Minutes of the Public Sittings held on 6 November 2013

Procès-verbal de l'audience publique tenue le 6 novembre 2013

6 November 2013, a.m.

PUBLIC SITTING HELD ON 6 NOVEMBER 2013, 10.00 A.M.

Tribunal

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

The Kingdom of the Netherlands is represented by:

Ms Liesbeth Lijnzaad, Legal Advisor, Ministry of Foreign Affairs,

as Agent

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

as Co-Agent;

and

Mr Thomas Henquet, Legal Counsel, Ministry of Foreign Affairs,
Mr Erik Franckx, Professor, Vrije Universiteit Brussel, Department of International and European Law, Centre for International Law, Belgium,

as Counsel and Advocates;

Ms Anke Bouma, Legal Counsel, Ministry of Infrastructure and the Environment,
Mr Peter Post, Transport Adviser, Ministry of Foreign Affairs,
Mr Tom Diederen, Legal Officer, Ministry of Foreign Affairs,

as Advisers.

The Russian Federation is not represented

« ARCTIC SUNRISE »

AUDIENCE PUBLIQUE TENUE LE 6 NOVEMBRE 2012, 10 H 00

Tribunal

Présents : M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. MAROTTA RANGEL, NELSON, CHANDRA-SEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, MME KELLY, MM. ATTARD *et* KULYK, *juges* ; ANDERSON, juge *ad hoc* ; M. GAUTIER, *Greffier*.

Le Royaume des Pays-Bas est représenté par :

Mme Liesbeth Lijnzaad, Conseillère juridique, Ministère des affaires étrangères,

comme agent;

M. René Lefeber, Conseiller juridique adjoint, Ministère des affaires étrangères,

comme co-agent;

et

M. Thomas Henquet, Conseil juridique, Ministère des affaires étrangères,
M. Erik Franckx, Professeur, Vrije Universiteit Brussel, Département de droit européen et international, Centre de droit international, Belgique,

comme conseils et avocats;

Mme Anke Bouma, Conseil juridique, Ministère de l'infrastructure et de l'environnement,
M. Peter Post, Conseiller aux transports, Ministère des affaires étrangères,
M. Tom Diederen, Juriste, Ministère des affaires étrangères,

comme conseillers

La Fédération de Russie n'est pas représentée.

Opening of the Oral Proceedings
[ITLOS/PV.13/C22/1/Rev.1, p. 1–2; TIDM/PV.13/A22/1/Rev.1, p. 1–2]

The President:
Pursuant to article 26 of its Statute, the Tribunal holds a hearing today in the *"Arctic Sunrise" Case* between the Kingdom of the Netherlands and the Russian Federation.

At the outset I would like to note that Judge Lucky is prevented by illness from sitting on the bench.

On 21 October 2013, the Kingdom of the Netherlands submitted to the Tribunal a request for the prescription of provisional measures pending the constitution of an arbitral tribunal in a dispute with the Russian Federation concerning the vessel *Arctic Sunrise*. The request was made pursuant to article 290, paragraph 5, of the United Nations Convention on the Law of the Sea. The case was named the *"Arctic Sunrise" Case* and entered in the List of cases as Case No. 22.

I now call on the Registrar to summarize the procedure and to read out the submissions of the Kingdom of the Netherlands

Le Greffier :
Le 21 octobre 2013, une copie de la demande en prescription de mesures conservatoires a été transmise au Gouvernement de la Fédération de Russie. Par note verbale du 22 octobre 2013 reçue au Greffe du Tribunal le 23 octobre 2013, l'Ambassade de la Fédération de Russie à Berlin a informé le Tribunal que :

> Lors de la ratification de la Convention, le 26 février 1997, la Fédération de Russie a fait une déclaration selon laquelle, entre autres, elle n'accepte pas les procédures prévues à la section 2 de la partie XV de ladite Convention aboutissant à des décisions obligatoires pour les différends concernant les actes d'exécution forcée accomplis dans l'exercice de droits souverains ou de la juridiction.

Par la même note, la Fédération de Russie a informé le Tribunal qu'elle avait notifié au Royaume des Pays-Bas

> qu'elle n'accepte pas la procédure d'arbitrage prévue à l'annexe VII de la Convention, engagée par les Pays-Bas concernant l'affaire du navire l'*Arctic Sunrise* et qu'elle n'a pas l'intention de participer à la procédure devant le Tribunal en ce qui concerne la demande en prescription de mesures conservatoires soumise par le Royaume des Pays-Bas au titre de l'article 290, paragraphe 5, de la Convention.

Le 24 octobre 2013, le Greffe du Tribunal a reçu une communication dans laquelle le Royaume des Pays-Bas priait le Tribunal de continuer la procédure et de rendre sa décision concernant la demande de mesures conservatoires.

Par ordonnance du 25 octobre 2013, le Président a fixé au 6 novembre 2013 la date de l'ouverture de la procédure orale.

Je vais à présent donner lecture des conclusions du Royaume des Pays-Bas.

The Tribunal prescribe as provisional measures that the Russian Federation

(i) Immediately enable the *Arctic Sunrise* to be resupplied, to leave its place of detention and the maritime areas under the jurisdiction of the Russian Federation and to exercise the freedom of navigation;

(ii) Immediately release the crew members of the *Arctic Sunrise*, and allow them to leave the territory and maritime areas under the jurisdiction of the Russian Federation;

(iii) Suspend all judicial and administrative proceedings, and refrain from initiating any further proceedings, in connection with the incidents leading to the boarding and detention of the *Arctic Sunrise*, and refrain from taking or enforcing any judicial or administrative measures against the *Arctic Sunrise*, its crew members, its owners and its operators; and

(iv) Ensure that no other action is taken which might aggravate or extend the dispute.

Mr President.

The President:
Thank you, Mr Registrar.

At today's hearing, the Kingdom of the Netherlands will present its oral arguments. The morning sitting will last until 1 p.m., with a break of 30 minutes at around 11.30 a.m. Possibly, an afternoon sitting will be held at 3 p.m.

I note the presence at the hearing of the Agent, the Co-Agent, and of Counsel and Advocates of the Applicant. I therefore call on the Agent of the Kingdom of the Netherlands, Ms Liesbeth Lijnzaad, to introduce her delegation.

Ms Lijnzaad:
Mr President, Members of the Tribunal, it is an honour for me to appear again before this Tribunal representing the Kingdom of the Netherlands.

With the indulgence of the Tribunal, I will first introduce the delegation of the Kingdom of the Netherlands. My name is Ms Liesbeth Lijnzaad, Legal Adviser of the Ministry of Foreign Affairs, and I am the Agent. With me are Mr René Lefeber, Deputy Legal Adviser, Ministry of Foreign Affairs, who is the Co-Agent; Mr Thomas Henquet, Legal Counsel, Ministry of Foreign Affairs; Professor Erik Franckx, a professor at Vrije Universiteit Brussel in the Department of International and European Law. They are Counsel and Advocates. Then there is Ms Anke Bouma, Legal Counsel, Ministry of Infrastructure and the Environment; Mr Peter Post, Transport Adviser, Ministry of Foreign Affairs; and Mr Tom Diederen, Legal Officer, Ministry of Foreign Affairs. They are our Advisers.

The President:
Thank you, Ms Lijnzaad. May I then request you to begin with your statement.

STATEMENT OF MS LIJNZAAD – 6 November 2013, a.m.

Argument of the Netherlands

STATEMENT OF MS LIJNZAAD
AGENT OF THE NETHERLANDS
[ITLOS/PV.13/C22/1/Rev.1, p. 3–9; TIDM/PV.13/A22/1/Rev.1, p. 3–9]

Mme Lijnzaad :
Avec la permission du Tribunal, je vais maintenant introduire l'affaire.

Le différend à l'origine de la présente affaire porte sur l'arraisonnement et l'immobilisation illicites d'un navire battant pavillon néerlandais en mer de Barents dans la zone économique exclusive de la Fédération de Russie ainsi que sur la détention de son équipage par les autorités russes.

En agissant de la sorte, sans le consentement préalable du Royaume des Pays-Bas, la Fédération de Russie a enfreint la liberté de navigation et le droit de l'Etat du pavillon d'exercer sa juridiction sur le navire, en vertu de la Convention des Nations Unies sur le droit de la mer et du droit international coutumier.

En règle générale, un Etat côtier ne peut pas exercer sa compétence d'exécution à l'encontre d'un navire sous le pavillon d'un Etat tiers dans sa zone économique exclusive.

