement of Facts, para. 45.

[307] Marchenkov Interrogation Report, p. 11 (Appendix 8.a).

321. The Tribunal also considers that the actions of the Russian authorities following the events of 18 September 2013 belie any reasonable suspicion of potential terrorism. The boarding, seizure, and detention of the vessel only occurred approximately 36 hours after the protest action that triggered the accusations of terrorism. The conduct of the Russian authorities during that 36-hour period did not show that they had a reasonable suspicion of terrorism on the part of the *Arctic Sunrise*. For example, several hours after the protest actions, the *Ladoga* accepted a delivery of food and medical supplies for Ms. Saarela and Mr. Weber from crewmembers of the *Arctic Sunrise*. Also, there were long periods of relative inactivity on the part of the *Ladoga vis-à-vis* the *Arctic Sunrise* following the protest actions, ostensibly because it awaited further instructions from higher authorities. The Tribunal believes that the Russian authorities' conduct would have been markedly different had they truly suspected that the *Arctic Sunrise* intended to engage in terrorist activities.

322. The Tribunal concludes that there were no reasonable grounds for the Russian authorities to suspect the *Arctic Sunrise* of terrorism and therefore any purported suspicion of potential terrorism could not provide a legal basis for the measures taken by Russia against the vessel on 19 September 2013. The Tribunal rejects the notion that the *Arctic Sunrise* posed a terrorist threat to Russia's rights that could have justified preventive action against it by Russia.

323. The Tribunal concludes that Russia's right as a coastal State to take measures to protect its rights in the EEZ against terrorism did not provide a legal basis for its boarding, seizure, and detention of the *Arctic Sunrise* on 19 September 2013.

iii. Prevention of interference with the exercise of a coastal State's sovereign rights for the exploration and exploitation of non-living resources in its EEZ

324. A coastal State has the right to take measures to prevent interference with its sovereign rights for the exploration and exploitation of the non-living resources of its EEZ. The Tribunal will therefore address the question of whether the actions of the *Arctic Sunrise* could have been regarded by Russia as constituting an interference with its sovereign rights, thus triggering its right to take appropriate measures.

325. The Netherlands concedes that a coastal State may intervene to prevent or end protest actions in the EEZ but states that any intervention that affects freedom of protest at sea must pursue a legitimate aim and be necessary and proportionate to that aim.[308] It cites examples of such actions taken by itself and other States.[309]

[308] Hearing Tr., 10 February 2015 at 53 (opening statement of the Netherlands).

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

326. In the view of the Tribunal, the protection of a coastal State's sovereign rights is a legitimate aim that allows it to take appropriate measures for that purpose. Such measures must fulfil the tests of reasonableness, necessity, and proportionality.

327. The Tribunal has given careful and detailed consideration to the types of protest actions that could reasonably be considered as constituting an interference with the exercise of those sovereign rights, particularly in the context of the case at hand. In that regard, the Tribunal considers that it would be reasonable for a coastal State to act to prevent: (i) violations of its laws adopted in conformity with the Convention; (ii) dangerous situations that can result in injuries to persons and damage to equipment and installations; (iii) negative environmental consequences (*see* paragraphs 307 to 313 above); and (iv) delay or interruption in essential operations. All of these are legitimate interests of coastal States.

328. At the same time, the coastal State should tolerate some level of nuisance through civilian protest as long as it does not amount to an "interference with the exercise of its sovereign rights." Due regard must be given to rights of other States, including the right to allow vessels flying their flag to protest.[310]

329. At the time it was boarded and seized, the *Arctic Sunrise* was no longer engaged in actions that could potentially interfere with the exercise by Russia of its sovereign rights as a coastal State. The measures taken by Russia might have been designed to prevent a resumption of the *Arctic Sunrise*'s protest actions, but the Russian authorities did not give this as the reason for the boarding, seizure, and detention of the vessel. The criminal and administrative proceedings that were instituted were based on other grounds.

330. There is no basis to conclude that the conduct of the *Arctic Sunrise* at the time of its boarding amounted to interference with Russia's exercise of its sovereign rights for the exploration and exploitation of non-living resources of its continental shelf. At that time, the *Arctic Sunrise* was exercising the freedom of navigation. Its involvement in the protest action against the *Prirazlomnaya* had come to an end, and there is no evidence that its presence in the EEZ was interfering with the operation of the platform.

331. In this regard, the Tribunal notes that Article 78 of the Convention provides that the exercise of the rights of a coastal State over the continental shelf "must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided in this Convention." If the boarding and seizing of the *Arctic Sunrise* were conducted in the exercise of Russia's rights over the continental shelf, they would not have been in compliance with the Convention, because they would have infringed and unjustifiably interfered with the navigation and other rights and freedoms of the Netherlands.

[310] *See* para. 227 above.

332. The Tribunal, therefore, concludes that Russia's right as a coastal State to take measures to prevent interference with its sovereign rights for the exploration and exploitation of the non-living resources of its EEZ and the continental shelf did not provide a legal basis for the measures it took *vis-à-vis* the *Arctic Sunrise* on 19 September 2013.

(c) Conclusion

333. In light of the foregoing analysis, the Tribunal concludes that the boarding, seizure, and detention of the *Arctic Sunrise* by the Russian Federation on 19 September 2013 did not comply with the Convention. Accordingly, the Tribunal finds that Russia, as a coastal State, has breached obligations owed by it under Articles 56(2), 58(1), 58(2), 87(1)(*a*), and 92(1) of the Convention to the Netherlands as a flag State enjoying exclusive jurisdiction over the *Arctic Sunrise* in Russia's EEZ. Given this conclusion, the Tribunal also finds that all law enforcement measures taken by Russia *vis-à-vis* the *Arctic Sunrise* subsequent to its unlawful boarding, seizure, and detention of the vessel have no basis in international law. Having reached this conclusion, the Tribunal does not need to consider the reasonableness, necessity, and proportionality of those measures.

C. Compliance with the ITLOS Order

334. The Netherlands submits that Russia breached its international obligations to the Netherlands by failing to comply with the ITLOS Order.

335. The Tribunal recalls that, on 21 October 2013, the Netherlands applied for the prescription of provisional measures in the context of this arbitration.[311] On 22 November 2013, ITLOS ordered the following:

> (1) (*a*) The Russian Federation shall immediately release the vessel *Arctic Sunrise* and all persons who have been detained, upon the posting of a bond or other financial security by the Netherlands which shall be in the amount of 3,600,000 euros, to be posted with the Russian Federation in the form of a bank guarantee;
>
> (*b*) Upon the posting of the bond or other financial security referred to above, the Russian Federation shall ensure that the vessel *Arctic Sunrise* and all persons who have been detained are allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation;
>
> (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 Presi-

[311] Request for the prescription of provisional measures under Article 290, paragraph 5, of the United Nations Convention of the Law of the Sea, 21 October 2013 (Annex N-2).

dent to request further reports and information as he may consider appropriate after that report.[312]

336. Pursuant to Articles 290 and 296(1) of the Convention[313] and Article 25(1) of the ITLOS Statute,[314] these provisional measures are binding upon the Parties to this arbitration.[315]

337. The failure of a State to comply with provisional measures prescribed by ITLOS is an internationally wrongful act. According to the Commentary to the Articles on State Responsibility, where a binding judgment of an international court or tribunal imposes obligations on one State party to the litigation for the benefit of another State party, that other State party is entitled, as an injured State, to invoke the responsibility of the first State.[316]

338. On 2 December 2013, the Netherlands issued a bank guarantee in the amount of EUR 3,600,000 in favour of the Russian Federation and informed the Russian Federation and ITLOS that it had done so.[317]

339. As a consequence, pursuant to the ITLOS Order, Russia was under an obligation to: (i) immediately release the persons who had been detained; (ii) ensure that they were allowed to leave Russian territory and maritime areas under Russia's jurisdiction; (iii) immediately release the *Arctic Sunrise*; and (iv) ensure that the *Arctic Sunrise* was allowed to leave Russian territory and

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[312] ITLOS Order, para. 105. https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/published/C22_Order_221113.pdf. Website last visited on 9 August 2015.

[313] Article 290 uses the word "prescribe" and provides at subparagraph 6 that "[t]he parties to the dispute shall comply promptly with any provisional measures prescribed under this article." Article 296(1) provides that "[a]ny decision rendered by a court or tribunal having jurisdiction under this Section shall be final and shall be complied with by all the parties to the dispute."

[314] Article 25(1) provides that, "[i]n accordance with article 290, the Tribunal and its Seabed Disputes Chamber shall have the power to prescribe provisional measures."

[315] On the binding nature of the provisional measures is prescribed, *see* ITLOS Order, para. 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 … ." On the binding nature of provisional measures prescribed by a court or tribunal under Part XV or Part XI, Section 5 of the Convention, *see also* T. A. Mensah, "Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)," (2002) 62 *Zeitschrift fur ausländisches öffentliches Recht und Völkerrecht*, pp. 44–45; R. Wolfrum, "Provisional Measures of the International Tribunal for the Law of the Sea," in P. Chandrasekhara Rao & R. Khan (eds.), *The International Tribunal for the Law of the Sea: Law and Practice*, 2001, pp. 185–186.

[316] J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 258, para. 7.

[317] *Note Verbale* from the Netherlands to the Russian Federation, 2 December 2013 (Annex N-27). Netherlands' Report on Compliance with the ITLOS Order, 22 November 2013 (Annex N-28). By letter dated 9 June 2015, the Netherlands advised ITLOS that the bank guarantee had ceased to be effective as it was not collected by Russia within the relevant time period, *i.e.*, by 2 June 2014. The Agent for the Netherlands indicated that parliament had been informed of its potential liability in the amount of the bank guarantee and had committed to implement any decision of this Tribunal that may require it to pay compensation in the amount of the bank guarantee.

maritime areas under its jurisdiction.[318] According to the ITLOS Order, Russia's compliance with such measures was to be prompt.[319]

340. The Tribunal turns first to the question of whether the Russian Federation ensured the immediate release of all persons who had been detained upon the posting of the bank guarantee by the Netherlands in accordance with Paragraph 1(*a*) of the *dispositif* of the ITLOS Order.

341. Criminal proceedings were commenced against the Arctic 30 on 25 September 2013.[320] By detention orders of 26, 27, and 29 September 2013, the District Court granted a petition of the Investigation Committee to remand the Arctic 30 in custody until 24 November 2013.[321] Each member of the Arctic 30 lodged an appeal against the detention orders.[322] By *Note Verbale* dated 3 October 2013, the Netherlands, *inter alia*, requested the immediate release of the Arctic 30.[323] By thirty individual decisions rendered between 8 and 24 October 2013, the Regional Court of Murmansk rejected the appeals of the Arctic 30 against the District Court's detention orders of 26, 27, and 29 September 2013.[324] In mid-November, the Investigation Committee sought a further three-month prolongation of the detention of the Arctic 30. Although this petition was initially granted in respect of one crewmember of the *Arctic Sunrise*, over the period of 18–28 November 2013, the Primorsky District Court of St. Petersburg ordered the release on bail of all members of the Arctic 30.[325]

342. By 29 November 2013, all 30 individuals had been released from custody.[326]

343. Given that the persons who had been detained by Russia were all released by 29 November 2013, *i.e.*, seven days following the prescription of provisional measures by ITLOS and three days prior to the Netherlands posting the bank guarantee, the Tribunal considers that Russia cannot be said to have failed to comply with this aspect of Paragraph 1(*a*) of the *dispositif* of the ITLOS Order.

344. The Tribunal now addresses the question of whether Russia ensured that all persons who had been detained were allowed to leave Russian

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[318] ITLOS Order, para. 105.

[319] ITLOS Order, para. 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)."

[320] Greenpeace International Statement of Facts, para. 68.

[321] *See e.g.* Order on the imposition of interim measures in the form of detention, District Court, 26 September 2013 (Appendix 9); Greenpeace International Statement of Facts, paras. 70, 71, 75.

[322] Greenpeace International Statement of Facts, para. 84.

[323] *Note Verbale* from the Netherlands to the Russian Federation, 3 October 2013 (Annex N-11).

[324] *See e.g.* Appellate Ruling, Murmansk Regional Court, 23 October 2013 (Appendix 15); Greenpeace International Statement of Facts, paras. 84, 96.

[325] *See e.g.* Decision, Primorsky District Court of St. Petersburg, 19 November 2013 (Appendix 22).

[326] Greenpeace International Statement of Facts, para. 112.

territory and maritime areas under the jurisdiction of the Russian Federation in accordance with Paragraph 1(*b*) of the *dispositif* of the ITLOS Order. As previously mentioned, Russia was under an obligation to comply with this measure promptly.

345. After the release of all members of the Arctic 30 by 29 November 2013,[327] lawyers acting for the non-Russian nationals of the group lodged applications with the Investigation Committee for the necessary papers to enable them to leave the country.[328] On 6 December 2013, the Kommersant newspaper reported that the head of the Saint Petersburg Section of the Federal Migration Service ("FMS") stated that it was ready to issue exit visas to the applicants if the Investigation Committee consented.[329] The same article quoted Lieutenant General of Justice A. Y. Mayakov as saying that a request from the FMS would "not be disregarded."[330] The Investigation Committee subsequently advised those individuals who petitioned for exit visas that their requests were denied on the ground that the Investigation Committee's remit did not include the issuance of exit visas.[331]

346. On 18 December 2013, the Russian State Duma issued an amnesty that provided, *inter alia*, for the termination of the investigation and prosecution of persons suspected or accused of hooliganism under Article 213(2) of the Criminal Code.[332] By individual decisions dated 24 and 25 December 2013, the Investigation Committee terminated the criminal prosecution of the Arctic 30 on hooliganism charges and lifted their bail conditions.[333]

347. On 26–27 December 2013, the FMS rendered decisions in respect of the 26 non-Russian national crewmembers of the *Arctic Sunrise*, stating that no proceedings would be initiated against them for failure to hold an entry visa given that they had not entered Russia of their own volition.[334]

348. By 29 December 2013, all of the non-Russian nationals had left the country.[335]

349. Under the ITLOS Order, Russia was under an obligation promptly to ensure that all persons who had been detained were allowed to leave Rus-

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[327] Greenpeace International Statement of Facts, para. 112.

[328] Greenpeace International Statement of Facts, para. 115.

[329] Greenpeace International Statement of Facts, para. 116.

[330] Kommersant, 6 December 2013, http://kommersant.ru/Doc/2361407. Website last visited on 9 August 2015.

[331] Greenpeace International Statement of Facts, para. 117; *see e.g.* Decision on the dismissal of petition, Investigation Committee, 9 December 2013 (Appendix 26).

[332] Article 6(5), http://www.rg.ru/2013/12/18/amnistia-dok.html. Website last visited on 9 August 2015.

[333] *See e.g.* Resolution on termination of proceedings following the act of amnesty, Investigation Committee, 24 December 2013 (Appendix 27).

[334] *See e.g.* Decision on the refusal to initiate administrative proceedings, FMS, 25 December 2015 (Appendix 28).

[335] Greenpeace International Statement of Facts, para. 120.

sian territory following the issuance of the bank guarantee by the Netherlands. The time it took for all of the non-Russian members of the Arctic 30 to be in a position to leave Russian territory from the issuance of the bank guarantee by the Netherlands on 2 December 2013 was 27 days. This, the Netherlands argues, "does not meet the requirement of immediacy."[336]

350. The Tribunal notes that the ITLOS Order obliged Russia to act promptly in this regard. This established a positive obligation on Russia to ensure promptly that the individuals could leave its territory. The Tribunal finds that the 27-day delay did not meet the promptness requirement. The Tribunal considers that the fact that the individuals could not leave the territory for almost one month demonstrates insufficient effort on the part of Russia positively to ensure that the individuals could leave the country. This failure is exacerbated by the fact that the individuals had already been detained for significant periods of time. The Tribunal finds that Russia breached this aspect of Paragraph (1)(*b*) of the *dispositif* of the ITLOS Order.