Après avoir arraisonné le navire, les autorités russes ont arrêté et placé en détention les 30 personnes à bord. La Fédération de Russie a ainsi violé les droits de l'homme de ces individus, à savoir le droit à la liberté et à la sécurité, ainsi que le droit de quitter le territoire, y inclus – dans le cas présent – les zones maritimes relevant de la juridiction russe, en vertu du Pacte international relatif au droit civil et politique et du droit international coutumier.

La détention du navire et de l'équipage s'est poursuivie après l'arrivée au port. A ce jour, la détention dure depuis presque sept semaines, à compter de l'arraisonnement illicite. Des poursuites judiciaires ont été engagées sur des motifs apparemment infondés contre les personnes à bord du navire. De plus, les autorités russes ont saisi l'*Arctic Sunrise* et laissent son état général se détériorer. Par conséquent, les actes internationalement illicites de la Fédération de Russie à l'encontre du Royaume des Pays-Bas se poursuivent et le différend s'aggrave et s'étend.

Les Pays-Bas ont demandé à la Fédération de Russie, à plusieurs reprises, de procéder à la mainlevée du navire et à la libération des personnes à bord, mais en vain. En effet, la Fédération de Russie n'a pas répondu à la demande de mesures conservatoires incluses dans l'exposé des conclusions et des motifs sur lesquels elles se fondent.

La présente espèce porte sur un différend entre Etats quant aux droits et aux obligations d'un Etat côtier dans sa zone économique exclusive ayant une incidence sur les droits et obligations d'un Etat eu égard à un navire battant son pavillon. Le règlement d'un tel différent devrait ne pas porter atteinte à la jouissance, par les personnes à bord, de leurs droits et libertés individuels. Cela, ainsi que la position juridique indécise de la Fédération de Russie quant à la justification de ses actes à l'encontre de l'*Arctic Sunrise*, souligne l'opportunité pour le Tribunal de prescrire les mesures conservatoires requises.

Ces mesures conservatoires sont que la Fédération de Russie :

i) autorise immédiatement l'*Arctic Sunrise* à être réapprovisionné, à quitter son lieu d'immobilisation, ainsi que les zones maritimes sous la juridiction de la Fédération de Russie et à exercer sa liberté de navigation ;

ii) libère immédiatement les membres de l'équipage de l'*Arctic Sunrise* et leur permettent de quitter le territoire de la Fédération de Russie et les zones maritimes sous sa juridiction ;

iii) suspende toutes les procédures judiciaires et administratives et s'abstienne d'engager toute nouvelle procédure en rapport avec les événements qui ont abouti à l'arraisonnement et à l'immobilisation de l'*Arctic Sunrise* et s'abstienne de prendre ou d'exécuter toutes mesures judiciaires ou administratives à l'encontre de l'*Arctic Sunrise*, de ses membres d'équipage et de ses propriétaires et exploitants ;

iv) s'assure que n'est prise aucune autre mesure qui risquerait d'aggraver ou d'étendre le différend.

Dans cette déclaration orale aujourd'hui, le Royaume des Pays-Bas soutient que les exigences pour la prescription de mesures conservatoires en application de l'article 290, paragraphe 5, de la Convention sont remplies.

D'ailleurs, le Royaume des Pays-Bas tient à réaffirmer sa volonté de régler le différend d'une manière amiable. Il se réjouit de la disposition déclarée de la Fédération de Russie à continuer à chercher une solution mutuellement acceptable. Toutefois, comme l'atteste notre présence ici aujourd'hui, il n'a pas été possible à ce jour d'arriver à une telle solution.

Le Royaume des Pays-Bas regrette l'absence de la Fédération de Russie à la présente audience. Néanmoins, les actes portant préjudice à ses droits se poursuivent. Le différend s'aggrave et s'étend. Le Royaume des Pays-Bas se voit, par conséquent, contraint de demander au Tribunal de poursuivre cette procédure à défaut de comparution de la Fédération de Russie.

La suite de la présente déclaration orale est structurée comme suit :

a) la non-participation de la Fédération de Russie à la présente procédure ;
b) juridiction, comprenant deux aspects :
   i. premièrement, le Tribunal est compétent pour connaître de la demande de mesures conservatoires ;
   ii. deuxièmement, le tribunal arbitral devant être constitué en application de l'annexe VII de la Convention est *prima facie* compétent.
c) Puis la demande est soutenue par les faits.
d) Ensuite, la demande s'appuie sur un fondement juridique, c'est-à-dire :
   i. premièrement, la demande au fond peut être étayée ;
   ii. deuxièmement, les exigences pour la prescription de mesures conservatoires en application de l'article 290 de la Convention sont remplies.
e) en conclusion, les observations finales.

Monsieur le Président, je vais maintenant poursuivre en anglais.

As I have mentioned in my introduction, the Kingdom of the Netherlands regrets the refusal of the Russian Federation to participate in the proceedings before the Tribunal. This has an impact on the sound administration of justice. In proceedings between States before international courts and tribunals it is rare for a State not to participate. It is the first time that this Tribunal is confronted with a default of appearance.

However, this is not the first time that an international court has been faced with a situation of default. We have found three instances before the Permanent Court of International Justice, all in proceedings on provisional measures, and nine instances before the International Court of Justice in one or more stages of the proceeding, where a default situation arose. However, instances of non-appearance have been virtually non-existent in the last 25 years or so, indicating the decline of non-appearance as a phenomenon. That is, until today.

According to our records, it is the first time that the Russian Federation has failed to participate in proceedings between States before an international court or tribunal. Before this Tribunal, the Russian Federation participated in the proceedings brought against it in 2007 by Japan in the *"Hoshinmaru"* case and the *"Tomimaru"* case. Furthermore, the Russian

Federation has availed itself of the compulsory procedures under the Convention to settle disputes. In 2002, the Russian Federation initiated proceedings before the Tribunal against Australia in the *"Volga"* case.

If a State considers that an international court or tribunal does not have jurisdiction, as the Russian Federation seems to indicate in its communication to the Tribunal on 22 October, the regular practice of States is to appear and challenge that jurisdiction. The Russian Federation itself followed this practice in the case brought against it by Georgia before the International Court of Justice in 2008. It participated in those proceedings, including the proceedings related to Georgia's request to indicate provisional measures. The Russian Federation challenged the jurisdiction of the Court, but this did not prevent the Court from indicating provisional measures after the Court had satisfied itself that it had *prima facie* jurisdiction. However, the Russian Federation's challenge to the jurisdiction of the Court prevailed and the Court declined to exercise jurisdiction on the merits. If the Russian Federation believes that the arbitral tribunal that is being constituted does not have jurisdiction, it would have been in keeping with its own practice to argue so in these proceedings as well. Instead, it has refused to participate. Thus, the Tribunal will have to address the consequences of this non-appearance.

The non-appearance of a party is governed by article 28 of the Tribunal's Statute. It reads as follows:

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

Accordingly, the refusal of the Russian Federation to participate in the proceedings does not bar the Tribunal from exercising its jurisdiction to entertain a request for the prescription of provisional measures. Further to a communication of the Russian Federation of 22 October, the Tribunal informed the Kingdom of the Netherlands on 23 October of the Russian Federation's intention not to participate in these proceedings. The letter also drew the attention of the Kingdom of the Netherlands to article 28 of the Tribunal's Statute. It conveyed that the President of the Tribunal would like to receive any comments the Kingdom may wish to make. In our letter of 24 October 2013, we requested the Tribunal to continue the proceedings and make a decision on the request for the prescription of provisional measures. The Tribunal accordingly continued the proceedings and convened the present hearing.

The failure of the Russian Federation to participate in these proceedings has legal implications for the making of a decision by the Tribunal. Since this Tribunal has not yet had a case before it to consider the interpretation and application of article 28 of its Statute, it is important that this be addressed in these proceedings. In this respect, the Kingdom of the Netherlands considers the case law of the International Court of Justice to be of relevance. The provision of the Statute of the International Court of Justice related to default proceedings bears resemblance to article 28 of the Tribunal's Statute. Pursuant to article 53, paragraph 2, of the Statute of the International Court of Justice, the Court must satisfy itself, not only that it has jurisdiction, but also that the claim is well founded in fact and law.

The test to be applied by the Tribunal is three-pronged. The Tribunal must satisfy itself that: it has jurisdiction; the claim is well founded in fact; and the claim is well founded in law. Before the Kingdom of the Netherlands will submit that this test is indeed met, it would like to share with you the relevant considerations of the International Court of Justice

in applying the corresponding test under its Statute. We note that the Tribunal itself has, on a number of occasions, sought inspiration from the jurisprudence of the Court on matters pertaining to procedure. The late Professor Shabtai Rosenne saw no obstacle in this regard. In his study on provisional measures juxtaposing the Court and the Tribunal, he wrote: "Since Annex VI, Article 28 of the Law of the Sea Convention follows Article 53 of the Statute of the ICJ, it may be assumed that ITLOS will follow the same practice."

I pray for your indulgence as the following chronological review of the Court's case law is extensive. I would also like to mention that this review does not distinguish between incidental proceedings and proceedings on the merits.

First, in the case concerning *Corfu Channel*, the International Court of Justice found that, while it is obliged

> to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice. It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded.

Second, in the case concerning *Fisheries Jurisdiction*, the Court addressed the failure of a State to appear which was understood to entertain objections to the Court's jurisdiction. In its Orders on provisional measures, the Court considered that,

> according to the jurisprudence of the Court and of the Permanent Court of International Justice the non-appearance of one of the parties cannot by itself constitute an obstacle to the indication of provisional measures, provided the parties have been given an opportunity of presenting their observations on the subject.

In its Judgments on jurisdiction in the same case, the Court concluded that it, "in accordance with its Statute and its settled jurisprudence, must examine *proprio motu* the question of its own jurisdiction."

For the purpose of deciding whether the claim is well founded in law, the Court observed in its Judgments on the merits, also in the *Fisheries Jurisdiction* case, that it

> is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed on any of the parties, for the law lies within the judicial knowledge of the Court.

Third, in the case concerning *United States Diplomatic and Consular Staff in Tehran*, the Court found that "the non-appearance of one of the States concerned cannot by itself constitute an obstacle to the indication of provisional measures". The Court added that, "by not appearing in the present proceedings, the Government of Iran, by its own choice, deprives itself of the opportunity of developing its own arguments before the Court."

In its Judgment, the International Court of Justice found that,

> in accordance with its settled jurisprudence, the Court, in applying Article 53 of its Statute, must first take up, *proprio motu*, any preliminary question, whether of

> admissibility or of jurisdiction, that appears from the information before it to arise in the case.

Of equal importance, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court stated that

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

In the same case, with respect to whether the claim is well founded in law, the Court observed:

> The use of the term "satisfy itself" [...] implies that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence. For the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law [...], so that the absence of one party has less impact.

With respect to whether the claim is well founded in fact, the Court observed that

> in principle the Court is not bound to confine its consideration to the material formally submitted to it by the parties [...]. Nevertheless, the Court cannot by its own enquiries make up for the absence of one of the Parties; that absence, in a case of this kind involving extensive questions of fact, must necessarily limit the extent to which the Court is informed of the facts.

In addition, the Court stated that

> the equality of the parties must remain the basic principle for the Court. The intention of Article 53 was that in a case of non-appearance neither party should be placed at a disadvantage; therefore the party which declines to appear cannot be permitted to profit from its absence, since this would amount to placing the party appearing at a disadvantage.

In 1991, the *Institut de Droit international* reflected essential elements of the Court's case law in a resolution on "Non-Appearance Before the International Court of Justice". Article 4 of that Resolution provides that, notwithstanding the non-appearance of a State before the Court in proceedings to which it is a party, that State is, by virtue of the Statute, bound by any decision of the Court in that case, whether on jurisdiction, admissibility, or the merits. Article 5 of the Resolution provides that a State's non-appearance before the Court is in itself no obstacle to the exercise by the Court of its functions under Article 41 of the Statute, that is the provision related to the indication of provisional measures.

It must now be considered how article 28 of the Tribunal's Statute is to be applied to a request for the prescription of provisional measures under article 290 of the Convention. Taking into account the case law of the International Court of Justice, the Kingdom of the Netherlands wishes to make the following observations.

First, the non-appearance of the Russian Federation cannot by itself constitute an obstacle to the prescription of provisional measures by the Tribunal.

Second, the Tribunal must, on its own accord, examine the question of jurisdiction. The Tribunal needs to establish its jurisdiction to prescribe provisional measures. It must also establish the *prima facie* jurisdiction of the arbitral tribunal that is being constituted to address the merits.

Third, the Tribunal needs to ensure that the factual and legal requirements for prescribing the provisional measures are met. Article 28 of the Tribunal's Statute applies to requests for provisional measures. To conclude otherwise would mean that proceedings on the merits could take place despite default, but incidental proceedings could not. The legal ramifications of its application should be understood in the context of incidental proceedings. Article 28 should be read in conjunction with Article 290, paragraph 5, of the Convention. It follows from the simultaneous application of both provisions that the assessment of a request for provisional measures follows a *prima facie* method of reasoning.

Fourth, the Russian Federation, which has chosen not to appear, remains a party to the case and is bound by the decision of the Tribunal in accordance with Article 33, paragraph 1, of the Tribunal's Statute.

The Kingdom of the Netherlands remains hopeful that the Russian Federation will reconsider its position and participate in the arbitral procedure.

Now, Mr President, with your permission, I would like to suggest calling to the stand Mr Henquet, who will continue our oral statement and will discuss jurisdiction.

The President:

Thank you, Ms Lijnzaad.

Before we proceed to the next statement, some Judges would like to ask questions of the Applicant. I give the floor to Judge Wolfrum.

Questions from Judges

[ITLOS/PV.13/C22/1/Rev.1, p. 9–10; TIDM/PV.13/A22/1/Rev.1, p. 9–11]

Judge Wolfrum:
Thank you, Mr President.

Ms Lijnzaad, may I ask you a question concerning the planning and the organization of the most recent cruise of the *Arctic Sunrise*? Could the Applicant please clarify whether, in its view, the operator of the *Arctic Sunrise*, Greenpeace, decided on the activities of the persons on board the vessel? Referring to activities, I mean the entry into the safety zone and some of them climbing onto the installation established by the Russian Federation; or, in the alternative, was the decision to take these actions made by the captain or by the crew on the spot? It is totally up to you at what time you respond to that question.

Thank you, Mr President.

The President:
Thank you, Judge Wolfrum.

I now give the floor to Judge Cot.

M. le Juge Cot :
Je vous remercie, Monsieur le Président.

Bonjour, Madame l'agente du Royaume des Pays-Bas. Ma question est la suivante : la demande en prescription de mesures conservatoires qui a été présentée par le Royaume des Pays-Bas fait état, aux paragraphes 30 et 31, d'une demande de mainlevée de l'immobilisation de l'*Arctic Sunrise* moyennant une caution ou autre garantie financière. Je voulais savoir si le Royaume des Pays-Bas pouvait donner une estimation, approximative, de la valeur du navire en question.

Même remarque que mon collègue Wolfrum, si vous pouvez répondre le moment venu … Je vous remercie.

The President:
Thank you, Judge Cot.

Judge Golitsyn.

Judge Golitsyn:
My question is: is the urgency for the release of the *Arctic Sunrise* at the stage of provisional measures justified, given the fact that, in accordance with the official report on the seizure of the property dated 15 October 2013 (Appendix 7 to Annex 2 of the Request), the competent Russian authorities "will be responsible for compliance with the security measures and have been notified of their liability for any loss, disposal or legal transfer of property that has been seized or confiscated"?

The President:
Thank you, Judge Golitsyn.

I now give the floor to Judge Akl.

M. le Juge Akl :
Madame l'agente du Royaume des Pays-Bas, c'est une simple question : pourriez-vous, si possible, nous indiquer quelles sont les pénalités imposables pour la violation des lois et

règlements de la Fédération de Russie relatifs à la zone de sécurité autour des îles artificielles et des installations dans la zone économique exclusive ?

Naturellement, selon les possibilités, nous attendons d'avoir ces réponses à votre convenance.

Je vous remercie, Monsieur le Président.

Le Président :

Je vous remercie, Monsieur le Juge Akl.

Je donne la parole au Juge Bouguetaia.

M. le Juge Bouguetaia :

Je vous remercie, Monsieur le Président.