351. The Tribunal turns now to the question of whether the Russian Federation immediately released the *Arctic Sunrise* in accordance with Paragraph 1(*a*) of the *dispositif* of the ITLOS Order.

352. The *Ladoga* and the *Arctic Sunrise* arrived at Murmansk on 24 September 2013. The *Arctic Sunrise* was officially seized and transferred for safekeeping to the Murmansk branch of the Federal Unitary Enterprise "Rosmorport" on 15 October 2013.[337]

353. By *Note Verbale* addressed to Russia dated 18 October 2013, the Netherlands formally lodged its protest against the seizure of the *Arctic Sunrise*.[338] Stichting Phoenix's legal representatives in Russia attempted to secure the release of and access to the *Arctic Sunrise*.[339] By a decision of 24 March 2014, the Primorsky District Court of St. Petersburg rejected a petition for the review of the Investigation Committee's decision not to allow representatives of Stichting Phoenix to inspect the *Arctic Sunrise* for the purpose of assessing and preventing damage.[340]

354. It was not until 6 June 2014, some six months after the Netherlands' issuance of the bank guarantee, that the Investigation Committee lifted the seizure of the *Arctic Sunrise* and handed the ship over to representatives of Stichting Phoenix.[341]

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[336] Memorial, para. 361.

[337] Official report of seizure of property, 15 October 2013 (Annex N-14/Appendix 16).

[338] *Note Verbale* from the Netherlands to the Russian Federation, 18 October 2013 (Annex N-15).

[339] Hearing Tr., 10 February 2015 at 81, 83 (examination of Mr. Sergey Vasilyev).

[340] Ruling, Primorsky District Court of St. Petersburg, 14 March 2014 (Appendix 32). *See also* Letter from the Investigation Committee to Stichting Phoenix, 24 March 2014 (Appendix 33).

[341] Transfer-Acceptance Act of a Vessel, Investigation Committee, 6 June 2014 (Appendix 34). *See also* Greenpeace International Statement of Facts, para. 130; *Note Verbale* from the Russian Federation to the Netherlands, 12 June 2014 (Annex N-32).

355. The Netherlands claims that this delay constitutes a "patent violation" of the Russian Federation's duty to release immediately the vessel.[342] The Tribunal agrees. The ITLOS Order obliged Russia to release immediately the *Arctic Sunrise* upon issuance of the bank guarantee by the Netherlands. Instead, it released the vessel six months after the issuance by the Netherlands of the bank guarantee. The Tribunal considers that this conduct constitutes a violation by the Russian Federation of this aspect of Paragraph 1(*a*) of the *dispositif* of the ITLOS Order.

356. Finally, the Tribunal addresses the question of whether, upon the posting of the bank guarantee by the Netherlands, the Russian Federation promptly ensured that the *Arctic Sunrise* was allowed to leave Russian territory and maritime areas under its jurisdiction in accordance with Paragraph 1(*b*) of the *dispositif* of the ITLOS Order.[343]

357. As noted above at paragraph 354, the *Arctic Sunrise* was only released from detention six months after the Netherlands issued a bank guarantee, at which point the vessel was handed over to its owners, Stichting Phoenix. At that point, the *Arctic Sunrise* required maintenance work and cleaning before it could set sail.[344] These works were completed on 22 July 2014. According to the Netherlands, owing to "unexplained delays", the port State inspection was conducted and permission for the ship to leave was only received nine days later, on 31 July 2014.[345] Thus, on 1 August 2014, upon completion of a professional damage assessment and essential maintenance and receipt of the port authorities' permission to leave Murmansk, the *Arctic Sunrise* set sail for Amsterdam, where it arrived on 9 August 2014.[346]

358. Pursuant to the ITLOS Order, Russia was under an obligation to ensure promptly that the *Arctic Sunrise* was allowed to leave Russian territory and maritime areas under its jurisdiction upon the posting by the Netherlands of a bank guarantee.[347] Approximately eight months passed from the date the Netherlands posted the bank guarantee (2 December 2013) to the date on which the *Arctic Sunrise* was allowed to leave the maritime areas under Russia's jurisdiction (1 August 2014). The Tribunal considers that a delay of eight months violates the promptness requirement. Russia's conduct thus constitutes a breach of Paragraph 1(*b*) of the *dispositif* of the ITLOS Order.

359. The Tribunal notes that the Netherlands also submits that Russia did not comply with the ITLOS Order in two further ways, by failing to: (i) return items that were taken while the vessel was in the custody of the Russian authorities; and (ii) submit a report in response to Paragraph (2) of

[342] Memorial, para. 359.

[343] ITLOS Order, para. 105.

[344] Greenpeace International Statement of Facts, paras. 130–131, 133–134, 136.

[345] Memorial, para. 362; Greenpeace International Statement of Facts, para. 137.

[346] Greenpeace International Statement of Facts, paras. 131–139.

[347] ITLOS Order, para. 105.

the *dispositif* of the ITLOS Order. With respect to the first matter, the Tribunal is satisfied that the vessel was not returned with all of the items that were on board when the ship was detained. The Tribunal notes that this is one of the heads of reparation sought by the Netherlands that is reserved for a later phase of these proceedings. Second, the Tribunal accepts that Russia failed to submit a report in compliance with Paragraph (2) of the *dispositif* of the ITLOS Order.

360. The Tribunal finds that, by failing to comply with Paragraphs (1) and (2) of the *dispositif* of the ITLOS Order, Russia breached its obligations to the Netherlands under Articles 290(6) and 296(1) of the Convention.

361. The Netherlands has requested the Tribunal to find that, by failing to comply with the ITLOS Order, Russia has breached its obligations under Article 300 of the Convention. The Tribunal concludes that Russia has the obligation to "fulfill in good faith the obligations assumed under the Convention," which include the provisional measures ordered by ITLOS.

362. The Netherlands has also requested the Tribunal to find that Russia is in breach of Part XV of the Convention. However, except as regards Russia's obligations under Articles 290(6) and 296(1) (referred to in paragraph 360 above), the Tribunal does not find any reason to conclude that Russia is in breach of Part XV of the Convention as a whole.

D. Russia's Failure to Pay Deposits in this Arbitration

363. The Netherlands asks the Tribunal to find that, in failing to make during these proceedings the deposits requested by the Tribunal to cover its fees and expenses, Russia has breached its obligations to the Netherlands "in regard to the equal sharing of the Tribunal's expenses as provided for by Article 7 of Annex VII to the Convention, Articles 31 and 33 of the Tribunal's Rules of Procedure, Paragraph 7 of the Tribunal's Procedural Order No. 1, and Part XV and Article 300 of the Convention."[348]

364. The Tribunal recalls that it requested the Parties to deposit equal amounts as advances for the fees and expenses of the Tribunal on three occasions. The first request was set out in Paragraph 7.1 of Procedural Order No. 1 and in a letter sent by the PCA on the Tribunal's behalf on 3 March 2014. The second and third requests were made *via* letters from the PCA dated 28 January and 19 March 2015. While the Netherlands paid its share of the deposit within the time limit granted on each occasion, the Russian Federation made no payments toward the deposit. On each occasion, having been informed of Russia's failure to pay, the Netherlands paid Russia's share of the deposit.

365. The Tribunal first considers whether, by failing to pay its share of the requested deposits, Russia has breached the Convention.

[348] Memorial, para. 397(1)(*g*); Hearing Tr., 11 February 2015 at 33:18–34:1 (closing statement of the Netherlands).

366. Part XV of the Convention and its associated Annexes establish a detailed dispute settlement regime that is an integral part of the Convention. State parties are under an obligation to implement their obligations under these provisions in good faith, as with all other obligations in the Convention (Article 300). A State party cannot choose whether to accept these obligations, and it cannot, therefore, by its actions, treat the provisions as a matter of choice so as to defeat the evident purpose of the provisions to establish, with limited exceptions, a compulsory dispute settlement regime.

367. The Convention may not oblige a Party to *appear* before a tribunal having jurisdiction under the Convention. The tribunal is empowered in those situations where a party does not appear to continue to exercise its jurisdiction (Annex VII, Article 9). That does not mean that a party has no obligations under the dispute settlement regime. In particular, any decision by a tribunal having jurisdiction "shall be final and shall be complied with by all parties to the dispute" (Article 296(1)). Article 6 of Annex VII requires a party to facilitate the work of a tribunal established under that Annex. A party is not entitled to defeat the compulsory dispute settlement regime by withholding necessary deposits required for a tribunal to function. A requirement to make such deposits must be regarded as inherent in the obligations under Part XV and Annex VII of the Convention.

368. The fact that a party may contest the jurisdiction of the tribunal is not a basis on which a party can frustrate the effective discharge by that tribunal of its responsibility to adjudicate a dispute brought before it, including determining its own jurisdiction.

369. Nor does the fact that the Tribunal's Rules of Procedure deal with a situation where a party does not make required deposits relieve a party of its obligation under the Convention to make the required deposits. The fact that a mechanism exists to deal with the situation of a defaulting party with regard to deposits does not mean that requests by the Tribunal can be regarded as no more than non-binding exhortations. The only proper view of such "requests" by a tribunal established under Annex VII is that they give rise to an obligation to pay the amounts requested. This is particularly so as it cannot be assumed that in every situation it will be feasible for the other party to make additional payments to replace those requested from the defaulting party. The obligation does not depend upon whether the tribunal "requires" or only "requests" the deposits.

370. The Tribunal accordingly finds that Russia has breached its obligation under the Convention to make deposits requested in procedural directions issued by the Tribunal toward the expenses of the Tribunal. It follows that the Tribunal can order Russia immediately to reimburse the Netherlands for the amount of the deposits which Russia was requested to pay and which, in default, the Netherlands has advanced to allow the Tribunal to continue its work. As well as reimbursing the requested amounts, Russia is also liable to pay the Netherlands interest on the amounts outstanding which, if not agreed, will be determined by the Tribunal.

371. The Tribunal does not find it necessary in light of its findings as to the obligation to make deposits derived from the Convention to determine whether an obligation to make the required deposits can also be derived from the Rules of Procedure or the wording of particular procedural orders.

E. Circumstances Precluding Wrongfulness

372. Having concluded that, in the manner described in Sections B, C, and D above, the Russian Federation has violated its international obligations, the Tribunal has considered whether there exists any circumstance precluding the wrongfulness of Russia's conduct in accordance with the law of State responsibility[349] and, on the evidence available, concludes that there is none.

VIII. Reparation

373. The Netherlands submits the following claims for reparation:

i. In the form of satisfaction, a declaratory judgment; a formal apology; and appropriate assurances and guarantees of non-repetition of internationally wrongful acts;

ii. In the form of restitution, an order to the Russian Federation to issue a Notice to Mariners revoking existing Notices to Mariners relating to the *Prirazlomnaya*; the return of the objects belonging to the *Arctic Sunrise* which have not yet been returned; the return of personal belongings of the persons on board the *Arctic Sunrise* which have not yet been returned; and the formal dismissal of the charges of piracy and hooliganism brought against the persons who were on board the *Arctic Sunrise*;

iii. In the form of compensation, material damages suffered by the Kingdom of the Netherlands due to the issuance of the bank guarantee, and due to the non-participation of the Russian Federation in the present proceedings; and for material and non-material damage suffered as a result of the law enforcement acts against the *Arctic Sunrise* and the persons on board the ship.[350]

374. The Netherlands has claimed entitlement to reparation on alternative bases. The Netherlands first requests "full reparation" on the basis of the Russian Federation's "responsibility under international law for breaches of its obligations owed to the Netherlands as the flag State of the *Arctic Sunrise*."[351] In this regard, the Netherlands refers to Article 304 of the Convention, which provides that:

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[349] The Tribunal notes that the Netherlands addressed circumstances precluding wrongfulness in its Memorial (paras. 200–205, 251–252, 348–349, 369, 377) as well as in its Second Supplementary Submission (pp. 20–32).

[350] Hearing Tr., 11 February 2015 at 30–35 (closing statement of the Netherlands); Supplementary Submission; Memorial, paras. 391–396; *see* paras. 140.iii.b) and 141 above.

[351] Memorial, paras. 379–380.

> [t]he provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.[352]

375. In the alternative, the Netherlands asserts that Articles 110(3), 111(8) and 106 of the Convention provide grounds for reparation even if the Russian Federation did not commit internationally wrongful acts through its law enforcement actions.[353]

376. Having concluded in Section VII above that the Russian Federation has violated its international obligations, the Tribunal finds that the Netherlands is entitled to reparation on the basis of general international law. Accordingly, the Tribunal finds it unnecessary to address the alternative grounds for reparation raised by the Netherlands. The Tribunal therefore turns to the specific forms of reparation requested by the Netherlands pursuant to general international law.

A. Satisfaction

377. The Netherlands requests satisfaction for "the legal damage suffered as result of the non-compliance of the Russian Federation with its obligations under international law owed to the Netherlands, the violation of the sovereignty of the Netherlands, and the declaration of the safety zone beyond the extent allowed under the UNCLOS."[354]

378. With respect to the Netherlands' claim for satisfaction concerning the Russian Federation's alleged unlawful establishment of a safety zone around the *Prirazlomnava*, the Tribunal recalls its finding, in Section VII.A above, that Russia did not at any time establish a safety zone of three nautical miles around the *Prirazlomnaya* within the meaning of Article 60 of the Convention.

379. With regard to the general nature of satisfaction, the Netherlands refers to the Commentary to the Articles on State Responsibility, which states that satisfaction is commonly "a declaration of the wrongfulness of the act by a competent court or tribunal," and is the most appropriate remedy "for those injuries, not financially assessable, which amount to an affront to the State."[355] The Netherlands also asserts that "[a]nother form of satisfaction frequently resorted to is a formal apology," and requests both forms of satisfaction "in respect of all five internationally wrongful acts indicated in the Memorial."[356] Additionally, the Netherlands has requested that the Tribunal order the Russian Federation

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[352] Supplementary Submission, para. 4.

[353] Memorial, para. 390; Supplementary Submission, paras. 5–23.

[354] Supplementary Submission, para. 29.

[355] Supplementary Submission, paras. 29–30, quoting Articles on State Responsibility, Commentary to Article 37.

[356] Supplementary Submission, para. 30.

to "[p]rovide the Kingdom of the Netherlands with appropriate assurances and guarantees of non-repetition" of these internationally wrongful acts.[357]

380. The Tribunal considers that its findings (as stated above in Sections VII.B, VII.C and VII.D) and declaratory judgment (as stated below in Section XI) regarding the international wrongfulness of the Russian Federation's conduct provides appropriate satisfaction in the present case. In light of this, the Tribunal considers it unnecessary to order that the Russian Federation issue a formal apology regarding the same internationally wrongful acts or provide assurances of non-repetition of these internationally wrongful acts.

B. Restitution

381. The Netherlands requests restitution for "the application by the Russian Federation of national legislation relating to the *Prirazlomnaya vis-à-vis* the Netherlands, including ships flying its flag, in particular by extending the breadth of safety zones around installations in its exclusive economic zone beyond the extent allowed under the UNCLOS."[358] In particular, the Netherlands requests that the Tribunal order that the Russian Federation issue "a notice to mariners revoking existing notices to mariners relating to the *Prirazlomnava*, including in particular Notices to Mariners No. 51/2011 and Notices to Mariners 21/2014, and replacing them by notices to mariners that are in accordance with the UNCLOS."[359]

382. The Tribunal recalls its finding, in Section VII.A above, that Russia did not establish a safety zone around the *Prirazlomnava* within the meaning of Article 60 of the Convention. Therefore, the Tribunal dismisses this request for restitution.

383. The Netherlands also requests restitution with respect to "various objects belonging to the *Arctic Sunrise* which have not yet been returned."[360] Should restitution of these objects in their original state be impossible, the Netherlands claims compensation totalling EUR 295,000.[361] Moreover, the Netherlands requests restitution with respect to the personal belongings that were taken from the persons on board the *Arctic Sunrise* while they were in custody.[362] Should restitution of these objects in their original state be impossible, the Netherlands claims compensation totalling EUR 45,000.[363]

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[357] Statement of Claim, para. 37; Memorial, para. 397.