Monsieur le Président, je voudrais demander à l'agente du Royaume des Pays-Bas s'il lui était possible de nous dire dans quelles conditions exactes les 30 marins qui étaient sur l'*Arctic Sunrise* ont été arrêtés. Il est évident que les faits se sont établis en zone économique exclusive. Mais je voudrais savoir avec précision dans quelle partie exactement les marins ont été arrêtés. S'agit-il d'une arrestation qui s'est faite en zone économique exclusive, mais en dehors de la zone dite « zone de sécurité », ou dans la zone de sécurité, ou éventuellement sur la plateforme ou, comme on croit le savoir, sur les petites embarcations qui ont transporté les marins du navire l'*Arctic Sunrise* jusqu'à la plateforme ?

Je vous remercie.

Le Président :

Je vous remercie, Monsieur le Juge Bouguetaia.

I wish to inform the Agent of the Applicant that those questions can be answered either during the hearing or in writing. It would be appreciated to receive a written answer by Thursday 7 November 2013 by 6 p.m.

I now give the floor to Mr Thomas Henquet to make the next statement of the Netherlands.

STATEMENT OF MR HENQUET – 6 November 2013, a.m.

Argument of the Netherlands (continued)

STATEMENT OF MR THOMAS HENQUET
COUNSEL FOR THE NETHERLANDS
[ITLOS/PV.13/C22/1/Rev.1, p. 10–15]

Mr Henquet:
Mr President, Members of the Tribunal, it is an honour for me to appear before the Tribunal for the first time.

I will first address the jurisdiction of this Tribunal under article 290, paragraph 5. I will thereafter address the *prima facie* jurisdiction of the arbitral tribunal that is being constituted under Annex VII to the Convention.

This Tribunal has jurisdiction to prescribe provisional measures if two requirements are met: first, the dispute "is being submitted" to arbitration and, second, the constitution of the arbitral tribunal is pending. Both requirements are met.

First, on 4 October, the Kingdom of the Netherlands submitted the dispute to arbitration under Annex VII. That dispute settlement procedure applies under article 287, paragraph 5, of the Convention. This is because the parties have not agreed on the same mode of binding dispute settlement: the Netherlands opted for the International Court of Justice and the Russian Federation opted for arbitration under Annex VII. The parties also did not agree on any other binding dispute settlement procedure in this case.

Second, the constitution of the arbitral tribunal is currently pending. The Netherlands appointed its arbitrator in accordance with article 3, paragraph (b), of Annex VII to the Convention. The other members of the arbitral tribunal remain to be appointed. The term within which the Russian Federation had to appoint its arbitrator expired last Monday.

In conclusion, the dispute has been submitted to arbitration and the constitution of the arbitral tribunal is pending. In the meantime, this Tribunal has jurisdiction to prescribe provisional measures.

I now turn to the jurisdiction of the arbitral tribunal that is being constituted. Article 290, paragraph 5, provides that the International Tribunal for the Law of the Sea may only prescribe provisional measures if it considers that, *prima facie*, the arbitral tribunal would have jurisdiction. Article 288 sets out a two-pronged test for the jurisdiction of the arbitral tribunal: first, the dispute must be submitted to the tribunal in accordance with Part XV; and second, the dispute must concern the interpretation or application of the Convention. Again, we submit that both elements of the test are met.

First, under article 286, a dispute may only be submitted to binding dispute settlement if no settlement has been reached by recourse to section 1. The relevant provision under section 1 is article 283, concerning the obligation to exchange views between the parties. The parties have exchanged several diplomatic notes, and we will recall those later. Further, the respective Ministers of Foreign Affairs discussed the dispute thrice: twice before the submission of the dispute to arbitration and once before the submission of the request for provisional measures. This notwithstanding, the dispute has rapidly escalated, and it continues to aggravate and extend.

The possibilities to settle the dispute by negotiation or otherwise have been exhausted. Therefore, under the settled case law of this Tribunal, the Kingdom of the Netherlands was permitted to submit the dispute to arbitration.

The second element of the test for the jurisdiction of the arbitral tribunal is also met: the dispute concerns the interpretation and application of the Convention. More specifically, it concerns the rights and obligations of the Russian Federation as a coastal State in its

exclusive economic zone, and, notably, its right to board, investigate, inspect, arrest, detain and seize vessels flying the flag of a third State. This concerns in particular Part V and Part VII, notably article 56, paragraph 2; article 58; article 87, paragraph 1(a); and article 110, paragraph 1.

In conclusion, the two-pronged *prima facie* test under article 290, paragraph 5, of UNCLOS is met. This *prima facie* jurisdiction is not affected by the declaration of the Russian Federation upon ratification of the Convention. The Russian Federation 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.

The Russian Federation invoked this declaration in its communication to the Tribunal of 22 October. The Russian Federation stated that it does not accept the arbitration procedure and that it did not intend to participate in the proceedings before this Tribunal.

We would make the following submissions on the position of the Russian Federation. Ultimately it is for the arbitral tribunal to decide whether it has jurisdiction, *compétence de la compétence*. This Tribunal must now decide whether the arbitral tribunal has *prima facie* jurisdiction. We submit that it does. Article 297, paragraph 1(a), of the Convention provides that the dispute shall be subject to binding dispute settlement when it is alleged that a coastal State has acted in contravention of the provisions of the Convention in regard to the freedoms and rights of navigation. This is precisely what the Kingdom of the Netherlands alleges.

Article 298 allows States to opt for exceptions to binding dispute settlement. However, they may only do so in the following categories of disputes. The first category of disputes, in paragraph 1(a), concerns sea boundary delimitations or historic bays or titles. The *Arctic Sunrise* dispute does not fall in this category. The second category of disputes, in paragraph 1(b), concerns military activities. The *Arctic Sunrise* dispute does not fall in this category either. The third category of disputes, in paragraph 1(c), concerns 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. There is no Security Council involvement and the *Arctic Sunrise* dispute does not fall in this category.

The remaining categories of disputes, also in paragraph 1(b), concern 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, paragraphs 2 and 3. This merits further consideration.

Before considering the Russian declaration, may I remind the Tribunal that, as a general rule, the 1982 Convention on the Law of the Sea does not allow reservations and exceptions. The Convention truly is a package deal. We note that the Russian declaration makes an exception for "disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction". However, article 298, paragraph 1(b), limits the scope of this exception; it only applies to disputes that are excluded from dispute settlement under article 297, paragraph 2 or 3.

Therefore, the question arises how to interpret the Russian declaration. Let us explore two possible interpretations. The first is that the declaration would be in conformity with the Convention. This would mean that the exception is limited to disputes in article 297, paragraph 2 and 3. These are disputes regarding marine scientific research and fisheries, respectively. The facts before us do not concern marine scientific research, nor do they concern fisheries. Therefore, the Russian declaration cannot affect the jurisdiction of the arbitral tribunal. The second possible interpretation is that the declaration is of a general

nature. This would mean that any "disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction" would be beyond the reach of binding dispute settlement. However, such a broad exception is not permitted by the Convention. The Convention prohibits it.

This prohibition is underscored by a declaration of the Kingdom of the Netherlands upon ratification. The Netherlands objected to any declaration or statement excluding or modifying the legal effect of the Convention. However, let us consider not only the position of the Kingdom of the Netherlands. The Russian Federation also made a declaration, and it is along the very same lines. I will read it out:

> 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.

So, the refusal by the Russian Federation to accept the jurisdiction of the arbitral tribunal would not only be inconsistent with article 309 of the Convention, but it would also be inconsistent with its very own declaration upon ratification. Therefore, the declaration by the Russian Federation cannot affect the jurisdiction of the arbitral tribunal; either it does not apply, or it is not allowed.

In conclusion, we submit that the *prima facie* test for jurisdiction is met.

Mr President, Members of the Tribunal, I will now demonstrate that the claim is supported by fact.

On 18 September the Russian Federation informed the Kingdom of the Netherlands that "the decision was made to seize the *Arctic Sunrise*". This followed a protest by Greenpeace International directed against the offshore ice-resistant fixed platform Prirazlomnaya in the Barents Sea.

On 19 September, in the exclusive economic zone of the Russian Federation, armed agents of the Russian Federal Security Service descended from a Russian helicopter of this Service and boarded the *Arctic Sunrise*. The agents took control of the vessel, and detained the vessel and its crew. The Russian coastguard subsequently towed the vessel to Murmansk.

The day after, on 20 September, the Kingdom of the Netherlands requested the Russian Federation to provide information, including answers to specific questions, concerning these actions. The Netherlands also underlined the importance of the immediate release of the vessel and its crew. It requested the Russian Federation to reply by the 23rd.

On 24 September the *Arctic Sunrise* arrived in Murmansk, where it was moored alongside the Russian coastguard vessel *Ladoga*. The crew was brought to shore. The crew members have since been kept in detention pending judicial proceedings.

The Russian Federation did not respond to the requests by the Kingdom of the Netherlands of 20 September. It also did not respond to an urgent reminder by the Netherlands on 26 September. In that note the Netherlands reiterated its request that the Russian Federation immediately release the vessel and its crew. In this connection, the Netherlands inquired as to "whether such release would be facilitated by the posting of a bond or other financial security and, if so, what the Russian Federation would consider to be a reasonable amount for such bond or other financial security."

"ARCTIC SUNRISE"

On 27 September the Russian authorities announced that investigations on board the *Arctic Sunrise* would be conducted. They suggested that a representative of the Consulate General be present during these investigations. The Netherlands declined this as the detention of the vessel was unlawful.

On 28 September the Russian authorities commenced the investigation of the vessel. The Netherlands recorded its formal protest thereto. As of today, the Netherlands has not received a report of the investigation.

On 1 October the Russian Federation responded to the requests for information of the Kingdom of the Netherlands. The Russian Federation argued that the boarding, investigation and detention of the *Arctic Sunrise* and the detention of its crew were justified on the basis of general provisions in the Convention related to the exclusive economic zone and the continental shelf. It also gave notification that it had instituted a criminal investigation into crew members of the vessel for the crime of piracy under Russian law.

In reply, the Netherlands contested that these provisions of the Convention justified the actions taken against the *Arctic Sunrise* and its crew.

The Netherlands also stated that it appeared that the two States have diverging views on the rights and obligations of the Russian Federation as a coastal State in its exclusive economic zone. The matter was urgent because of the detention of the vessel and its crew. Hence, the Kingdom of the Netherlands stated that it considered initiating arbitration as soon as feasible. The Netherlands did so on 4 October. Since then the dispute has further aggravated and extended. First, the detention of the entire crew has been ongoing for nearly seven weeks. Second, by judgment of 8 October the captain of the *Arctic Sunrise* was found guilty and fined for failing to comply with a coastguard order to stop the vessel and allow for an inspection. Third, on 15 October Russian authorities formally seized the *Arctic Sunrise* on the basis of a court order. The Netherlands formally protested against the seizure. It also once again urged the Russian Federation to immediately release the vessel and its crew.

Mr President, at this point, the Kingdom of the Netherlands would like to introduce the witness testimony of Mr Daniel Simons. Mr Simons is legal counsel with Greenpeace International. His testimony will be directed to the factual account provided by Greenpeace International as Annex 2 to the Request for provisional measures. Mr Simons is a co-author of this factual account. The account spans the period between 18 September and 17 October.

The President:
Thank you, Mr Henquet.

Examination of witness

MR DANIEL SIMONS
EXAMINED BY MR THOMAS HENQUET
[ITLOS/PV.13/C22/1/Rev.1, p. 15-17]

The President:

The Tribunal will then proceed to hear the witness, Mr Daniel Simons. He may now be brought into the courtroom.

I call upon the Registrar to administer the solemn declaration to be made by the witness.

The Registrar:

Thank you, Mr President.

Good morning, Mr Simons. A witness is required to make the solemn declaration under article 79 of the Rules of the Tribunal before making any statement before the Tribunal. You have been provided with the text of the declaration. May I invite you to make the solemn declaration?

(*The witness made the solemn declaration.*)

The Registrar:

Thank you, Mr Simons.

The President:

Good morning, Mr Simons. Your examination will be conducted by Mr Henquet of the Kingdom of the Netherlands.

Mr Henquet, you may proceed.

Mr Henquet:

Good morning, Mr Simons. Thank you for agreeing to testify in these proceedings. With the permission of the Tribunal I would like to give the witness a copy of the factual account which is Annex 2 to the Request for provisional measures. (*Document handed to the witness*) Mr Simons, could you please take a look at the document I have just put in front of you? Can you confirm that you are indeed the co-author of this factual account?

Mr Simons:

Yes, I am.

Mr Henquet:

Second, can you confirm that the contents of this factual account are correct to the best of your knowledge?

Mr Simons:

Yes, I can.

Mr Henquet:

Mr Simons, could you explain the sources of the information underlying the factual account?

Mr Simons:
Normally, in drawing up a statement of facts like this, we would be able to rely on direct sources of information. I am thinking of, for example, the testimony of crew members, the log book of the ship, audio recordings of communications on the bridge, as all radio communications are automatically recorded on Greenpeace ships. As you know, Greenpeace International has always been willing to make such direct information available to the Foreign Ministry of the Netherlands.

In this case, those sources of information are unfortunately not available to us. The 30 persons who could testify as to the events of the day are all unfortunately in detention in Murmansk. The ship's log book and the recordings of audio are within the control of the Russian authorities and may have been partly lost, as explained in the statement of facts.

We do have access to some real-time information or almost real-time information from 18 and 19 September. The ship was in regular contact by telephone with a Greenpeace International employee in London. After the telephone conversations that person immediately summarized the content of the telephone conversation in an internet chat group. We have the records of those chat groups which provide a fairly detailed account of the events of the day. Also, some emails were sent from the ship to various staff members. We have been able to draw on those. Of course, as far as events after 19 September are concerned, the statement of facts also draws on various sources of information, documents from the domestic legal proceedings, news reports, official statements, the video that is available of those events et cetera.

Mr Henquet:
Could I ask you to explain your personal involvement in obtaining this information that you have just described?

Mr Simons:
I was a member of the chat group that I just mentioned, where the information coming from the ship was shared with the staff members. Also, I have been responsible over the past few weeks for coordinating the legal response to the prosecutions in Murmansk. As part of that, I have been in Murmansk for two weeks and so I have gained some personal knowledge through that involvement.

Mr Henquet:
Thank you very much.

Mr President, this concludes our questioning of the witness.

The President:
Mr Simons, at this stage Judge Golitsyn has a question that he would like to ask.

MR DANIEL SIMONS
QUESTIONED BY JUDGE GOLITSYN

Judge Golitsyn:
Mr Simons, you are a legal counsel of Greenpeace International. In your capacity as legal counsel, did you, or any other members of the legal team of Greenpeace International, advise the crew members before they undertook this trip on floated boats that their activities in the safety zone and on the platform may constitute a violation of the safety regulations for the safety zone and also regulations on continental shelf installations enacted by the Russian

Federation in furtherance of its jurisdiction under article 60 of the United National Convention on the Law of the Sea? I will have a follow-up question.

Mr Simons:
We always conduct an assessment of the legal risks that may be involved in advance of any protests at sea. This assessment is made available to management. It is also made available to prospective participants in such a protest, and they have the ability to opt out of the action if they are not comfortable with the risks that are entailed. Of course, the content of that legal advice is privileged. I therefore believe it would be problematic, in view of the ongoing prosecutions in Murmansk, if I were to disclose the exact content of the legal advice that was given at that time.

Judge Golitsyn:
In the light of what you have just told us, it would be understood that the crew members who took part in these activities were aware of the fact that they may be detained and prosecuted under Russian law for violation of safety regulations in the safety zone and on the continental shelf installation.

Mr Simons:
As far as the safety zone is concerned, I can say that we have not been able to find any criminal or administrative rule in Russian law which imposes a sanction for entering a safety zone. I would say that the decision to enter the safety zone was certainly not taken lightly. A protest of this kind is, of course, very difficult to conduct at a distance of three nautical miles from a platform and the protest was entirely safe. The Prirazlomnaya is an ice-resistant platform. It is capable, according to the director of the company, of withstanding a torpedo strike. We certainly took safety considerations into account and we felt it would be possible to conduct the protest entirely safely.

The President:
Thank you, Judge Golitsyn.

Mr Simons, thank you for your testimony. Your examination is now finished.

(*The witness withdrew*)

"ARCTIC SUNRISE"

STATEMENT OF MR THOMAS HENQUET (continued)
COUNSEL FOR THE NETHERLANDS
[ITLOS/PV.13/C22/1/Rev.1, p. 17]

Mr Henquet:
Mr President, we would like to add that, since the period covered by the factual account of Greenpeace, events have unfolded further. On 22 October the captain of the ship reported to the operator that Russian authorities had investigated the ship. The captain witnessed the investigation together with his lawyer and finally, by 23 October, the crew of the *Arctic Sunrise* had reportedly been charged with hooliganism. It remains unclear to us whether these charges replace the piracy charges or whether they are supplemental to those charges.