[358] Supplementary Submission, para. 31.

[359] Supplementary Submission, para. 31.

[360] Supplementary Submission, para. 40, referring to objects listed in Claim Statement (Annex N-42), Appendix 2.

[361] Supplementary Submission, para. 41, referring to Claim Statement (Annex N-42), Appendices 1 and 2.

[362] Supplementary Submission, para. 49, referring to objects listed in Claim Statement (Annex N-42), Appendix 10.

[363] Supplementary Submission, para. 50, referring to Claim Statement (Annex N-42), Appendices 1 and 2.

384. The Tribunal recalls its finding, in Section V.C.1 above, that "the Netherlands is entitled to bring claims in respect of alleged violations of its rights under the Convention which resulted in injury or damages to the ship, the crew, all persons and objects on board as well as its owner and every person involved or interested in its operations."[364]

385. Recalling also its findings in Section VII.B regarding the international wrongfulness of the measures taken against the *Arctic Sunrise* and its crew, the Tribunal considers it appropriate to order reparation with respect to all objects belonging to the *Arctic Sunrise* and those persons on board the vessel. The Tribunal concludes that restitution is the most appropriate form of reparation in this instance, and that compensation is the most appropriate alternative in the event that the timely restitution of the objects in their original state should prove impossible.

386. Finally, the Netherlands requests restitution in the form of a "formal dismissal of the charges of piracy and hooliganism brought against the persons who were on board the *Arctic Sunrise*."[365] In particular, the Netherlands submits that while the Arctic 30 "were granted an amnesty for the charge of hooliganism and … although [they] may in practice no longer face piracy charges, the charges have not been formally withdrawn, causing discomfort for the persons concerned."[366]

387. The Tribunal recalls that, following the issuance of the amnesty, the Investigation Committee formally terminated the criminal prosecution of the Arctic 30 for the offence of hooliganism by its decisions of 24 and 25 December 2013.[367] Thereafter, on 24 September 2014, the Investigation Committee closed the criminal case in respect of all potential offenses committed on 18–19 September 2013 by the Arctic 30. In its decision to close the case, the Investigation Committee invoked Article 24(4) of the Russian Code of Criminal Procedure, which provides for the closure of a case when criminal prosecution in respect of all suspected and accused persons has been terminated. The Investigation Committee explicitly stated that "the criminal prosecution of the individuals initially accused in the criminal case has already been terminated" and that "no grounds exist that would warrant the requalification of the criminal charges."[368] Accordingly, there appears to be no need for any further order from the Tribunal in respect of the charges brought against the Arctic 30.

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[364] *See* para. 172 above.

[365] Hearing Tr. 11 February 2015 at 30–35 (closing statement of the Netherlands); Memorial, para. 391–396.

[366] Supplementary Submission, para. 46.

[367] *See e.g.* Resolution on termination of proceedings following the act of amnesty, Investigation Committee, 24 December 2013 (Appendix 27).

[368] Order on the closure of criminal case No. 83543, Investigation Committee, 24 September 2014, p. 22 (Appendix 37).

C. Compensation

388. The Netherlands requests compensation for material damage arising from "the costs of the bank guarantee issued pursuant to the ITLOS Order" and "the costs of the payments by the Netherlands of the Russian Federation's share of the Tribunal's fees and expenses."[369]

389. Regarding the costs charged by the issuing bank for the guarantee,[370] the Tribunal considers that the Netherlands is entitled to this compensation. The Tribunal reserves any question concerning the quantum of compensation to a later phase of these proceedings.

390. The question of the costs of the payments by the Netherlands of Russia's share of the Tribunal's fees and expenses is addressed in Section X (Costs) below.

391. Additionally, the Netherlands requests compensation for damage to the *Arctic Sunrise*, including physical damage and costs incurred to prepare it for its return voyage.[371] According to the Netherlands:

> [d]ue to its treatment by the authorities of the Russian Federation, the ship itself was damaged and polluted by coal dust and/or iron ore dust originating from nearby stored bulk cargo … . Upon the formal release of the *Arctic Sunrise*, substantial costs were incurred for the preparation of the ship for its return voyage to Amsterdam. Replacements and resupplying, including the resupplying of fuel and victual, were required in order for the ship to be seaworthy and for the return voyage to be possible. In addition, harbour dues and agent costs were charged by the authorities of the Russian Federation in the period between the formal release of the *Arctic Sunrise* and its departure to Amsterdam.[372]

392. The Netherlands also records lost profits as damage to the *Arctic Sunrise*, citing Article 36(2) of the Articles on State Responsibility. According to the Netherlands:

> [d]uring the entire period of detention until the return of the *Arctic Sunrise* in Amsterdam, the ship was unavailable to its owner and its charterer and operator, resulting in a loss of profits. This loss of profits was due to the unavailability of the ship during its detention and the fee paid by the charterer, Greenpeace International, to the owner, Stichting Phoenix.[373]

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[369] Supplementary Submission, para. 32.

[370] Supplementary Submission, para. 33, referring to Annex N-43.

[371] Supplementary Submission, paras. 42–44, referring to Claim Statement (Annex N-42), Appendix 1.

[372] Supplementary Submission, para. 42, referring to Claim Statement (Annex N-42), Appendices 1 and 2.

[373] Supplementary Submission, para. 44, referring to Claim Statement (Annex N-42), Appendix 1.

393. The Tribunal considers that the Netherlands is entitled to compensation for damage to the *Arctic Sunrise*, including physical damage and costs incurred to prepare it for its return voyage, as well as lost profits. The Tribunal reserves any question concerning the quantum of compensation to a later phase of these proceedings.

394. Finally, the Netherlands requests compensation for non-material and material damage to persons on board the *Arctic Sunrise*. Regarding non-material damage, the Netherlands cites *Ahmadou Sadio Diallo* and *M/V "SAIGA" (No. 2)* for the premise that "[t]he award of non-material damages in situations of wrongful detention is well-established under international law."[374] Having regard to the circumstances of the present case and the case-law of both the International Court of Justice and ITLOS, the Tribunal considers that the Netherlands is entitled to the award of non-material damages in relation to the arrest, detention, and prosecution of those on board the *Arctic Sunrise*. The Tribunal reserves any question on the quantum of compensation to a later phase of these proceedings.

395. Among the material damages claimed, the Netherlands includes the bail paid as security for the release of persons detained in the Russian Federation, as well as the costs incurred during their wrongful detention and during the period between the release and departure of detained persons from the Russian Federation.[375] The Tribunal considers that the Netherlands is entitled to compensation for this damage. The Tribunal reserves any question concerning the quantum of compensation to a later phase of these proceedings.

396. In respect of the remaining compensation claims raised by the Netherlands (including expenses relating to the Halyard Survey BV vessel survey report, WEA Accountants report fee, and the costs of procuring the Audited Claims Statement by WEA Accountants), the Tribunal considers that these claims arise from the arbitration itself. It therefore addresses them as costs of the Parties in Section X below.

IX. Interest

397. The Tribunal considers that it is necessary to award interest on all heads of compensation in order to achieve full reparation in the present case. As regards the appropriate rate of interest and the method for calculating interest, the Tribunal reserves its decision to a later phase of these proceedings.

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[374] Supplementary Submission, para. 51, referring to *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, Compensation, Judgment of 19 June 2012, ICJ Reports 2012, p. 324, paras. 21–24; *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10, para. 175).

[375] Supplementary Submission, para. 53, referring to Claim Statement (Annex N-42), Appendix 1.

X. Costs

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

Article 7
Expenses

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

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

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

XI. Decision

401. For the above reasons, the Tribunal unanimously:

A. *Finds* that it has jurisdiction over all the claims submitted by the Netherlands in this arbitration;

B. *Finds* that all the claims submitted by the Netherlands in this arbitration are admissible;

C. *Finds* that by boarding, investigating, inspecting, arresting, detaining, and seizing the *Arctic Sunrise* without the prior consent of the Netherlands, and by arresting, detaining, and initiating judicial proceedings against the Arctic 30, the Russian Federation breached obligations owed by it to the Netherlands as the flag State under Articles 56(*2*), 58(1), 58(2), 87(1)(*a*), and 92(1) of the Convention;

D. *Finds* that by failing to comply with Paragraphs (1) and (2) of the *dispositif* of the ITLOS Order, the Russian Federation breached its obligations to the Netherlands under Articles 290(6) and 296(1) of the Convention;

E. *Finds* that by failing to pay its share of the deposits requested in procedural directions issued by the Tribunal to cover its fees and expenses in this arbitration, the Russian Federation has breached its obligations under Part XV and Article 300 of the Convention;

F. *Finds* that the Netherlands is entitled to compensation for:

1. damage to the *Arctic Sunrise*, including physical damage to the vessel, resulting from the measures taken by the Russian Federation, and costs incurred to prepare the vessel for its return voyage from Murmansk to Amsterdam; as well as costs incurred due to loss of use of the *Arctic Sunrise* during the relevant period;
2. non-material damage to the Arctic 30 for their wrongful arrest, prosecution, and detention in the Russian Federation;
3. damage resulting from the measures taken by the Russian Federation against the Arctic 30, including the costs of bail paid as security for their release from custody, expenses incurred during their detention in the Russian Federation, and costs in respect of the persons detained between their release from prison and their departure from the Russian Federation; and
4. the costs incurred by the Netherlands for the issuance of the bank guarantee to the Russian Federation pursuant to the ITLOS Order;

G. *Finds* that the Netherlands is entitled to interest, at a rate to be decided by the Tribunal, on the amounts referred to in sub-paragraphs F and I of this paragraph;

H. *Orders* the Russian Federation to return to the Netherlands, by 14 October 2015, all objects belonging to the *Arctic Sunrise* and the persons on board the vessel at the time of its seizure that have not yet been returned, and, failing the timely restitution of these objects, to compensate the Netherlands for the value of any objects not returned;

I. *Orders* the Russian Federation immediately to reimburse the Netherlands the amounts of Russia's share of the deposits paid by the Netherlands;

J. *Decides* that the fees and expenses of the Tribunal incurred to date shall be borne by the Parties in equal shares;

K. *Decides* that each Party shall bear its own costs incurred to date (*including the expenses referred to in paragraph 396 above*); and

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

Dated: 14 August 2015

[*Signed*]
Professor Alfred H.A. Soons, Arbitrator

[*Signed*]
Dr. Alberto Székely, Arbitrator

[*Signed*]
Mr. Henry Burmester, Arbitrator

[*Signed*]
Professor Janusz Symonides, Arbitrator

[*Signed*]
Judge Thomas A. Mensah, President of the Tribunal

[*Signed*]
Ms. Evgeniya Goriatcheva, Registrar

Award in the Arbitration regarding the *Arctic Sunrise*

Sentence arbitrale relative à l'affaire de l'*Arctic Sunrise*

Award on compensation

Quantum of damages—Damage to the *Arctic Sunrise*—Cost of mobilising public support for release of *Arctic Sunrise* not compensable—Replacement of rigid hull inflatable boats on like for like basis—The Netherlands not entitled to be placed in better position than that in which it would have been absent wrongful conduct.

Non-material damage to individuals on board the *Arctic Sunrise*—Compensation awarded by International Court of Justice in *Amadou Sadio Diallo* case is upper limit, not direct comparator, for compensation to be awarded in present case—Impairment of individuals' ability to leave Russian territory in violation of ITLOS Order aggravating factor—No consistent practice among international courts and tribunals in respect of calculation of award of non-material damages for wrongful detention—No practice of awarding damages on a basis of *per diem* calculation—Consistent practice of awarding a lump sum taking into account all circumstances of case.

Damages resulting from measures taken against individuals on board the *Arctic Sunrise*—Only direct damages may be compensated—Costs of global emergency support and mobilization of public support too remote to be compensated—Costs associated with contact with, and visit, by next of kin not compensable—Award of compensation for personal objects seized from the *Arctic Sunrise* on equitable basis—Salary costs compensable in principle.

The Netherlands entitled to compensation for costs incurred for issuance of bank guarantee—The Russian Federation under obligation to reimburse amounts of its share of all deposits paid by the Netherlands at date of issuance of award—Tribunal has wide margin of discretion to determine questions of interest—Injured State entitled to such interest as will ensure full reparation for the injury—Different rates of interest applicable to sums awarded for non-material and material damage suffered—Rate in respect of material damages ought to be higher than that applied to non-material damages—Simple interest to be awarded, as compound interest was not requested—Interest on all heads of damage to accrue from date of Award on the Merits as proxy for date on which losses occurred.

Sentence sur la compensation

Montant des dommages-intérêts—dommages causés à l'*Arctic Sunrise*—les coûts encourus pour la mobilisation du soutien public en faveur de la mainlevée de l'*Arctic Sunrise* ne sont pas susceptibles d'indemnisation—l'in-

demnisation pour le remplacement des embarcations pneumatiques à coque rigide est limitée à la valeur de ces embarcations avant les faits—les Pays-Bas ne peuvent prétendre à une situation plus favorable à celle dans laquelle ils se seraient trouvés en l'absence du comportement illicite.

Préjudice moral causé aux personnes qui se trouvaient à bord de l'*Arctic Sunrise*—le montant des dommages-intérêts accordés par la Cour internationale de Justice dans l'affaire *Amadou Sadio Diallo* constitue la limite supérieure des montants susceptibles d'être accordés dans la présente affaire, mais ne peut pas servir à établir de comparaison directe—le fait d'avoir empêché les personnes de quitter le territoire russe en violation de l'ordonnance du Tribunal international du droit de la mer constitue une circonstance aggravante—il n'y a pas de pratique établie des cours et tribunaux internationaux en ce qui concerne le calcul des dommages-intérêts accordés en réparation d'un préjudice moral pour détention illégale—il n'y a pas de pratique établie d'accorder des dommages-intérêts calculés sur une base journalière—la pratique établie est d'accorder une somme forfaitaire tenant compte de toutes les circonstances de l'affaire.

Préjudice causé par les mesures prises à l'égard des personnes qui se trouvaient à bord de l'*Arctic Sunrise*—seuls les dommages directs peuvent être indemnisés—les coûts de l'intervention mondiale d'urgence et les coûts encourus pour la mobilisation du soutien public sont des préjudices trop indirects pour être indemnisés—les coûts encourus pour prendre contact avec les proches et leur permettre de se rendre sur place ne sont pas susceptibles d'indemnisation—les objets personnels saisis à bord de l'*Arctic Sunrise* doivent faire l'objet d'une indemnisation équitable—en principe, les coûts salariaux sont indemnisables.

Les Pays-Bas ont le droit d'être indemnisés des frais engagés pour la constitution d'une garantie bancaire—la Fédération de Russie est tenue de rembourser aux Pays-Bas les sommes correspondant à la part russe de la consignation que la partie néerlandaise a versées pour l'arbitrage jusqu'à la date du prononcé de la sentence—le Tribunal jouit d'une grande liberté dans la détermination des intérêts—l'État lésé a droit au versement des intérêts qui permettent la réparation intégrale du préjudice—les montants accordés au titre du préjudice moral et ceux accordés au titre des dommages matériels sont soumis à des taux d'intérêt différents—les taux applicables au titre des dommages matériels sont supérieurs à ceux applicables au titre du préjudice moral—des intérêts simples sont accordés, aucune demande d'intérêts composés n'ayant été présentée—pour chaque chef de dommage, les intérêts courent à partir de la date de la sentence sur le fond au lieu de la date à laquelle le préjudice a eu lieu.

* * * * *

In the matter of the *Arctic Sunrise* Arbitration

-before-

an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea

-between-

The Kingdom of the Netherlands

-and-

The Russian Federation

Award on Compensation

Arbitral Tribunal:

Judge Thomas A. Mensah (President)

Mr. Henry Burmester

Professor Alfred H.A. Soons

Professor Janusz Symonides

Dr. Alberto Székely

Registry:

Permanent Court of Arbitration

10 July 2017

Agents, Counsel, Advisers, and other Representatives of the Parties

The Netherlands

Agent

— Professor Dr. Liesbeth Lijnzaad, Legal Adviser of the Ministry of Foreign Affairs of the Kingdom of the Netherlands

Co-Agent

— Professor Dr. René Lefeber, Deputy Legal Adviser of the Ministry of Foreign Affairs of the Kingdom of the Netherlands Counsel

— Professor Dr. Erik Franckx, Professor, Vrije Universiteit Brussel, Department of International and European Law, Centre for International Law

Party Representative

— Peter van Wulfften Palthe, Ambassador of the Kingdom of the Netherlands in Austria Advisers

— Mr. Marco Benatar, Researcher, Vrije Universiteit Brussel, Department of International and European Law, Centre for International Law

— Ms. Anke Bouma, Legal Counsel, Ministry of Infrastructure and the Environment of the Kingdom of the Netherlands

— Mr. Tom Diederen, Legal Officer, Ministry of Foreign Affairs of the Kingdom of the Netherlands

— Mr. Peter Post, Transport Adviser, Ministry of Foreign Affairs of the Kingdom of the Netherlands

— Ms. Annemarieke Vermeer, Legal Counsel, Ministry of Foreign Affairs of the Kingdom of the Netherlands

The Russian Federation

No agents, counsel, advisers, or other representatives were appointed by the Russian Federation in this arbitration

TABLE OF CONTENTS

Glossary of Defined Terms and Abbreviations

Arctic 30	The thirty persons who were on board the *Arctic Sunrise* on 14–24 September 2013
Award on Jurisdiction	Award on Jurisdiction issued by this Tribunal on 26 November 2014
Award on the Merits	Award on the Merits issued by this Tribunal on 14 August 2015
Articles on State Responsibility	ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001
Convention	United Nations Convention on the Law of the Sea, 1982
Declaration	Declaration made by Russia upon ratification of the Convention
ECtHR	European Court of Human Rights
Fourth Supplemental Pleading	The Netherlands' Fourth Supplemental Written Pleadings (Replies to Questions Posed by the Arbitral Tribunal to the Netherlands pursuant to Article 25 of the Rules of Procedure) dated 14 March 2015
Greenpeace International	Greenpeace International (Stichting Greenpeace Council)
Greenpeace International Statement of Facts	Statement of Facts by Greenpeace International dated 15 August 2014, filed by the Netherlands in this arbitration as Annex N-3
Greenpeace Claim Statement	Claim Statement by Greenpeace International dated October 2015, filed by the Netherlands in this arbitration as Annex N-48
ICJ	International Court of Justice
ILC	International Law Commission of the United Nations
ITLOS	International Tribunal for the Law of the Sea
Larsen Report	Expert report of Mr. Allan Thomas Larsen dated 17 November 2016
Memorial	The Netherlands' Memorial dated 31 August 2014
the Netherlands	The Kingdom of the Netherlands, the claimant in this arbitration
Order	Order prescribing provisional measures issued by ITLOS on 22 November 2013 in *"Arctic Sunrise"* (*Kingdom of the Netherlands* v. *Russian Federation*)
PCA (or Registry)	Permanent Court of Arbitration

Potter Report	Expert report of Mr. Iain Potter dated 20 January 2017
Parties	The Kingdom of the Netherlands and the Russian Federation
Prirazlomnaya	Offshore oil production platform located in the Pechora Sea at 69° 15'56.88" N 57° 17'17.34" E, in Russia's exclusive economic zone
Registry (or PCA)	Permanent Court of Arbitration
RHIB	Rigid hull inflatable boat
Russian Federation (or Russia)	The Russian Federation, the respondent in this arbitration
Supplementary Submission	The Netherlands' Supplementary Written Pleadings on Reparation for Injury dated 30 September 2014
Tribunal's Questions	15 questions posed by the Tribunal to the Netherlands on 28 January 2016
Updated Pleading	The Netherlands' Updated Pleading on Reparation dated 28 October 2015
WEA Accountants	WEA Noord-Holland Accountants, an independent accounting firm

I. Introduction

1. The Kingdom of the Netherlands ("the Netherlands") is the claimant in this arbitration. It is represented by Professor Dr. Liesbeth Lijnzaad, Legal Adviser of the Netherlands' Ministry of Foreign Affairs, as Agent, and Professor Dr. René Lefeber, Deputy Legal Adviser of the Netherlands' Ministry of Foreign Affairs, as Co-Agent.

2. The Russian Federation ("Russian Federation" or "Russia", and together with the Netherlands, "Parties") is the respondent. It has not appointed any agents, counsel, or other representatives.

3. The arbitration concerns measures taken by Russia against the *Arctic Sunrise*, a vessel flying the flag of the Netherlands, and the thirty persons on board that vessel ("Arctic 30"). On 18 September 2013, Greenpeace International (Stichting Greenpeace Council) ("Greenpeace International"), the charterer and operator of the *Arctic Sunrise*, used the vessel to stage a protest at the Russian offshore oil platform *Prirazlomnaya* ("*Prirazlomnaya*"), located in the Pechora Sea (the south-eastern part of the Barents Sea) within the exclusive economic zone of Russia. On 19 September 2013, in response to the protest, the *Arctic Sunrise* was boarded, seized, and detained by the Russian authorities. The vessel was subsequently towed to Murmansk (a northern Russian port city). The *Arctic Sunrise* was held in Murmansk despite requests from the Netherlands for its release. The Arctic 30 were initially arrested, charged with administrative and criminal offences, and held in custody. They were released on bail in late November 2013 and subsequently granted amnesty by decree of the Russian State Duma on 18 December 2013. The non-Russian nationals were permitted to leave Russia shortly thereafter. On 6 June 2014, the arrest of the *Arctic Sunrise* was lifted. The ship departed from Murmansk on 1 August 2014 and arrived in Amsterdam on 9 August 2014.

4. In earlier stages of these proceedings, the Netherlands claimed that, in taking the measures described above against the *Arctic Sunrise* and the Arctic 30, Russia had violated its obligations toward the Netherlands under the United Nations Convention on the Law of the Sea ("Convention")[1] and customary international law. The Netherlands also claimed that Russia had violated the Convention by failing to comply fully with the order on provisional measures ("Order") prescribed by the International Tribunal for the Law of the Sea ("ITLOS") and by failing to participate in these arbitral proceedings.

5. In a *Note Verbale* to the Netherlands dated 22 October 2013,[2] Russia referred to the declaration it made when ratifying the Convention ("Declaration"). In the Declaration, Russia stated that it does "not accept 'the procedures provided for in section 2 of Part XV of the Convention entailing binding decisions with respect to disputes … concerning law-enforcement activities

[1] 1982, vol. 1833, UNTS, p. 396.

[2] Annex N-17. All references to an Annex with a prefix N are references to an Annex to the Memorial of the Netherlands.

in regard to the exercise of sovereign rights or jurisdiction.'" By another *Note Verbale*, dated 27 February 2014 and addressed to the Permanent Court of Arbitration ("PCA" or "Registry"), Russia stated that "[t]he Russian side confirms its refusal to take part in this arbitration and abstains from providing comments both on the substance of the case and procedural matters."[3]

6. On 26 November 2014, the Tribunal issued its Award on Jurisdiction ("Award on Jurisdiction"), unanimously deciding that:

> 1. The Declaration of Russia upon ratification of the Convention does not have the effect of excluding the present dispute from the procedures of Section 2 of Part XV of the Convention and, therefore, does not have the effect of excluding the present dispute from the jurisdiction of the Tribunal.
>
> 2. All issues not decided in this Award on Jurisdiction, including all other issues relating to jurisdiction, admissibility, and merits, are reserved for further consideration.

7. On 14 August 2015, the Tribunal issued its Award on the Merits ("Award on the Merits"), deciding matters of jurisdiction that were not decided in the Award on Jurisdiction, as well as matters of admissibility and the merits of the Netherlands' claims. The operative part of the Award on the Merits reads as follows:

> For the above reasons, the Tribunal unanimously:
>
> *A.* *Finds* that it has jurisdiction over all the claims submitted by the Netherlands in this arbitration;
>
> *B.* *Finds* that all the claims submitted by the Netherlands in this arbitration are admissible;
>
> *C.* *Finds* that by boarding, investigating, inspecting, arresting, detaining, and seizing the *Arctic Sunrise* without the prior consent of the Netherlands, and by arresting, detaining, and initiating judicial proceedings against the Arctic 30, the Russian Federation breached obligations owed by it to the Netherlands as the flag State under Articles 56(2), 58(1), 58(2), 87(1)(*a*), and 92(1) of the Convention;
>
> *D.* *Finds* that by failing to comply with Paragraphs (1) and (2) of the *dispositif* of the ITLOS Order, the Russian Federation breached its obligations to the Netherlands under Articles 290(6) and 296(1) of the Convention;
>
> *E.* *Finds* that by failing to pay its share of the deposits requested in procedural directions issued by the Tribunal to cover its fees and expenses in this arbitration, the Russian Federation has breached its obligations under Part XV and Article 300 of the Convention;
>
> *F.* *Finds* that the Netherlands is entitled to compensation for:
>
> 1. damage to the *Arctic Sunrise*, including physical damage

[3] Annex N-34.

to the vessel, resulting from the measures taken by the Russian Federation, and costs incurred to prepare the vessel for its return voyage from Murmansk to Amsterdam; as well as costs incurred due to loss of use of the *Arctic Sunrise* during the relevant period;

2. non-material damage to the Arctic 30 for their wrongful arrest, prosecution, and detention in the Russian Federation;
3. damage resulting from the measures taken by the Russian Federation against the Arctic 30, including the costs of bail paid as security for their release from custody, expenses incurred during their detention in the Russian Federation, and costs in respect of the persons detained between their release from prison and their departure from the Russian Federation; and
4. the costs incurred by the Netherlands for the issuance of the bank guarantee to the Russian Federation pursuant to the ITLOS Order;

G. *Finds* that the Netherlands is entitled to interest, at a rate to be decided by the Tribunal, on the amounts referred to in sub-paragraphs F and I of this paragraph;

H. *Orders* the Russian Federation to return to the Netherlands, by 14 October 2015, all objects belonging to the *Arctic Sunrise* and the persons on board the vessel at the time of its seizure that have not yet been returned, and, failing the timely restitution of these objects, to compensate the Netherlands for the value of any objects not returned;

I. *Orders* the Russian Federation immediately to reimburse the Netherlands the amounts of Russia's share of the deposits paid by the Netherlands;

J. *Decides* that the fees and expenses of the Tribunal incurred to date shall be borne by the Parties in equal shares;

K. *Decides* that each Party shall bear its own costs incurred to date (including the expenses referred to in paragraph 396 above); and

L. *Reserves* all questions concerning quantum of compensation and interest to a later phase of these proceedings.[4]

8. In its Award on the Merits, the Tribunal also noted that Russia had not participated in this arbitration at any stage.[5] Following the issuance of that Award, Russia has maintained its decision not to participate in this arbitration.

9. In the present Award, the Tribunal will give its findings on the questions that were not decided in the Award on the Merits, namely on all questions concerning quantum of compensation and interest.

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[4] Award on the Merits, para. 401.

[5] Award on the Merits, para. 7. Regarding Russia's non-participation in these proceedings, see also Award on the Merits, paras. 8–19.

II. Procedural History

10. A detailed history of this arbitration is set out in the Award on the Merits. In the present procedural summation, the Tribunal records only key developments subsequent to the issuance of that Award.

11. As noted above, the Award on the Merits was issued on 14 August 2015. It was sent by the PCA to the Parties by e-mail and courier. Hard copies of the Award were received by the Netherlands on 17 August 2015, by the Russian Ambassador to the Netherlands in The Hague on 17 August 2015, and by the Ministry of Foreign Affairs in Moscow on 19 August 2015.

12. By letter dated 14 August 2015, the Tribunal invited preliminary comments from the Parties regarding the conduct of the compensation phase of these proceedings and, in particular, invited Russia to indicate whether it intended to participate in the compensation phase.

13. By letter dated 14 September 2015, the Netherlands requested that the Tribunal proceed with the compensation phase. Russia did not provide any comments.

14. On 2 October 2015, the Tribunal fixed a calendar for the first steps of the compensation phase. In earlier stages of these proceedings, the Netherlands had made submissions on the question of reparation, first, in its Memorial dated 31 August 2014 ("Memorial"), which it submitted together with, as Annex N-3, a "Statement of Facts" prepared by Greenpeace International ("Greenpeace International Statement of Facts") and, second, in its Supplementary Written Pleadings on Reparation for Injury dated 30 September 2014 ("Supplementary Submission"). In the calendar for the compensation phase, the Netherlands was invited to update these pleadings on reparation by 2 November 2015 and the Russian Federation was invited to indicate, by 17 November 2015, whether it intended to submit a response to the Netherlands' updated pleadings on reparation, which response would be due by 17 December 2015.

15. On 28 October 2015, the Netherlands submitted its Updated Pleading on Reparation ("Updated Pleading"), together with, as Annex N-48, a "Claim Statement" prepared by Greenpeace International ("Greenpeace Claim Statement").

16. By letter dated 30 October 2015, the Netherlands, having received additional information from Greenpeace International, reduced the amount of the compensation claim stated in its Updated Pleading.

17. By letter dated 28 January 2016, the Tribunal posed 15 questions to the Netherlands arising from its Updated Pleading ("Tribunal's Questions"). The Tribunal invited the Netherlands to respond to these questions by 14 March 2016 and indicated that, upon communication of the Netherlands' responses to Russia, the latter would have 15 days to indicate whether it intended to submit any comments thereon, noting that if it did, it would have 30 days to submit such comments.

18. On 14 March 2016, the Netherlands submitted its Fourth Supplemental Written Pleadings, responding to the Tribunal's questions of 28 January 2016 ("Fourth Supplemental Pleading").

19. By letter dated 13 June 2016, the Tribunal noted that Russia had neither indicated an intention to submit nor submitted any comments on the Netherlands' Fourth Supplemental Pleading within the time periods granted, and informed the Parties that it was minded to appoint an accounting expert and a marine surveying expert pursuant to Article 24(1) of its Rules of Procedure.

20. On 4 July 2016, the Secretary-General of the PCA appointed Ms. Evgeniya Goriatcheva as Registrar for these proceedings, upon the conclusion of the term of employment with the PCA of the previous Registrar, Ms. Sarah Grimmer.

21. By letter dated 12 August 2016, the Tribunal invited the Parties to comment on the proposed appointment of Messrs. Iain Potter and Allan Thomas Larsen as Tribunal experts and on their draft Terms of Reference.

22. The Parties did not make any comments on the proposed appointment of Messrs. Potter and Larsen as Tribunal experts or on their draft Terms of Reference.

23. By letter dated 8 September 2016, noting that the Parties had provided no comments, the Tribunal informed them that it would invite Messrs. Potter and Larsen to sign their Terms of Reference.

24. On 12 September 2016, the Tribunal provided the Parties with copies of the signed Terms of Reference of Messrs. Potter and Larsen. Pursuant to their Terms of Reference, Messrs. Potter and Larsen were to report in writing to the Tribunal on certain accounting and marine surveying issues, respectively.

25. In the same letter, the Tribunal invited the Netherlands to provide certain additional documents to Mr. Potter by 26 September 2016, in accordance with his Terms of Reference. At the request of the Netherlands, the deadline for the submission of additional documents was subsequently extended to 17 October 2016.

26. On 25 September 2016, the Tribunal transmitted to the Parties a request from Mr. Larsen for certain additional information and documents, and invited the Netherlands to provide the requested information and documents by 17 October 2016.

27. On 17 October 2016, the Netherlands submitted additional information and documents pursuant to Mr. Potter's Terms of Reference and Mr. Larsen's request.

28. By letter dated 7 November 2016, Mr. Potter requested clarifications from the Tribunal regarding the scope of his assignment.