Mr President, Members of the Tribunal, this concludes my part of the oral statement and with your indulgence, I would now like to hand over to my colleague, Mr René Lefeber.

The President:
Mr Lefeber, you have the floor.

STATEMENT OF MR RENÉ LEFEBER
CO-AGENT OF THE NETHERLANDS
[ITLOS/PV.13/C22/1/Rev.1, p. 18-27]

Mr Lefeber:
Mr President, Members of the Tribunal, it is an honour for me to appear for the first time before this Tribunal. Shakespeare said "[t]here is a tide in the affairs of men, which taken at the flood, leads on to fortune. Omitted, all the voyage of their life is bound in shallows and miseries. On such a full sea are we now afloat." (*Julius Caesar*, Act IV, Scene 3).

From the time its native son, Hugo Grotius, first declared that the freedom of the seas was the right of all, the Netherlands has defended the freedom of navigation and other freedoms of the seas, as well as uses related to these freedoms. It does so today.

Pursuant to article 28 of the Tribunal's Statute, the claim must be well founded in law. However, in these proceedings related to the prescription of provisional measures, the Tribunal does not, according to its settled jurisprudence, need to establish definitely the existence of the rights claimed by the Kingdom of the Netherlands. This notwithstanding, the Kingdom will address whether its claim on the merits can be substantiated.

The applicable law in the proceedings before the arbitral tribunal that is being constituted and this Tribunal is the Convention and other rules of international law not incompatible with the Convention. So provides article 293 of the Convention. Such other rules include the 1966 International Covenant on Civil and Political Rights as well as customary international law.

The Kingdom of the Netherlands claims that the freedom of navigation by a vessel flying its flag and its right to exercise jurisdiction over that vessel have been infringed by the Russian Federation. In addition, it claims that the right to liberty and security of a vessel's crew members and their right to leave the territory and maritime areas of a coastal State have been infringed by the Russian Federation. As for the freedom of navigation, the provisions of the Convention on the High Seas apply in the exclusive economic zone. The high seas are open to all States for navigation and, hence, the exclusive economic zones of coastal States are open to all States for navigation: article 58, paragraph 1, and article 87 of the Convention. This was recently considered by this Tribunal in its Judgment of 28 May in the case concerning the *Louisa*: "article 87 of the Convention deals with the freedom of the high seas, in particular the freedom of navigation, which applies to the high seas and, under article 58 of the Convention, to the exclusive economic zone." (*M/V "Louisa"*, para. 109).

The contemporary law of the sea has undergone significant changes since the days of Hugo Grotius. In the 20th century, coastal States have successfully claimed and acquired sovereign rights over adjacent maritime areas. This development of international law corresponds with legitimate concerns of coastal States to protect their national interests, notably in the field of the use and conservation of natural resources and the protection of the coastal marine environment. Unlike the territorial sea, the sovereignty of a State does not extend to that area. The sovereign rights of a coastal State in maritime areas beyond its territorial sea are resource-oriented and limited in scope. The exercise of jurisdiction to protect these sovereign rights is functional. The law of the sea restricts the right of a coastal State to exercise jurisdiction in these areas. A coastal State cannot unilaterally extend such a right. Indeed, concern over the broad assertion of jurisdiction in the exclusive economic zone, notably enforcement jurisdiction, by coastal States prompted my Government to address this matter in a declaration upon ratification of the Convention. The declaration states that jurisdiction over the establishment and use of installations and structures is limited to the rules contained in article 56. paragraph 1, and is subject to the obligations contained in

article 56, paragraph 2, article 58 and article 60 of the Convention. In addition, the declaration states that the coastal State does not enjoy residual rights in the exclusive economic zone: "The rights of the coastal State in its exclusive economic zone are listed in article 56 of the Convention, and cannot be extended unilaterally."

The Kingdom of the Netherlands itself is a coastal State with maritime areas in the North Sea and the Caribbean Sea. It has proclaimed an exclusive economic zone and has made use of the rights of a coastal State under the contemporary law of the sea. At the same time, the Kingdom of the Netherlands is conscious of its obligations as a coastal State towards flag States. It respects the navigational rights of foreign vessels and exercises limited enforcement jurisdiction in order to respect the rights of flag States.

In the present case, the Russian Federation has not exercised similar restraint. By boarding the *Arctic Sunrise*, the Russian Federation has overstepped its rights as a coastal State and violated its obligations owed to the flag State of the *Arctic Sunrise*, the Kingdom of the Netherlands.

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

The Russian Federation has made various inconsistent attempts to justify the boarding of the *Arctic Sunrise*.

First, in its diplomatic note of 18 September, the day before the boarding of the *Arctic Sunrise*, the Russian Federation informed the Kingdom of the Netherlands that the decision had been made to seize the vessel. Having stated that the actions by Greenpeace "bore the characteristics of terrorist activities", the Russian Federation observed that the actions of the *Arctic Sunrise* can be interpreted only as "a provocation, which exposed the Arctic region to the threat of an ecological disaster with unimaginable consequences". On 1 November, Interfax News Agency reported that the Prime Minister of the Russian Federation, Dmitry Medvedev, said 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".

Second, in its diplomatic note of 1 October the Russian Federation stated that the boarding of the *Arctic Sunrise* had been carried out on the basis of articles 56, 60 and 80 of the Convention and in accordance with domestic law. In its diplomatic note to the Tribunal of 22 October, the Russian Federation invokes the Convention without specifying the relevant provisions. It pointed out that the actions of the Russian authorities in respect of the vessel *Arctic Sunrise* and its crew to enforce laws and regulations of the Russian Federation as a coastal State are in accordance with the relevant provisions of the Convention.

Third, a court order of 7 October to seize the vessel referred to article 19 of the 1958 Convention on the High Seas with respect to piracy. According to the court, it was on the basis of that Convention that the coastguard had seized the *Arctic Sunrise* as "there was a reasonable suspicion that this ship was engaged in piracy".

Fourth, a judgment of 8 October, by which the captain of the *Arctic Sunrise* was found guilty of an administrative offence, stated that "the ship increased its speed and continually changed course, thereby manoeuvring dangerously and posing a real threat to the safety of the naval ship and its crew."

STATEMENT OF MR LEFEBER – 6 November 2013, a.m.

Fifth, in recent days, it is reported in the news that charges have been brought under Russian law against the members of the crew for hooliganism.

Mr President, the foregoing illustrates the wavering legal stance of the Russian Federation as to the legal basis for its actions related to the *Arctic Sunrise*. For the sake of argument, in the light of the absence of the Russian Federation at the present hearing, the Kingdom of the Netherlands will consider the application of the justifications invoked by the Russian Federation as well as other justifications provided for in the Convention. Article 110 of the Convention lists five exceptions to the general prohibitive rule.

First, subparagraph (a): were there any reasonable grounds for suspecting that the *Arctic Sunrise* was engaged in piracy? No, there were no such grounds. In its diplomatic note of 1 October the Russian Federation informed the Kingdom of the Netherlands that a criminal investigation had been instituted into piracy committed by an organized group under Russian law. It also would appear that the content of this domestic law provision differs from the definition of piracy in the Convention. To justify the boarding of the *Arctic Sunrise* on the suspicion that the vessel was engaged in piracy, the actions concerned need to qualify as piracy under international law, notably article 101 of the Convention. Although a Russian court referred to article 19 of the 1958 Convention on the High Seas with respect to piracy, the President of the Russian Federation, Vladimir Putin, stated on 25 September that the Greenpeace activists are "obviously not pirates". The Kingdom of the Netherlands can only concur with the President of the Russian Federation on this point. The facts in the present case do not provide reasonable grounds for suspecting that the crew of the *Arctic Sunrise* engaged in piracy.

The actions of the Greenpeace activists do not meet the requirements of article 101 of the Convention. In particular, they do not qualify as any illegal acts of violence or detention, or any act of depredation; the actions were also not committed for private ends.

Second, subparagraph (b): were there any reasonable grounds for suspecting that the *Arctic Sunrise* was engaged in slave trade? No, there were no such grounds and this has also not been alleged by the Russian Federation. Furthermore, we would like to note that enforcement rights beyond that of visit are limited to the flag State: article 99 of the Convention.