29. On 23 November 2016, the Tribunal transmitted Mr. Larsen's expert report dated 17 November 2016 ("Larsen Report") to the Parties and invited them to provide their comments thereon by 21 December 2016. At the request of the Netherlands, this deadline was subsequently extended to 1 February 2017.

30. Having sought the views of the Parties on Mr. Potter's letter of 7 November 2016, the Tribunal provided additional instructions to Mr. Potter on 2 December 2016.

31. On 24 January 2017, the Tribunal transmitted Mr. Potter's expert report dated 20 January 2017 ("Potter Report") to the Parties and invited them to provide their comments thereon by 21 February 2017.

32. By letters dated 31 January and 17 February 2017, the Netherlands provided its comments on the Larsen Report and the Potter Report, respectively.

33. The Russian Federation did not provide any comments on the reports of the Tribunal-appointed experts.

III. Quantum of Damages

34. As noted above, in its Award on the Merits, the Tribunal identified the heads of damages for which the Netherlands is entitled to compensation and reserved the question of the quantum of such compensation to a later phase of the proceedings. In this Section, the Tribunal determines the quantum of compensation to which the Netherlands is entitled under each head of damages identified in the Award on the Merits.

A. Damage to the *Arctic Sunrise*

1. The Netherlands' claim

35. In its Award on the Merits, the Tribunal found that the Netherlands is entitled to compensation for "damage to the *Arctic Sunrise*, including physical damage to the vessel, resulting from the measures taken by the Russian Federation, and costs incurred to prepare the vessel for its return voyage from Murmansk to Amsterdam; as well as costs incurred due to loss of use of the *Arctic Sunrise* during the relevant period."[6] The Tribunal also ordered Russia to compensate the Netherlands for the value of "all objects belonging to the *Arctic Sunrise*" that were not returned to the Netherlands by 14 October 2015.[7]

36. The Netherlands submits that the compensation to which it is entitled under this head of damages amounts to a total of EUR 1,799,546,[8] composed of the following items:[9]

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[6] Award on the Merits, para. 401(*F*)(1). Reproduced in full at paragraph 7 above.

[7] Award on the Merits, para. 401(*H*). Reproduced in full at paragraph 7 above.

[8] The Netherlands last updated the total amount claimed under this head of damages in its letter to the Tribunal of 30 October 2015, in which the total was stated as EUR 1,824,121. However, the amount of one of the items composing this total was revised in the Netherlands' Fourth Supplemental Pleading (pp. 2–3, paras. 6–7). When this revision is taken into account and all the amounts in Table A are summed up, the total amount claimed becomes EUR 1,799,546.

[9] Updated Pleading, paras. 5–6; Greenpeace Claim Statement (Annex N-48); Letter from the Netherlands to the Tribunal dated 30 October 2015; Fourth Supplemental Pleading, pp. 2–3, 9–10.

Table A

#	*Category*	*Amount claimed (in EUR)*
1.	**Restitution/replacement of objects belonging to the Arctic Sunrise**	**269,037**
1.1.	Moving and shipping of returned objects	26,889
1.2.	Replacement of rigid hull inflatable boats ("RHIBs")	164,496[10]
1.3.	Replacement of other equipment	2,386
1.4.	Ship's inventory	75,266[11]
2.	**Repair of damage and pollution caused to the Arctic Sunrise during the detention of the ship**	**367,078**
2.1.	Mobilising public support for the release of the *Arctic Sunrise*	8,896
2.2.	Legal fees of Russian cases; postage/courier	96,558
2.3.	Relevant share of standby crew cost (rest in item 4 below)	62,723
2.4.	Relevant share of the costs of the Arctic 30/*Arctic Sunrise* emergency response team (rest in item 3.1 of Table B below)	198,563
2.5.	Costs related to emergency response in Russia	338
3.	**Resuming the operation of the Arctic Sunrise**	**197,353**
3.1.	Condition Survey Report by Murmansk P&I Agency and MLC Inspection Survey, 2 July 2014	17,589
3.2.	Crew related (outside of regular salary) cost (travel, accommodation, subsistence)	32,215
3.3.	Telecommunications and rent/office use	12,097
3.4.	Harbour (port) fees, agent, pilot, tug, dryer and van rental	18,862

[10] Fourth Supplemental Pleading, pp. 2–3, paras. 6–7.

[11] *See* Letter from the Netherlands to the Tribunal dated 30 October 2015, explaining that an amount of EUR 7,646 should be deducted from the cost of the ship's inventory, previously stated as EUR 82,912 in the Greenpeace Claim Statement (Annex N-48).

3.5.	*a.* Resupplying of the ship (fuel, oil and victual lost during the detention of the ship)	54,030
	b. Other resupplies including fire and safety items, radio, charts	12,721
3.6.	Dry-docking and wood work	49,839
4.	**Return voyage of the Arctic Sunrise from Murmansk to Amsterdam**	**161,413**
4.1.	Fuel	27,543
4.2.	Crew	129,689
4.3.	Crew travel/VSAT	4,181
5.	**Loss of use of the Arctic Sunrise**	**804,665**
5.1.	Loss of hire for the period up to and including the detention of the ship in Murmansk (18 September 2013 until 6 June 2014)	556,699
5.2.	Loss of hire for the period after release of the ship until return in the Netherlands (7 June until 9 August 2014)	140,274
5.3.	Loss of hire for the period of repairs in the Netherlands (10 August until 27 September 2014)	107,692
	Total	**1,799,546**

2. The Tribunal's analysis

(a) Non-compensable categories of claim

37. Having found in the Award on the Merits that the Netherlands is entitled to compensation for damage to the *Arctic Sunrise* in principle, the Tribunal at this stage of the proceedings has considered whether the specific categories of damage set out in Table A above are compensable. For the reasons stated in Section III.C.2(*a*) below, the Tribunal finds that the Netherlands' claim for compensation for the costs of mobilising public support for the release of the *Arctic Sunrise*, identified in Table A above as item 2.1, is not compensable.

(b) Replacement of the RHIBs

38. Under item 1.2 of Table A above, the Netherlands requests compensation in the amount of EUR 164,496 for the value of six RHIBs belonging to the *Arctic Sunrise*. Five of these RHIBs were used during the protest action of

18 September 2013. All six were seized by the Russian authorities when the vessel was boarded on 19 September 2013. They were returned on 12 May 2015.

39. The Netherlands arrives at the total value of the claim by subtracting the residual value of the returned RHIBs (EUR 87,350) from the cost of their replacement incurred by Greenpeace International (EUR 251,846).[12] While noting that the net book value of the RHIBs on 17 September 2013 was EUR 25,395.82, as a result of the practice of Greenpeace International of depreciating its RHIBs in five years, the Netherlands asserts that RHIBs continue to be used after five years and that, on 17 September 2013, the six RHIBs of the *Arctic Sunrise* were "fit for use in a protest action."[13] The Netherlands therefore concludes that the cost of replacement of the RHIBs is the "best estimate for the[ir] fair market value."[14]

40. The Tribunal asked its maritime surveying expert, Mr. Larsen, to report on whether the amount claimed by the Netherlands for the replacement value of the RHIBs was well-founded and reasonable.[15] As noted in the procedural history above, Mr. Larsen sought and received clarifications from the Netherlands in the course of the preparation of his report.

41. The key points of Mr. Larsen's report are as follows. Mr. Larsen agreed with the Netherlands that the book value of the RHIBs would not reflect their fair market value.[16] However, he concluded that the amount claimed by the Netherlands was "not fully supported" and therefore not "well founded".[17] Mr. Larsen stated, *inter alia*, that, given the evidence of earlier damage and repairs, the condition of the RHIBs on 17 September 2013 could not be considered "good" or "fit for use in a protest action."[18] He also noted that there is evidence of damage having been caused to five of the RHIBs during the protest action of 18 September 2013.[19] Further, Mr. Larsen opined that the replacement cost of the RHIBs should be "based on a like for like basis," in respect of "age, specification and condition of each RHIB."[20] He observed that, here, two of the RHIBs, each 18 years old, were replaced by new RHIBs, such that the full reimbursement of the replacement cost would create a financial gain for Greenpeace International.[21] Regarding the other RHIBs, Mr. Larsen indicated that the Netherlands did not provide him with the requested specification

[12] Fourth Supplemental Pleading, pp. 2–3, paras. 6–7.

[13] Fourth Supplemental Pleading, pp. 1–2, paras. 1, 4–5.

[14] Fourth Supplemental Pleading, p. 3, para. 7.

[15] Terms of Reference of Mr. Allan Larsen, para. 4.1.

[16] Larsen Report, p. 132, lines 1466–1467.

[17] Larsen Report, p. 134, lines 1537–1538.

[18] Larsen Report, p. 131, lines 1435–1436.

[19] Larsen Report, pp. 87–89.

[20] Larsen Report, p. 134, lines 1517–1518.

[21] Larsen Report, p. 134, lines 1499–1500, 1506–1507.

details, making it impossible to determine whether they were replaced on a like for like basis.[22]

42. In its comments on Mr. Larsen's report,[23] the Netherlands submitted that he had exceeded the scope of his assignment by commenting on the lawfulness of the events of 18 September 2013 and dismissing certain facts already established in the Award on the Merits. To the extent that Mr. Larsen's conclusions were affected by this dismissal of previously established facts, the Netherlands requested the Tribunal not to take these conclusions into account in its decision.

43. Additionally, the Netherlands argued that the criteria employed by Mr. Larsen in respect of the condition and fitness for use of the RHIBs on 17 September 2013 were "too stringent" and "not in line with marine surveying practice." In the view of the Netherlands, the photo and video evidence of the protest action of 18 September 2013 demonstrates that the RHIBs were fit for use. The Netherlands further argued that it would have been appropriate for the expert to address the likelihood of possible aggravation of the damage to the RHIBs caused during the protest action as a result of the lack of maintenance during their detention. With respect to the replacement cost of the RHIBs, the Netherlands indicated that it "subscribes to the conclusion that replacement should be on a 'like for like' basis," but asked the Tribunal to take into account that, during the period when the RHIBs were held by the Russian authorities, Greenpeace International was "required to replace the RHIBs in a timely manner in order to be able to continue its operations." Some RHIBs were replaced by new RHIBs due to the unavailability of adequate replacements on the second-hand market. Finally, the Netherlands argued that Mr. Larsen should have provided an estimate of the fair market value of equivalent RHIBs and that, in the absence of such estimate, the Tribunal should award the amount as claimed by the Netherlands.

44. Having carefully reviewed the report of Mr. Larsen and the submissions of the Netherlands, as well as the supporting documentation, the Tribunal observes, as an initial matter, that whereas in its claim the Netherlands submitted that the cost of replacement of the RHIBs was EUR 251,846, this figure was later corrected to EUR 246,070 in a letter dated 17 October 2016 from Greenpeace International, which was provided to the expert by the Netherlands in response to a clarification request. Although the Netherlands did not formally amend its request for relief, it appears that the correct figure of its claim for the RHIBs is EUR 158,720 (the replacement cost of EUR 246,070 minus the residual value of the returned RHIBs of EUR 87,350).

45. Further, the Tribunal notes that, insofar as Mr. Larsen may have exceeded the scope of his mandate by commenting on certain issues of fault pertaining to the events of 18 September 2013 or on issues already decided in

[22] Larsen Report, p. 133, lines 1502–1504.

[23] Letter from the Netherlands to the Tribunal dated 31 January 2017.

the Award on the Merits, the Tribunal has disregarded such comments. In any event, they are not pertinent to the assessment of the quantum of compensation owed by Russia to the Netherlands in respect of the RHIBs.

46. Extraneous comments aside, Mr. Larsen's report has confirmed the appropriateness of resorting to replacement cost as an indicator for the fair market value of the RHIBs, while also bringing to light an important weakness of the Netherlands' claim.

47. In his report, Mr. Larsen made the sound observation that the replacement cost of the RHIBs should be assessed on a like for like basis. The Tribunal agrees with Mr. Larsen in this respect and finds, more specifically, that the replacement cost to which the Netherlands is entitled is that of boats of equivalent age, specification, and condition to the RHIBs of the *Arctic Sunrise* as they were before Russia's first breach of its obligations under the Convention—that is, as they were before the boarding, seizure, and detention of the *Arctic Sunrise* on 19 September 2013.[24]

48. In comparing the replacement RHIBs with the RHIBs of the *Arctic Sunrise*, Mr. Larsen opined that at least two older RHIBs were replaced by newer ones, whereas insufficient information was submitted by the Netherlands to assess whether the other RHIBs of the *Arctic Sunrise* were replaced with equivalent boats. Mr. Larsen further observed that prior to the protest action of 18 September 2013, the RHIBs of the *Arctic Sunrise* may not have been in perfect condition. Additionally, it is plain from the materials in the record that some damage was caused to the RHIBs during the action of 18 September 2013.[25]

49. The Netherlands recognized both that replacement should be on a like for like basis and that in the present case some of the replacement RHIBs were newer than the RHIBs of the *Arctic Sunrise*.[26] Regarding the latter point, the Netherlands explained that new RHIBs had to be acquired due to the unavailability of adequate replacements on the second-hand market.[27] While this may be so, in the view of the Tribunal the explanation proffered by the Netherlands fails to address the crux of the issue, namely, that the award of the full amount claimed by the Netherlands would create a windfall. If the Tribunal were to make such an award, the Netherlands would receive monetary compensation equivalent to the full replacement value of the RHIBs (minus the residual value of the RHIBs of the *Arctic Sunrise*), while Greenpeace International would also keep the replacement RHIBs themselves, which, based on the Netherlands' own submission,[28] no doubt retain a certain residual value after only a few years of use. This result is not acceptable. The Netherlands is

[24] Award on the Merits, paras. 333, 401.

[25] *See* Award on the Merits, para. 90. *See also* Larsen Report, pp. 90–92, Table 10, listing collisions between the RHIBs on 18 September 2013 based on video evidence in the record.

[26] Letter from the Netherlands to the Tribunal dated 31 January 2017.

[27] Letter from the Netherlands to the Tribunal dated 31 January 2017.

[28] For the assertion of the Netherlands that RHIBs continue to be used after five years, see Fourth Supplemental Pleading, p. 2, para. 5.

entitled to full compensation of the loss directly caused by Russia's unlawful conduct; it is not, however, entitled to be put in a better position than that in which it would have been absent such unlawful conduct. Accordingly, the Tribunal's award of damages must reflect the fact that the replacement RHIBs will remain in the possession of Greenpeace International after this Award is rendered.

50. As noted by the Netherlands, Mr. Larsen has not quantified the changes that should be made to the claim submitted by the Netherlands to account for the deficiencies in its methodology. It does not follow, however, contrary to the submission of the Netherlands, that the claim should be granted as made. Mr. Larsen was only asked to opine on *whether* the claim is reasonable. In contrast, it was for the Netherlands to *prove* that its claim is reasonable and well founded.

51. In light of the information provided by the Netherlands and the expert's report, the Tribunal considers that the Netherlands is entitled to compensation for the costs arising from the seizure of the RHIBs of the *Arctic Sunrise*, but that the amount claimed is disproportionate. In the absence of precise information regarding the residual value of the replacement RHIBs and given the circumstances of the case, the Tribunal finds that it is reasonable to award 50 percent of the amount claimed (as identified in paragraph 44 above).

(c) Categories of claim audited by WEA Accountants

52. In support of the claims identified in Table A above as items 1, 2.1, 2.2, 2.5, 3.1–3.4, 3.5(*b*), 3.6, and 4.3 (as well as certain other claims addressed in Section III.C.2(*c*) below), the Netherlands submitted two costs overviews audited by an independent accounting firm, WEA Noord-Holland Accountants ("WEA Accountants").[29]

53. These overviews set forth amounts for broadly identified categories of costs, but did not include an itemized list of costs or supporting documentation. Additionally, the categories in the costs overviews were different from those in the Greenpeace Claim Statement (and reproduced in Table A above).

54. In view of the format of the Netherlands' submission, the Tribunal requested its accounting expert, Mr. Potter, to "review the costs overviews prepared by WEA Accountants … and issue a report on whether the amounts claimed are, in the Expert's opinion, reasonably based."[30] The Tribunal specified that "a reasonable approach would be for the Expert to limit his review to the items with values exceeding EUR 1,000."[31] The Tribunal also requested the Netherlands to provide the expert with "an itemized list and supporting

[29] *See* Greenpeace Claim Statement (Annex N-48), appendices 1 and 2.

[30] Terms of Reference of Mr. Iain Potter, para. 4.1.

[31] Letter from the Tribunal to the Parties dated 2 December 2016.

documentation for all the amounts claimed in the costs overviews."[32] As noted in the procedural history above, while preparing his report, the expert sought and received further clarifications from the Netherlands.

55. In his report, Mr. Potter first categorized the transactions with values exceeding EUR 1,000 that were listed in the costs overviews prepared by WEA Accountants as "supported", "unsupported", and "uncertain", based on the documentation made available to him.[33] He then determined what percentage of transactions set forth in each costs overview was supported, unsupported, or uncertain,[34] and applied these percentages to transactions with values below EUR 1,000.[35] In the first of the two costs overviews, Mr. Potter also identified a number of transactions involving expense claims for which he was unable to reconcile the amounts shown on the itemised list submitted by the Netherlands and the supporting documentation. Noting that it "would likely be time-consuming to investigate these individually and seek Greenpeace's assistance with reconciling each one," Mr. Potter assumed that "these transactions [were] likely to be supported to the same extent as the others which [he had] reviewed" and applied the percentages of supported, uncertain, and unsupported transactions in the same manner as for transactions with values below EUR 1,000.[36] Having done so, Mr. Potter arrived at total figures for transactions that he considered (i) supported and hence reasonably based; (ii) unsupported and therefore not reasonably based; and (iii) uncertain, in the sense that he could not formulate an opinion on them without additional information from the Netherlands.[37] Overall, expressed in percentage, Mr. Potter's conclusion was that 94.5 percent of the costs claimed on the basis of the overviews prepared by WEA Accountants were supported and therefore reasonably based.[38]

56. In its comments on Mr. Potter's report,[39] the Netherlands sought to justify some of the transactions that he had designated as "uncertain", for a total value of EUR 94,563.92. Specifically, the Netherlands submitted that the VAT charges questioned by Mr. Potter represent a "genuine unrecoverable cost" for Greenpeace International because it is registered in the Netherlands as a charitable organization and is not entitled to reimbursement of VAT or reverse charges. In respect of amounts claimed for hotel accommodation that were supported only by template invoices, the Netherlands explained that "due to the circumstances at the time no individual invoices could be collected," such that the costs "were collected in advance and approved by the Deputy

[32] Terms of Reference of Mr. Iain Potter, para. 4.2.

[33] Potter Report, Sections 3 and 4.

[34] Mr. Potter determined that 94 and 95 percent of transactions were supported in the first and second costs overviews, respectively. Potter Report, paras. 3.35, 3.36, 4.8.

[35] Potter Report, paras. 3.36, 4.8.

[36] Potter Report, paras. 3.34, 3.35.

[37] Potter Report, para. 6.6.

[38] *See* Potter Report, para. 6.5.

[39] Letter from the Netherlands to the Tribunal dated 17 February 2017.

Programme Director of Greenpeace." In support, the Netherlands submitted a copy of an e-mail containing this approval. Finally, the Netherlands drew the attention of the Tribunal to two invoices in the record supporting another transaction identified as uncertain by Mr. Potter.

57. Having carefully reviewed Mr. Potter's report, the Tribunal is satisfied that it may be used as a basis for the Tribunal's determination regarding the categories of costs supported by the overviews of WEA Accountants. The expert fulfilled his mandate of verifying the costs overviews, in the process clearly describing his methodology, as well as any areas of doubt arising from the lack of supporting documentation. In his approach to transactions with values below EUR 1,000 and unreconciled expense claims, he struck a reasonable balance taking account of his mandate to verify the claims and the time and cost involved in such verification. Accordingly, the Tribunal accepts Mr. Potter's methodology. The Tribunal also notes that the Netherlands did not object to or make any comment on Mr. Potter's methodology.

58. At the same time, the Tribunal is unable to directly adopt the specific percentage of supported claims arrived at by Mr. Potter, because the Netherlands has provided additional explanations and supporting documentation since the filing of his report. On the basis of these additional explanations and documents, the Tribunal concludes that transactions in the total amount of EUR 94,563.92 should be moved from the expert's "uncertain" category to his "supported" category.

59. Having thus re-categorized certain transactions and applying Mr. Potter's methodology, the Tribunal has recalculated the percentage of supported transactions with values exceeding EUR 1,000, arriving at the figures of 98.3 and 99.7 percent in the first and second costs overviews prepared by WEA Accountants, respectively.[40] Once these percentages are applied to transactions with values below EUR 1,000 as well as to unreconciled expense claims, it emerges that, overall, 98.6 percent of the costs claimed by the Netherlands on the basis of the costs overviews prepared by WEA Accountants are supported.[41]

60. Accordingly, the Tribunal will apply this percentage (98.6) to each category of claim supported by the costs overviews that it considers compensable in principle, in order to obtain the amount of compensation to which the Netherlands is entitled.

61. Of the categories of claim set out in Table A that are supported by the costs overviews, the Tribunal considers that items 1.1, 1.3–1.4, 2.2, 2.5, 3.1–3.4, 3.5(*b*), 3.6, and 4.3 are in principle compensable as elements of damage to the *Arctic Sunrise*. As stated in paragraphs 37 and 51 above, the Tribunal considers that the claim under item 2.1 of Table A is not compensable and that only 50 percent of the claim identified under item 1.2 is compensable.

[40] For the basis of this calculation, see Potter Report, paras. 3.35 and 4.8.

[41] For the basis of this calculation, see Potter Report, paras. 3.35, 3.36, 4.8, 6.3, 6.4, and 6.5.

62. The total amount of the compensable items is therefore EUR 428.301,[42] which, multiplied by 98.6 percent, yields EUR 422,304.79 as the amount of compensation owed by Russia to the Netherlands for the part of the damage to the *Arctic Sunrise* that is claimed on the basis of the costs overviews prepared by WEA Accountants (items 1, 2.1, 2.2, 2.5, 3.1–3.4, 3.5(*b*), 3.6, and 4.3 of Table A above).

(d) Other categories of claim

63. In support of the remaining claims, identified in Table A above as items 2.3, 2.4, 3.5(*a*), 4.1, 4.2, and 5, the Netherlands submitted detailed supporting documentation.

64. With respect to item 4, the Tribunal asked the Netherlands to explain whether there is a difference between the amount claimed as the cost of the return voyage of the *Arctic Sunrise* from Murmansk to Amsterdam and the costs that would have been incurred for the return voyage of the *Arctic Sunrise* from the *Prirazlomnaya* to Amsterdam had the vessel not been boarded and detained by the Russian authorities.[43] The Netherlands replied that "a difference is made between a regular onward or return voyage of the *Arctic Sunrise*, and th[is] particular return voyage."[44] According to the Netherlands, a Greenpeace ship manager will seek to ensure that each voyage serves a business purpose and the return costs incurred during a voyage serving a business purpose will be attributed to that particular purpose. However, in the present case, "due to the damages inflicted to the *Arctic Sunrise* during boarding and detention, it was unfit for any normal business activity and the entire voyage was undertaken solely for the purpose of a return to dock for repairs."[45] Accordingly, "[t]he costs of the return voyage could … not be attributed, or partly attributed, to another business purpose."[46]

65. With respect to item 5, in response to a question from the Tribunal,[47] the Netherlands explained that it should be compensated for the loss of hire of the *Arctic Sunrise* for the period following its return to Amsterdam on 9 August 2014, because at the time the vessel was "not fit for service" and had to remain at the dock for repairs until 27 September 2014.[48]

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[42] EUR 26,889 (item 1.1) + (0.5 * EUR 158,720 (item 1.2, as corrected in para. 44 above)) + EUR 2,386 (item 1.3) + EUR 75,266 (item 1.4) + EUR 96,558 (item 2.2) + EUR 338 (item 2.5) + EUR 17,589 (item 3.1) + EUR 32,215 (item 3.2) + EUR 12,097 (item 3.3) + EUR 18,862 (item 3.4) + EUR 12,721 (items 3.5(*b*)) + EUR 49,839 (item 3.6) + EUR 4,181 (item 4.3).

[43] Tribunal's Questions, Question 3.

[44] Fourth Supplemental Pleading, p. 4, para. 1.

[45] Fourth Supplemental Pleading, p. 4, para. 2.

[46] Fourth Supplemental Pleading, p. 4, para. 2.

[47] Tribunal's Questions, Question 5.

[48] Fourth Supplemental Pleading, p. 5. *See also* p. 10.

66. On the basis of these explanations and having carefully reviewed the supporting documentation, the Tribunal finds that the categories of claims identified in Table A above as items 2.3, 2.4, 3.5(*a*), 4.1, 4.2, and 5 are compensable in principle.

67. At the same time, the Tribunal's review of the documentation shows that small adjustments must be made to the amounts claimed. With respect to the amounts claimed under items 2.4 and 5.1, the Netherlands calculated costs arising from crew salaries and the loss of hire of the *Arctic Sunrise* starting from 18 September 2013.[49] However, in the view of the Tribunal, the only costs that may be compensated are those incurred after Russia first breached the Convention by boarding, seizing, and detaining the *Arctic Sunrise*, starting from 19 September 2013. Accordingly, the amount claimed under item 2.4 must be reduced by EUR 2,071.95[50] and the amount claimed under item 5.1, by EUR 2,024.66.[51] A further downward adjustment of EUR 295 must be made to item 5.3 to correct for a minor mathematical error.[52]

68. Having made the adjustments described in the preceding paragraph, the Tribunal concludes that the amount of compensation owed by Russia to the Netherlands for the part of the damage to the *Arctic Sunrise* claimed under items 2.3, 2.4, 3.5(*a*), 4.1, 4.2, and 5 of Table A above is EUR 1,272,821.39.[53]

(e) Conclusion

69. In light of the conclusions set out at paragraphs 62 and 68 above, the Tribunal finds that Russia owes the Netherlands EUR 1,695,126.18 in compensation for damage to the *Arctic Sunrise*.

B. Non-Material Damage to the Arctic 30

1. The Netherlands' claim

70. In its Award on the Merits, the Tribunal found that the Netherlands is entitled to compensation for "non-material damage to the Arctic 30 for their wrongful arrest, prosecution, and detention in the Russian Federation."[54]

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[49] Greenpeace Claim Statement (Annex N-48), Appendix 6.1; Fourth Supplemental Pleading, p. 9.

[50] For the basis of this calculation, see Greenpeace Claim Statement (Annex N-48), Appendix 6.1, p. 2.

[51] For the basis of this calculation, see Fourth Supplemental Pleading, p. 9.

[52] In calculating the loss of hire of the *Arctic Sunrise* for the period from 10 August until 27 September 2014, the Netherlands carries out the following calculation: 49 days * EUR 800,000/365 days. It arrives at a total of EUR 107,692, instead of EUR 107,397. Fourth Supplemental Pleading, p. 10.

[53] EUR 62,723 (item 2.3) + (EUR 198,563 – EUR 2,071.95) (item 2.4) + EUR 54,030 (item 3.5(*a*)) + EUR 27,543 (item 4.1) + EUR 129,689 (item 4.2) + (EUR 804,665 – EUR 2,024.66 – EUR 295) (item 5).

[54] Award on the Merits, para. 401(*F*)(2).

71. In respect of this head of damages, the Netherlands requests compensation at a rate of EUR 1,000 per person per day of detention. Submitting that the Arctic 30 were wrongfully detained for a combined period of 1719 days, it claims compensation in a total amount of EUR 1,719,000.[55]

72. Without explicitly stating so, the Netherlands appears to calculate the duration of detention from the various dates on which the Arctic 30 were remanded into custody by court order (26, 27, or 29 September 2013) to the dates of their release on bail (between 20 November and 2 December 2013).[56]

2. The Tribunal's analysis

73. With respect to the award of non-material damages, the Netherlands refers the Tribunal to two cases, namely the ITLOS judgment in *M/V "SAIGA" (No. 2)* and the decision of the International Court of Justice ("ICJ") in *Ahmadou Sadio Diallo*.[57] Specifically, the Netherlands submits that its claim for non-material damages in the amount of EUR 1,000 per person per day of wrongful detention is "comparable" to the daily sum of USD 1,180 granted in the *Diallo* case.[58]

74. The Tribunal is mindful of Judge Greenwood's comments in his Declaration in the *Diallo* case. In that case, Judge Greenwood noted that a tribunal seized of the task of assessing non-material damages ought not merely select an arbitrary figure but apply principles that are "capable of being applied in a consistent and coherent manner, so that the amount awarded can be regarded as just, not merely by reference to the facts of [the] case, but by comparison with other cases."[59] This Tribunal also considers it proper to compare the facts of the present case with the cases cited by the Netherlands and other relevant cases where non-material damages have been awarded for injuries of a similar nature.

75. Taking the *Diallo* case as a starting point, the Tribunal observes that the ICJ awarded USD 85,000 to Mr. Diallo as compensation for non-material damages. The Netherlands arrives at the sum of USD 1,180 per day as its comparator by dividing the total amount of compensation awarded to Mr. Diallo for non-material damages (*i.e.*, USD 85,000) by the number of days Mr. Diallo was held in detention (*i.e.*, 72). However, such a calculation ignores an important element of the *Diallo* case. In arriving at the sum awarded for non-material damages, the ICJ not only took the length of Mr. Diallo's detention into

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[55] Updated Pleading, para. 7; Supplementary Submission, para. 51, referring to Greenpeace International Statement of Facts, Appendix 29.

[56] *See* Greenpeace International Statement of Facts, Appendix 29; Award on the Merits, paras. 109, 126, 128.

[57] Supplementary Submission, para. 51, referring to *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, Compensation, Judgment of 19 June 2012, ICJ Reports 2012, p. 324.

[58] Supplementary Submission, para. 51.

[59] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, Compensation, Declaration of Judge Greenwood, ICJ Reports 2012, p. 391, para. 7.

account, but also considered the significant psychological suffering and loss of reputation caused by the Congo's wrongful conduct, as well as the fact that following his detention Mr. Diallo was expelled from the Congo despite having lived there for over 30 years.[60]

76. In this respect, the circumstances of the *Diallo* case are more extreme than the circumstances in the present case where the members of the Arctic 30 were detained for approximately two months each but later released and granted amnesty by the Russian authorities. Those members of the Arctic 30 possessing Russian nationality were not expelled from Russia. There is also no suggestion that they suffered a loss of reputation. At most, the Arctic 30 can be said to have been held in conditions that were, to use the words of one of their Russian lawyers who observed the situation first-hand, "not optimal".[61] In this respect the Tribunal accepts the witness testimony that the Arctic 30 were:

> generally confined to cold and unsanitary cells for 23 hours per day, the remaining hour consisting of solitary exercise in a small concrete box. Most [were] unable to speak to their families. Requests for telephone calls [were] not granted until several weeks later. The members of the [Arctic 30 were] held separately from one another; some [were] alone, others share[d] their cell with Russian inmates, but communication [was] often difficult due to lack of a common language.[62]

77. Taking these circumstances into account, the Tribunal considers the injury suffered by Mr. Diallo to be of a higher order than the injury suffered by the members of the Arctic 30. Accordingly, the Tribunal considers the compensation awarded in the *Diallo* case as an upper limit, rather than a direct comparator, on the compensation to be awarded in this case. In fact, Judge Greenwood in his Declaration noted that even the *Diallo* case:

> is very far from being one of the gravest cases of human rights violations. If US$85,000 is an appropriate sum to compensate for Mr. Diallo's moral damage, the sum which is required in a case where, for example, a person has been tortured or forced to witness the murder of family members would have to be several magnitudes higher.[63]

78. The Tribunal does note, however, that the non-Russian nationals among the Arctic 30 were not granted exit visas until the end of December 2013, thereby preventing them from leaving Russia for an additional month following their release from prison.[64] The Tribunal recalls its earlier finding that through

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[60] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, Compensation, Judgment of 19 June 2012, ICJ Reports 2012, p. 324, para. 21.