Third, subparagraph (c): were there any reasonable grounds for suspecting that the *Arctic Sunrise* was engaged in unauthorized broadcasting? No, there were no such grounds and this also has not been alleged by the Russian Federation.

Fourth, subparagraph (d): were there any reasonable grounds for suspecting that the *Arctic Sunrise* was without nationality? No, there were no such grounds and this has also not been alleged by the Russian Federation. The *Arctic Sunrise* is flying the flag of the Kingdom of the Netherlands and the Russian Federation was conscious of the fact that the *Arctic Sunrise* is of Dutch nationality. Its diplomatic note of 18 September may serve as evidence.

Fifth, subparagraph (e): were there any reasonable grounds for suspecting that the *Arctic Sunrise* was, though flying the flag of the Kingdom of the Netherlands, of Russian nationality? No, there were no such grounds and this has also not been alleged by the Russian Federation. The Russian Federation has acted on the understanding that the vessel is of Dutch nationality. Its diplomatic note of 18 September attests to that as well.

Therefore, none of the exceptions in article 110 of the Convention apply. Are there any other exceptions the Russian Federation could invoke to justify the boarding of the *Arctic Sunrise*? The *chapeau* of article 110 indicates that there may be such other exceptions. The boarding of foreign vessels may be justified where acts of interference derive from powers conferred by treaty.

The Convention itself provides for additional exceptions with respect to activities of foreign vessels in the exclusive economic zone.

First, article 73, paragraph 1, provides that the coastal State may take enforcement measures, including boarding, inspection, arrest and judicial proceedings, with respect to the use of living resources in its exclusive economic zone. The facts do not support the view that the *Arctic Sunrise* engaged in such use and this has also not been alleged by the Russian Federation. This exception does not apply.

Second, article 220, paragraphs 3 to 8, in conjunction with article 226, paragraph 1, permit a coastal State to take specified enforcement measures with respect to foreign vessels under narrowly defined circumstances. These circumstances all relate to the violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels. The facts do not support the view that the *Arctic Sunrise* polluted the marine environment and this has also not been alleged by the Russian Federation. This exception does not apply either.

The President:
I am sorry to interrupt you, Mr Lefeber. We have reached 11.34. Unless you can finish in a few minutes, we will now take a break of 30 minutes and continue at noon.

(Break)

The President:
We will continue the hearing.

Mr Lefeber, you have the floor.

Mr Lefeber:
Thank you, Mr President. Before the coffee break I was reviewing possible justifications for the boarding of the *Arctic Sunrise*. I had explained that exceptions must be explicit and narrowly construed. I had reviewed article 110 exceptions and then proceeded to other exceptions that may be found in the Convention, and I was drawing the Tribunal's attention to exceptions that may be found in relation to the exclusive economic zone. I had mentioned articles 73, 220 and 226, and I have one further observation to make in relation to articles 73, 220 and 226.

The additional exceptions contained in articles 73, 220 and 226 corroborate the fact that any exception to the general prohibitive rule must be narrowly construed. The boarding, investigating, inspecting, arresting, detaining and seizing of a vessel by a coastal State under these provisions is subject to the prompt release procedure under article 292 of the Convention.

The Convention also provides for general exceptions that may apply in connection with activities of foreign vessels in the exclusive economic zone.

First, article 111 allows a coastal State to board and arrest a foreign vessel after a hot pursuit. However, the facts of the case do not justify hot pursuit in accordance with the provisions of the Convention. The boarding was not preceded by an uninterrupted pursuit. Approximately 36 hours elapsed between the decision to seize the vessel and its boarding by agents of the Russian Federal Security Service. This exception does not apply.

Second, article 221 contains a safeguard clause with respect to measures to avoid pollution arising from maritime casualties. This provision permits the coastal State to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests from pollution or threat of pollution. Such measures must be taken following a maritime casualty, or acts relating thereto, which may reasonably be expected to result in major harmful consequences. The Russian Federation has alluded to the threat of an ecological disaster with unimaginable consequences in the

Arctic region to justify its action with respect to the *Arctic Sunrise*, but the facts do not support it. Therefore, this exception does not apply either.

There is no other treaty that applies between the Kingdom of the Netherlands and the Russian Federation that could have justified the boarding of the *Arctic Sunrise*. What is more, the conclusion of bilateral and multilateral treaties addressing contemporary concerns related to trafficking in drugs, migrants and weapons of mass destruction have only confirmed the exclusive right of the flag State to exercise enforcement jurisdiction. Procedures were introduced in these treaties to facilitate authorization by flag States to board a vessel, but they stop short of permitting the boarding of a vessel without the prior consent of the flag State.

Other justifications advanced by the Russian Federation also do not provide for exceptions to the general prohibitive rule. These justifications are not supported by law.

First, articles 56, 60 and 80 of the Convention. In accordance with article 60, a coastal State may establish reasonable safety zones around artificial islands, installations and structures. The breadth of the safety zone shall not exceed 500m, except as authorized by generally accepted international standards or as recommended by the competent international organization; and we would argue that in this case that is the international maritime organization. There are, however, no such authorizations or recommendations.

Mr President, we challenge the lawfulness of the extensive breadth and the applicable rules in the safety zone established around the Prirazlomnaya platform. Russian domestic law provides for a safety zone of three nautical miles around the platform and a ban where it is considered that there could be a danger to shipping, in which case permission is required from the operator of the platform to enter that safety zone of three nautical miles.

In addition to that, there is a ban on shipping in a safety zone of 500 metres around the platform. We challenge the lawfulness of the safety zone that extends to three nautical miles. This is not compatible with the Convention. In any event, the coastal State may only take "appropriate measures" under article 60, paragraph 4, of the Convention. The boarding of a foreign vessel, let alone the taking of other enforcement measures, is not, as it is not explicitly provided for.

Second, the alleged dangerous manoeuvring. The international standards and rules referred to by the Russian Federation in its diplomatic note of 1 October, that is the 1965 International Code of Signals and the 1972 International Regulations for Preventing Collisions at Sea, do not permit States to board a foreign vessel, let alone to take other enforcement measures. This is corroborated by article 97, paragraph 3, of the Convention. In matters of collision or any other incident of navigation, 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 States.

Third, the new allegations of hooliganism. Although such conduct may be prohibited under Russian law, this does not have a corollary in international law. The actions of Greenpeace would rather fall within the ambit of the freedoms of expression, demonstration and protest. These freedoms are supported by international law.

Therefore, the boarding of the *Arctic Sunrise* by the Russian authorities without the prior consent of the Kingdom of the Netherlands was a breach of the Convention as well as customary international law. The actions of the *Arctic Sunrise* on 18 September were reason for the Russian Federation to contact the Kingdom of the Netherlands on the same day in a diplomatic note, but it did not request – I repeat: it did not request – the Kingdom's consent to board the vessel. Such consent would have justified the boarding of the *Arctic Sunrise*. Consent is one of the circumstances precluding wrongfulness, as contained in the Articles on the Responsibility of States for Internationally Wrongful Acts. The facts of this case also do not support the application of any of the other circumstances precluding wrongfulness that can be found in these Articles: self-defence, countermeasures in respect of an internationally

wrongful act, *force majeure*, distress, or necessity. The part of these Articles related to circumstances precluding wrongfulness reflects customary international law.

In sum, the boarding of the *Arctic Sunrise* by the Russian authorities is a breach of the Convention and customary international law. It is prohibited under the Convention, in particular Part V and Part VII, notably article 56, paragraph 2; article 58, paragraph 2; and article 110, paragraph 1; as well as customary international law. The boarding carried out by agents of the Federal Security Service from a helicopter of that Service is attributable to the Russian Federation, as this aircraft was on government service, as were the agents. Therefore, the boarding of the vessel constitutes an internationally wrongful act, entailing the international responsibility of the Russian Federation.

Mr President, since the boarding of the *Arctic Sunrise* is internationally wrongful, all subsequent acts are internationally wrongful as well. Accordingly, the usurpation of control over the *Arctic Sunrise* is internationally wrongful; the transfer of the *Arctic Sunrise* to the internal waters of the Russian Federation is internationally wrongful; the inspections and investigations of the *Arctic Sunrise* are internationally wrongful; the arrest, continuing detention and seizure of the *Arctic Sunrise* are internationally wrongful; and the arrest and continuing detention of the crew of the *Arctic Sunrise* are internationally wrongful. Since these acts are all attributable to the Russian authorities, they also entail the international responsibility of the Russian Federation.