[61] Hearing Tr., 10 February 2015 at 66 (examination of Mr. Andrey Suchkov).

[62] Greenpeace International Statement of Facts, para. 76, as confirmed by the witness statements of Mr. Peter Henry Wilcox, Mr. Dimitri Litvinov, Mr. Frank Hewetson, Mr. Philip Edward Ball, Ms. Sini Annuka Saarela, and Mr. Andrey Suchkov.

[63] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, Compensation, Declaration of Judge Greenwood, ICJ Reports 2012, p. 391, para. 11.

[64] *See* Greenpeace International Statement of Facts, Appendix 29; Award on the Merits, paras. 132–133.

this delay Russia breached the part of the ITLOS Order requiring it to promptly "ensure that … all persons who have been detained are allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation" following the posting of a bank guarantee by the Netherlands on 2 December 2013.[65] The Tribunal considers the impairment of the Arctic 30's ability to leave Russian territory in violation of the ITLOS Order to be an aggravating factor in determining Russia's liability for non-material damages in this case.

79. In the second case to which the Netherlands refers, *M/V "SAIGA" (No. 2)*, Guinea detained the vessel *SAIGA*, its master, 21 members of crew, and three painters who were on board the vessel. The master of the vessel was detained for approximately 123 days while the other members of crew and the painters were detained for different periods ranging from 20 to 123 days.[66] ITLOS awarded USD 17,750 for the detention of the master (equating to USD 144 per day) and USD 76,000 for the entire period of detention of the crew and painters.[67] The Tribunal observes that no reasons were given for the basis on which the amount awarded was calculated and that the outcome is different from that of the *Diallo* case.

80. In addition to the cases cited by the Netherlands, the Tribunal has considered other jurisprudence, including, in particular, decisions of the European Court of Human Rights ("ECtHR") dealing with non-material damage for wrongful detention in the Russian Federation. In these cases also, the sums awarded vary significantly.

81. For example, in *Frumkin* v. *Russia*, a case dealing with the arbitrary arrest and detention of the applicant in Russia for approximately 16.5 days following the dispersal of a political rally, the ECtHR awarded the applicant EUR 25,000 (or EUR 1,515 per day of detention).[68] By comparison, in *Chukayev* v. *Russia*, the applicant was detained for approximately 498 days in what the ECtHR considered to be inhumane and degrading conditions on remand and was only awarded EUR 9,800 (or EUR 20 per day of detention).[69]

82. The different outcomes reached by the ICJ, ITLOS, and the ECtHR suggest that there is no identifiable consistent practice among international courts and tribunals in respect of the calculation of the award of non-material damages for wrongful detention, certainly not one that could be mechanically applied to any given case.

83. Nevertheless, as noted by the umpire in the *Lusitania* cases before the Mixed Claims Commission (United States/Germany), non-material injuries "are

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[65] Award on the Merits, paras. 349–350.

[66] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10, para. 33.

[67] *M/V* "SAIGA" *(No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10, Annex.

[68] *Frumkin* v. *Russia* (Application No. 74568/12), ECtHR, Judgment of 5 January 2016.

[69] *Chukayev* v. *Russia* (Application No. 36814/06), ECtHR, Judgment of 5 November 2015, para. 145.

very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefore as compensatory damages."[70]

84. Having said that, one consistent characteristic of the cases referred to above is that none of the ICJ, ITLOS or ECtHR decided to award non-material damages on the basis of a *per diem* calculation for days in detention. Rather, it was deemed appropriate in each of those cases to award a lump sum having taken into account all the circumstances of the case. For example, the Tribunal in *M/V SAIGA (No. 2)* awarded a single lump sum for the detention of the entire crew and painters whose individual lengths of detention varied from 20 to 123 days.[71] This Tribunal does not propose to deviate from the practice of awarding a lump sum, rather than a *per diem* amount, in its award of compensation for non-material damages.

85. Having previously determined that the circumstances of the present case entitle the Netherlands to the award of non-material damages in relation to the arrest, detention, and prosecution of those on board the *Arctic Sunrise*, and bearing in mind the facts of this case, including the aggravating factor of Russia's non-compliance with the ITLOS Order, the Tribunal finds that an award of non-material damages in a total amount of EUR 600,000 is appropriate in this case.

86. Finally, the Tribunal notes that while the Arctic 30 have filed individual applications in the ECtHR, asking for a finding that their apprehension and detention by the Russian authorities constitutes a violation of their rights under Articles 5 and 10 of the European Convention on Human Rights and Fundamental Freedoms,[72] the Netherlands has informed the Tribunal that those applications remain pending.[73] The Tribunal need therefore not consider the possibility of double compensation.

C. Damage Resulting from the Measures Taken by Russia against the Arctic 30

1. The Netherlands' claim

87. In its Award on the Merits, the Tribunal found that the Netherlands is entitled to compensation for "damage resulting from the measures taken by the Russian Federation against the Arctic 30, including the costs of bail paid as security for their release from custody, expenses incurred during their detention in the Russian Federation, and costs in respect of the persons detained

[70] Opinion in the *Lusitania* cases, 1 November 1923, United Nations, Reports of International Arbitral Awards Vol. VII, p. 32, at p. 40.

[71] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10, para. 33.

[72] Award on the Merits, para. 134.

[73] Fourth Supplemental Pleading, p. 12.

between their release from prison and their departure from the Russian Federation."[74] The Tribunal also ordered Russia to compensate the Netherlands for the value of all objects belonging to the Arctic 30 that were not returned to the Netherlands by 14 October 2015.[75]

88. The Netherlands submits that the compensation to which it is entitled under this head of damages amounts to a total of EUR 3,998,881,[76] composed of the following items:[77]

Table B

#	*Category*	*Amount claimed (in EUR)*
1.	**Restitution of personal belongings**	**5,605 plus lump sum**
1.1.	Shipping and handling of returned personal items	5,605
1.2.	Value of personal items not returned	lump sum to be determined by the Tribunal at its discretion[78]
2.	**Costs of obtaining Russian bail (legal costs; exchange costs)**	**81,312**
3.	**Costs incurred during the wrongful detention of the Arctic 30**	**3,365,414**
3.1.	Salary costs related to emergency response team; relevant share (85%); rest under item 2.4 in Table A above	1,125,191
3.2.	Emergency response support: supply of goods and services, including support to detainees	2,240,223
3.2.1.	Emergency response support	891,988

[74] Award on the Merits, para. 401(*F*)(3). Reproduced in full at paragraph 7 above.

[75] Award on the Merits, para. 401(*H*). Reproduced in full at paragraph 7 above.

[76] The Netherlands last updated the total amount claimed under this head of damages in its Updated Pleading (para. 8), in which the total was stated as EUR 4,003,722. However, the amount of one of the items composing this total was revised in the Netherlands' Fourth Supplemental Pleading (p. 8, para. 1). When this revision is taken into account, the total amount claimed becomes EUR 3,998,881.

[77] Updated Pleading, para. 8; Greenpeace Claim Statement (Annex N-48); Fourth Supplemental Pleading, pp. 6, 8.

[78] Fourth Supplemental Pleading, p. 6.

	a. Emergency response global	240,547
	b. Emergency response support in Murmansk	196,464
	c. Support to detainees as necessary in Russia—Murmansk	85,351
	d. Mobilisation of public support across the world in countries with Greenpeace presence for the release of the Arctic 30	369,626
3.2.2.	Legal costs related to arrest and detention of the Arctic 30	690,916
3.2.3.	Costs incurred for Arctic 30 support: contact with, and visit by, next of kin	133,0864[79]
3.2.4.	Salary costs having become due during detention	524,2335[80]
4.	**Costs incurred between the release from prison of the Arctic 30 and their departure from the Russian Federation**	**EUR 546,550**
4.1.	Emergency response support in St. Petersburg	196,464
4.2.	Support to detainees as necessary in Russia—St. Petersburg	85,351
4.3.	Costs of the support team set up to aid Arctic 30 upon release from prison	264,735
	Total	**3,998,881**

2. The Tribunal's analysis

(a) Non-compensable categories of claim

89. Having found in the Award on the Merits that the Netherlands is entitled to compensation for damage resulting from the measures taken by Russia against the Arctic 30 in principle, the Tribunal at this stage of the proceedings has considered whether the specific categories of damage set out in Table B above are compensable. For the reasons set out below, the Tribunal finds that the categories of damages identified as items 3.2.1(*a*) and 3.2.1(*d*) in

[79] This item is stated as EUR 133,277 in the Greenpeace Claim Statement (Annex N-48). In its Fourth Supplemental Pleading (p. 6), the Netherlands explains than EUR 191 should be subtracted from this amount.

[80] This item, stated as EUR 529,075 in the Greenpeace Claim Statement (Annex N-48), is amended to EUR 524,233 in the Fourth Supplemental Pleading (p. 8, para. 1).

Table B above are not compensable and that only 31.6 percent of the amount claimed under item 3.1 is compensable.

90. The Tribunal recalls that only direct damages may be compensated. Thus, Article 31 of the Articles on Responsibility of States for Internationally Wrongful Acts ("Articles on State Responsibility")[81] of the International Law Commission of the United Nations ("ILC") provides:

> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

91. The ILC commentary to the Articles on State Responsibility further explains that Article 31(2) is "used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act."[82]

92. With respect to items 3.1 and 3.2.1 in Table B above, the Tribunal asked the Netherlands to explain precisely what these costs consist of and why it should be compensated for these costs.[83] The Netherlands explained that the costs claimed under item 3.1 consist of the "salary costs of the persons who were diverted from their ordinary functions, in order to work on securing the release of the *Arctic Sunrise* and the Arctic 30, and on supporting the Arctic 30 whilst they were released on bail,"[84] including: (i) a core team tasked with coordinating the support effort; (ii) a team prepared to offer psychological and practical assistance to the Artic 30 and their next of kin upon the release of the Arctic 30 from detention; (iii) a ground support team tasked with making deliveries of necessary items to the Arctic 30 during their detention, liaising with consular staff, attending and reporting back on court hearings, and providing logistical support to the Arctic 30 and their next of kin after the release of the Arctic 30; (iv) a legal team working to secure the release of the Arctic 30 and update their next of kin; and (v) a team assigned to "reaching out to general audiences, politicians, celebrities and other influencers, embassies and the press in order to protest the detention and push for the release of the Arctic 30."[85] According to the Netherlands, this response team was constituted pursuant to "a duty of care [of the ship manager] to take all reasonable steps within its power to support the Arctic 30," arising from the "Security Princi-

[81] "Draft Articles on Responsibility of States for Internationally Wrongful Acts," ILC Yearbook 2001, vol. II(2).

[82] "Draft Articles on Responsibility of States for Internationally Wrongful Acts," ILC Yearbook 2001, vol. II(2), art. 31, para. 9.

[83] Tribunal's Questions, Question 13.

[84] Fourth Supplemental Pleading, p. 10.

[85] Fourth Supplemental Pleading, pp. 10–11.

ples" adopted by Greenpeace International.[86] While the Netherlands did not expressly state so, it appears that item 3.2.1 represents the expenses incurred by the staff whose salary is claimed under item 3.1.

93. Having carefully considered the explanation of the Netherlands, the Tribunal is of the view that a distinction must be drawn between the cost of steps taken by Greenpeace International that were immediately connected to the detention of the Arctic 30, such as the expenses incurred for the emergency support to the Arctic 30 in Murmansk (items 3.2.1(*b*) and 3.2.1(*c*) in Table B) and the cost of more remote steps such as global emergency support and the "mobilization of public support across the world in countries with Greenpeace presence for the release of the Arctic 30" (items 3.2.1(*a*) and 3.2.1(*d*) in Table B). Nothing in the Respondent's actions forced Greenpeace International to mobilise the significant resources involved in the latter two categories of damages. Accordingly, the Tribunal finds that the latter two categories are too remote to be compensated.

94. Similarly, in light of the explanation provided by the Netherlands, it appears that item 3.1 of Table B above covers both salary costs that arose directly from the Respondent's wrongful conduct (such as the costs of the ground support team tasked with making deliveries of necessary items to the Arctic 30 during their detention) and salary costs that are too remote to be compensable (such as the costs of the team assigned to "reaching out to general audiences, politicians, celebrities and other influencers, embassies and the press in order to protest the detention and push for the release of the Arctic 30"[87]). As the Netherlands has not provided a specific breakdown identifying which salary costs correspond to which tasks carried out by the staff of Greenpeace International, and in view of the close connection between items 3.1 and 3.2.1, the Tribunal considers that it would be reasonable to award compensation for costs claimed under item 3.1 in the same proportion as for item 3.2.1. As the compensable parts of item 3.2.1 (items 3.2.1(*b*) and 3.2.1(*c*)) constitute 31.6 percent of item 3.2.1, the Tribunal finds that 31.6 percent of item 3.1 is compensable. Additionally, for the reasons explained in paragraph 67 above, a downward adjustment of EUR 11,741 must be made to item 3.1 to exclude salary costs for the period preceding 19 September 2013.[88] On this basis, the Tribunal finds that an amount of EUR 351,850.20[89] is owed by Russia to the Netherlands under item 3.1 of Table B above.

95. The Tribunal further finds that the costs claimed under item 3.2.3 of Table B above (costs incurred for the Arctic 30 support—contact with, and visit by, next of kin) are not compensable. The Tribunal considers that in incur-

[86] Fourth Supplemental Pleading, p. 11, referring to Annex N-50, Appendix 11, "SGC Security Principles of 2005", para. 3.

[87] Fourth Supplemental Pleading, p. 11.

[88] This calculation is carried out on the basis of the spreadsheet in the Greenpeace Claim Statement (Annex N-48), Appendix 6.1.

[89] (1,125,191—11,741) * 0.316.

ring these costs Greenpeace International went above and beyond the ordinary level of support an organization may be expected to provide to its employees in similar circumstances, notwithstanding the fact that its commendable reaction may have been required under its policies.

(b) Request for a lump sum in compensation for personal objects

96. Under item 1.2 of Table B above, the Netherlands requests the Tribunal to award a lump sum to be determined by the Tribunal at its discretion for each member of the Arctic 30 individually in compensation for personal objects seized from the *Arctic Sunrise* that have not been returned to the Netherlands.

97. In support of this request, the Netherlands provides a list of the objects that were not returned, enumerating items such as phones, laptops, cameras, wires, clothes, cash, and documents.[90] The Netherlands explains that "[s]ome of these objects are difficult to replace because of the emotional value they represent and for other objects it is difficult to calculate the appropriate amount of compensation."[91]

98. While the Netherlands has not submitted any supporting documentation that would allow the Tribunal to specifically assess the value of individual personal objects, the Tribunal does not doubt that the Arctic 30 had personal belongings with them as they embarked on their voyage on the *Arctic Sunrise* and that the Respondent's unlawful conduct caused material injury to the Arctic 30 with respect to their belongings. In such a situation, and in line with the approach adopted by other international courts and tribunals,[92] the Tribunal considers it appropriate to award an amount of compensation on an equitable basis.

99. Therefore, in view of the circumstances of the case and upon analysis of the list of objects provided by the Netherlands, the Tribunal awards the sum of EUR 5,000 under this head of damages, to be allocated by the Netherlands among the Arctic 30.[93]

(c) Categories of claim audited by WEA Accountants

100. The claims identified in Table B above as items 1.1, 2, 3.2.1–3.2.3, and 4 were supported by the two costs overviews prepared by WEA Accountants.

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[90] Greenpeace Claim Statement (Annex N-48), Appendix 10.

[91] Fourth Supplemental Pleading, p. 5.

[92] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, Compensation, Judgment, ICJ Reports 2012, p. 324, paras. 32–36; *Lupsa* v. *Romania*, ECtHR, Judgment of 8 June 2006, paras. 70–72; *Chaparro Alvarez and Lapo Iñiguez* v. *Ecuador*, Judgment of 21 November 2007 (Preliminary Objections, Merits, Reparations, and Costs), Inter-American Commission on Human Rights, Series C, No. 170, paras. 240–242.

[93] The Tribunal notes that in its assessment of this amount it has disregarded items indicated as belonging to Greenpeace International on the list provided by the Netherlands.

101. As noted at paragraphs 57–60 above, having carefully reviewed the report of its accounting expert, Mr. Potter, and the submissions of the Netherlands, the Tribunal determined that 98.6 percent of the costs claimed by the Netherlands on the basis of the costs overviews prepared by WEA Accountants are supported. The Tribunal further stated that it would apply this percentage to each category of claim supported by the costs overviews that it considers compensable in principle, in order to obtain the amount of compensation to which the Netherlands is entitled.

102. Of the categories of claim set out in Table B that are supported by the costs overviews, the Tribunal considers that items 1.1, 2, 3.2.1(*b*), 3.2.1(*c*), 3.2.2, and 4 are compensable in principle as elements of damage resulting from the measures taken by Russia against the Arctic 30. As stated in paragraphs 93 and 95 above, the Tribunal considers that the claims under items 3.2.1(*a*), 3.2.1(*d*), and 3.2.3 of Table B are not compensable.

103. The total amount of the compensable items is therefore EUR 1,606,198,[94] which, multiplied by 98.6 percent, yields EUR 1,583,711.23 as the amount of compensation owed by Russia to the Netherlands for the part of the damage resulting from the measures taken by Russia against the Arctic 30 that is claimed on the basis of the costs overviews prepared by WEA Accountants.

(d) Other categories of claim

104. In support of the remaining claim identified in Table B above as item 3.2.4 (salary costs of Arctic 30 having become due during their detention), the Netherlands submitted supporting documentation, which was carefully reviewed by the Tribunal.

105. In the view of the Tribunal, this category of claim is compensable in principle. However, as with certain categories of claim discussed in paragraph 67 above, a downward adjustment of EUR 2,859 must be made to exclude salary costs for the period preceding 19 September 2013.[95]

106. Having made this adjustment, the Tribunal concludes that the amount of compensation owed by Russia to the Netherlands for the part of the damage resulting from the measures taken by Russia against the Arctic 30 claimed under item 3.2.4 of Table B is EUR 521,374.

(e) Conclusion

107. In light of the conclusions set out at paragraphs 94, 99, 103 and 106 above, the Tribunal finds that Russia owes the Netherlands EUR 2,461,935.43

[94] EUR 5,605 (item 1.1) + EUR 81,312 (item 2) + EUR 196,464 (item 3.2.1(*b*)) + EUR 85,351 (item 3.2.1(*c*)) + EUR 690,916 (item 3.2.2) + EUR 546,550 (item 4).

[95] This calculation is carried out on the basis of the spreadsheet in the Greenpeace Claim Statement (Annex N-48), Appendix 6.1, p. 2.

in compensation for damage resulting from the measures taken by Russia against the Arctic 30.

D. Costs Incurred for the Issuance of a Bank Guarantee

108. In its Award on the Merits, the Tribunal found that the Netherlands is entitled to compensation for "the costs incurred by the Netherlands for the issuance of the bank guarantee to the Russian Federation pursuant to the ITLOS Order."[96]

109. Under this head of damages, the Netherlands requests compensation in the amount of EUR 13,500, corresponding to the commission charged by the Royal Bank of Scotland for the issuance of the bank guarantee.[97] In support, the Netherlands submits proof of the relevant bank transfer.[98]

110. In view of its previous findings in the Award on the Merits and the filing of supporting documentation by the Netherlands, the Tribunal finds that the Respondent owes the Netherlands compensation under this head of damages in the requested amount of EUR 13,500.

IV. Deposits for the Costs of Arbitration

111. In the Award on the Merits, having decided that the expenses of the Tribunal should be borne by the Parties in equal shares, the Tribunal ordered the Russian Federation "immediately to reimburse the Netherlands the amounts of Russia's share of the deposits paid by the Netherlands."[99] When the Award on the Merits was issued, the total amount of Russia's share of the deposits paid by the Netherlands was EUR 475,000.

112. Since then, the Netherlands has paid a further amount of EUR 150,000 in substitution for Russia's share of a supplementary deposit requested by the Tribunal. For the avoidance of doubt, the Tribunal hereby confirms that the Russian Federation is under an obligation to reimburse the Netherlands the amounts of its share of all deposits paid by the Netherlands as at the date of issuance of this Award, minus half of any amount returned by the Registry to the Netherlands after the Award's issuance.

113. The deposit has covered the fees and expenses of members of the Tribunal, Registry, and experts appointed to assist the Tribunal, as well as all other expenses, including for hearings and meetings, information technology support, catering, court reporters, deposit administration, archiving, translations, couriers, and communications. In accordance with Article 33(4) of the Rules of Procedure, the Registry will "render an accounting to the Parties of

[96] Award on the Merits, para. 401(*F*)(4). Reproduced in full at paragraph 7 above.

[97] Updated Pleading, para. 9; Supplementary Submission, para. 33.

[98] Annex N-43, Proof of Payment, Royal Bank of Scotland.

[99] Award on the Merits, para. 401(*I*). Reproduced in full at paragraph 7 above.

the deposits received and return any unexpended balance to the Parties" after the issuance of this Award.

V. Interest

114. In the Award on the Merits, the Tribunal found that the Netherlands is entitled to interest on all amounts referred to under the heads of damages discussed in Section III above, as well as on all amounts owed by Russia to the Netherlands in reimbursement of Russia's share of the deposits paid by the Netherlands.[100] The Tribunal reserved its decision on the appropriate rate of interest and the method for calculating interest to a later phase of the proceedings.[101] Below, the Tribunal first summarizes the Netherlands' submissions on the remaining questions, before setting out its own conclusions.

1. The Netherlands' claim

115. The Netherlands submits that the applicable rate of interest "should be based on the average annual Euro LIBOR (London Interbank Offered Rate) interest rate."[102] With respect to the amounts to be awarded for (i) damage to the *Arctic Sunrise*; (ii) non-material damage to the Arctic 30; and (iii) damage resulting from the measures taken by Russia against the Arctic 30, the Netherlands requests a mark-up of the LIBOR rate of 10% to "reflect the interest rates applied to private and commercial borrowing."[103] With respect to the costs of the issuance of a bank guarantee and the payment of Russia's share of deposits in this arbitration, the Netherlands claims the LIBOR rate without any mark-up.[104]

116. With respect to the start date for the calculation of interest, the Netherlands submits that the general rule is that a right to an award of interest exists from the moment of the occurrence of the loss, but notes that "the complexities of the present case, such as the variety of heads of damage and the protracted course of events between the initial internationally wrongful conduct of the Russian Federation up and until the return of the *Arctic Sunrise* to Amsterdam and the restitution of objects, may be reasons for the Tribunal to find" that interest in the present case should be payable from a later date.[105] In this respect, the Netherlands submits the following dates are relevant:

— For the heads of damage related to the *Arctic Sunrise*, the date of the boarding of the ship and the date of the resumption of the use of the ship for operations;

[100] Award on the Merits, para. 401(*G*). Reproduced in full at paragraph 7 above.

[101] Award on the Merits, paras. 397, 401(*L*).

[102] Updated Pleading, para. 12.

[103] Updated Pleading, para. 12; Supplementary Submission, para. 54.

[104] Updated Pleading, paras. 12, 13.

[105] Fourth Supplemental Pleading, p. 13, para. 2.

— For the heads of damage related to the persons on board the *Arctic Sunrise*, the date of their detention on board the *Arctic Sunrise* and the date of their departure from the Russian Federation;

— For the heads of damage related to the payments the Netherlands made on behalf of the Russian Federation, the date of payment of each deposit.[106]

117. The Netherlands concludes that:

> interest should be payable no later than the date on which the Tribunal will issue its award on the quantum of compensation or the date of the Award on the Merits, 14 August 2015, for interest on the payments the Netherlands made on behalf of the Russian Federation in the first stages of these proceedings, but defers to the expertise of the Tribunal to determine, on the basis of international law, that the interest for any or all heads of damages should be payable from an earlier date.[107]

2. The Tribunal's analysis

118. Neither the Convention nor the ILC Articles on State Responsibility provide specific rules regarding how interest should be determined. Moreover, as is noted in the ILC commentary on the Articles on State Responsibility, there is no uniform approach in the practice of international courts and tribunals.[108] Thus, as is well established, the Tribunal has a wide margin of discretion to determine questions of interest.[109]

119. In the exercise of its discretion in this case, the Tribunal is guided by the principle that the injured State is entitled to such interest as will ensure full reparation for the injury it has suffered as a result of the internationally wrongful measures of the injuring State.[110]

120. Specifically, the Tribunal must determine the following four matters: (i) whether the same rate of interest should apply to the claims for material and non-material damages; (ii) at what rate (or rates) interest should be calculated; (iii) whether simple or compound interest ought to be awarded; and (iv) the date (or dates) from which interest begins to accrue.

121. First, the Tribunal determines that different rates of interest should apply to the sums awarded for non-material damage suffered by the Arctic 30

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[106] Fourth Supplemental Pleading, p. 13, para. 2.

[107] Fourth Supplemental Pleading, p. 13, para. 3.

[108] "Draft Articles on Responsibility of States for Internationally Wrongful Acts," ILC Yearbook 2001, vol. II(2), art. 38, para. 10.

[109] *See e.g. The Islamic Republic of Iran* v. *The United States of America*, Iran-U.S. C.T.R., vol. 16, p. 285, at p. 290 (1987).

[110] *See* "Draft Articles on Responsibility of States for Internationally Wrongful Acts', ILC Yearbook 2001, vol. II(2), art. 38(1): "Interest on any principal sum due … shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result."

(as to which, see Section III.B above) and the sums awarded for material damage suffered by the *Arctic Sunrise*, its owner, charter, and operator, and the Arctic 30 (as to which, see Sections III.A and III.C above). This matter is one toward which different approaches have been taken in the case law. Of the two cases addressing non-material damages cited by the Netherlands, one (*Diallo*) features the application of the same rate of interest for both material and non-material damages, whereas the other (*M/V Saiga (No. 2)*) includes an award of different rates for different heads of damage.[111] As in *M/V Saiga (No. 2)*, the Tribunal considers that a distinction must be made between different types of damages. The amounts awarded for non-material damages constitute a monetary estimate of the value of non-financial losses, whereas the material damages addressed in Sections III.A and III.C above represent expenses actually incurred. Accordingly, the rate to be applied in respect of these material damages ought to be higher than that applied to the Tribunal's award of non-material damages.

122. Second, the Tribunal determines that the interest rate applicable to the material damages addressed in Sections III.A and III.C above, under the headings of damage to the *Arctic Sunrise* and damage resulting from the measures taken by Russia against the Arctic 30, shall be the Euro LIBOR annual rate plus six percent. This rate is appropriate in light of the commercial conditions prevailing in the countries where the expenses were incurred and given that the expenses were for the most part incurred by Greenpeace International, a private foundation that borrows money at ordinary commercial rates.

123. Further, the Tribunal determines that the interest rate applicable to non-material damages shall be the Euro LIBOR annual rate plus three percent. In this respect, the Tribunal takes guidance from *M/V Saiga (No. 2)*, a factually comparable case where a rate of three percent was adopted for non-material damages.[112] Given the current Euro LIBOR annual rate, the rate selected by this Tribunal is similar to the rate applied in that case.

124. Additionally, the Tribunal determines that the interest rate applicable to the award of costs incurred by the Netherlands, namely the costs of issuance of a bank guarantee and the payment of Russia's share of arbitration costs, shall be the Euro LIBOR annual rate (without mark-up).

125. Third, the Tribunal determines that simple interest is to be awarded in this case. The Netherlands has not requested compounded interest.

126. Finally, the Tribunal determines that interest on all heads of damage shall accrue from the date of the Award on the Merits, that is, starting on 14 August 2015, save that interest on Russia's share of arbitration deposits paid

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[111] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, Compensation, Judgment of 19 June 2012, ICJ Reports 2012, p. 324, para. 56; *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10, para. 175.

[112] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, p. 10, para. 175.

by the Netherlands shall accrue from the dates on which those payments were made by the Netherlands, which are as follows:

i. 15 May 2014 for the first payment in the amount of EUR 150,000;
ii. 27 March 2015 for the second payment in the amount of EUR 150,000;
iii. 22 April 2015 for the third payment in the amount of EUR 175,000; and
iv. 2 November 2015 for the fourth payment in the amount of EUR 150,000.

127. The Tribunal considers that it is fair and reasonable to award interest in the present case from the date on which the losses occurred, as suggested by the Netherlands. As the Netherlands has itself noted, however, "the complexities of the present case, such as the variety of heads of damage and the protracted course of events between the initial internationally wrongful conduct of the Russian Federation up and until the return of the *Arctic Sunrise* to Amsterdam and the restitution of the objects" make it difficult to identify the dates on which the various losses occurred.[113] In fact, the Netherlands has not sought to identify those specific dates. In view of these circumstances, the Tribunal considers that the date of the Award on the Merits constitutes an appropriate proxy. The start dates for the accrual of interest on Russia's share of arbitration deposits paid by the Netherlands are treated differently because those dates are known to the Tribunal.

VI. Decision

128. For the above reasons, the Tribunal unanimously decides that the Russian Federation shall pay to the Netherlands the following amounts:

A. EUR 1,695,126.18 as compensation for damage to the *Arctic Sunrise*, with interest on this amount at the Euro LIBOR annual rate plus six percent, from 14 August 2015 to the date of effective payment;

B. EUR 600,000 as compensation for non-material damage to the Arctic 30 for their wrongful arrest, prosecution, and detention in the Russian Federation, with interest on this amount at the Euro LIBOR annual rate plus three percent, from 14 August 2015 to the date of effective payment;

C. EUR 2,461,935.43 as compensation for damage resulting from the measures taken by the Russian Federation against the Arctic 30, with interest on this amount at the Euro LIBOR annual rate plus six percent, from 14 August 2015 to the date of effective payment;

D. EUR 13,500 as compensation for the costs incurred by the Netherlands for the issuance of the bank guarantee to the Russian Federation pursuant to the ITLOS Order, with interest on this

[113] Fourth Supplemental Pleading, p. 13, para. 2.

amount at the Euro LIBOR annual rate, from 14 August 2015 to the date of effective payment;

E. EUR 150,000 as reimbursement of the first part of Russia's share of the deposits paid by the Netherlands, with interest on this amount at the Euro LIBOR annual rate, from 15 May 2014 to the date of effective payment;

F. EUR 150,000 as reimbursement of the second part of Russia's share of the deposits paid by the Netherlands, with interest on this amount at the Euro LIBOR annual rate, from 27 March 2015 to the date of effective payment;

G. EUR 175,000 as reimbursement of the third part of Russia's share of the deposits paid by the Netherlands, with interest on this amount at the Euro LIBOR annual rate, from 22 April 2015 to the date of effective payment; and

H. EUR 150,000, minus half of any amount returned by the Registry to the Netherlands after the Award's issuance, as reimbursement of the fourth part of Russia's share of the deposits paid by the Netherlands, with interest on this amount at the Euro LIBOR annual rate, from 2 November 2015 to the date of effective payment.

Dated: 10 July 2017

[*Signed*]
Professor Alfred H.A. Soons, Arbitrator

[*Signed*]
Dr. Alberto Székely, Arbitrator

[*Signed*]
Mr. Henry Burmester, Arbitrator

[*Signed*]
Professor Janusz Symonides, Arbitrator

[*Signed*]
Judge Thomas A. Mensah, President of the Tribunal

[*Signed*]
Ms. Evgeniya Goriatcheva, Registrar