The detention of the vessel and its crew, irrespective of its conformity with the domestic law of the Russian Federation, is an internationally wrongful act continuing in time. The arrest and detention of the persons on board the *Arctic Sunrise* is not only a breach of the law of the sea, but also of international human rights law.

The Russian authorities were only able to arrest and detain the crew after the boarding of the *Arctic Sunrise* without the prior consent of the Kingdom of the Netherlands. Even if the unlawful capture of a person by the authorities of one State in an area or place under the jurisdiction of another State may result in lawful detention under the domestic law of some nations under the doctrine of *male captus, bene detentus*, it does not preclude its wrongfulness under international law.

The arrest and detention of the crew of the *Arctic Sunrise* are contrary to international law and they are therefore arbitrary in nature. This is a breach of article 9, paragraph 1, of the 1966 International Covenant on Civil and Political Rights, pursuant to which no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law, and that includes international law. It also results in a breach of article 12, paragraph 2, of the Covenant, as the crew is not free to leave the territory and maritime areas under the jurisdiction of the Russian Federation.

Accordingly, the Kingdom of the Netherlands submits that its claim on the merits can be substantiated.

Mr President, to further corroborate that the claim is supported by law, I will now turn to the requirements for the prescription of provisional measures under article 290 of the Convention. Such measures may be prescribed if: (1) the arbitral tribunal that is being constituted has *prima facie* jurisdiction, (2) the requested provisional measures are appropriate under the circumstances to preserve the rights of the Kingdom of the Netherlands, and (3) the prescription of provisional measures is urgently required.

As already submitted, the arbitral tribunal that is being constituted has *prima facie* jurisdiction. This requirement is therefore met. As for the second requirement, that the requested provisional measures are appropriate under the circumstances to preserve the rights of the Kingdom of the Netherlands, we would like to observe that the Russian Federation's internationally wrongful acts continue as long as the vessel and its crew remain detained. The continuing detention of the *Arctic Sunrise* requires the prescription of provisional measures,

as it precludes the exercise of the freedom of navigation by a vessel that flies the flag of the Kingdom of the Netherlands. It also precludes the Kingdom's exercise of jurisdiction over the vessel.

Moreover, the vessel is at risk of perishing since the Russian authorities assumed control over the vessel. An operational vessel cannot be deactivated without creating a risk of damage, unless adequate measures are taken to preserve its operability. The operability of the vessel may be adversely affected when the vessel is reactivated. This reality is compounded by the prevailing weather, ice, and environmental conditions in the fragile and hostile Arctic region. The operator of the *Arctic Sunrise* has expressed concern that keeping a vessel unmanned for extended periods in cold weather may cause damage to machinery, and may cause fire, flooding, pollution, security and health risks. The vessel is an aging icebreaker and requires intensive servicing to maintain its operability. This has not been possible. As a result, the vessel's general condition may deteriorate, possibly compromising the vessel's safety and seaworthiness. This may create a risk for the environment, including the release of bunker oil.

The captain of the *Arctic Sunrise* witnessed an inspection of the vessel. On 22 October, he reported to the operator that navigational aids had been taken away from the vessel. These include the Electronic Chart Display and Information System, its monitor and the side scan sonar. Furthermore, the antenna of the long-range identification and tracking system had been removed from the crow's nest and the radio room is in disarray. The exact wording of the captain was "the radio room looks like a bomb hit it". The captain also reported that every single hard drive from the computer equipment had been removed. As all the satellite communication systems seem to have been disabled, the vessel's ability to operate independently appears to be greatly reduced and therefore its safety level has been adversely affected.

Moreover, the continuing detention of the crew requires the prescription of provisional measures. This case concerns a dispute between two States with respect to the rights and obligations of a coastal State in its exclusive economic zone. The settlement of such disputes between two States ought not to infringe upon the enjoyment of individual rights and freedoms of the crew of the vessels concerned.

Mr President, the continuing detention of the vessel and its crew has irreversible consequences. As a result of the continuing detention, the *Arctic Sunrise* is at risk of perishing; if the vessel perishes, the loss is irreversible. As for the continuing detention of the crew, every day spent in detention is irreversible. To prolong the detention pending the constitution of the arbitral tribunal and the resolution of the dispute would further prejudice the rights of the Kingdom of the Netherlands.

It also follows from the case law of the Tribunal that the rights of the Kingdom of the Netherlands as the flag State would not be fully preserved if the provisional measures were not prescribed. In the case concerning the *M/V Saiga* the Tribunal held:

> The rights of the Applicant would not be fully preserved if, pending the final decision, the vessel, its Master and the other members of the crew, its owners or operators were to be subjected to any judicial or administrative measures in connection with the incidents leading to the arrest and detention of the vessel and to the subsequent prosecution and conviction of the Master.

This consideration of the Tribunal fully applies in this case. The *Arctic Sunrise*, its master and the other members of the crew, its owner and operator are, directly or indirectly, subject to judicial and administrative measures in connection with the incidents leading to the arrest and detention of the vessel. The entire crew is being prosecuted. The similarities

between the two cases cannot but lead the Tribunal to prescribe the requested provisional measures, as it did in the case concerning the *M/V Saiga*.

The third, and final, requirement under article 290, paragraph 5, urgency, is also met. According to the Tribunal in the case concerning *MOX Plant*, there is urgency, amongst others, if action prejudicial to the rights of either party is likely to be taken before the constitution of the Annex VII arbitral tribunal. In the present case, action prejudicial to the rights of the Kingdom of the Netherlands is not merely likely to be taken by the Russian Federation; such action has already been taken and has been continuing since the boarding and detention of the *Arctic Sunrise*. Moreover, the dispute has further aggravated and extended since the initiation of the arbitral procedure.

The Tribunal has further clarified that urgency must be measured against the time needed to operationalize the arbitral tribunal. In this case, the Russian Federation has indicated that it does not accept the arbitration procedure under Annex VII of the Convention. As of today, the Russian Federation has not appointed its arbitrator. The refusal of the Russian Federation to accept arbitration is resulting in delays in the constitution of the arbitral tribunal. It will therefore take considerable time before the arbitral tribunal can exercise its judicial function.

In conclusion, the prescription of provisional measures is not only appropriate, but cannot endure any further delay.

Mr President, before I hand over to the Agent for the Kingdom of the Netherlands to make our final submissions, with your indulgence, I would like to make one further observation.

The events giving rise to this dispute took place in the Barents Sea. The Barents Sea was named after Willem Barentsz. In 1596, he sailed from Amsterdam to explore the North East Passage. His ship became stranded in ice and Captain Barentsz and his crew were forced to hibernate on *Novaya Zemlya*. It was a long and severe winter for the sailors. They built themselves, from the wreckage of the ship, a house. It was called "Het Behouden Huys", the Safe House. After the winter, the survivors, with the assistance of Russian coastal communities, returned to Amsterdam, where they arrived at the beginning of November of the following year. Their account is part of our national cultural heritage.

Mr President, winter is coming. My Government prays that the *Arctic Sunrise* and its crew may safely return to Amsterdam before the Arctic sun sets and winter comes. Mr President, Members of the Tribunal, thank you for your attention.

The President:
Thank you, Mr Lefeber.

At this stage Judge Anderson would like to ask questions.

Questions from Judges

Judge Anderson:
Thank you very much, Mr President.

My question arises from counsel's statement when allusion was made to the order made by a court in Russia in application of article 19 of the Convention on the High Seas of 1958. Have you been informed of any new legal basis for the seizure of the ship or does the ship remain under detention today on the basis of this order under the Convention on the High Seas?

The President:
Thank you, Judge Anderson, and thank you again, Mr Lefeber, for your statement.

Now I would like to give the floor to Ms Lijnzaad.

"ARCTIC SUNRISE"

STATEMENT OF MS LIJNZAAD
AGENT OF THE NETHERLANDS
[ITLOS/PV.13/C22/1/Rev.1, p. 27–28]

Ms Lijnzaad:
Thank you, Mr President. Mr President, Members of the Tribunal, before I conclude with making our final submissions, I would like to inform the Tribunal that my delegation would like to avail itself of the possibility to provide answers in writing by 6 o'clock tomorrow. We will be happy to look at the questions raised by the Judges and respectfully submit that some of the questions really require us to look into the detail of events developing in the Russian Federation, so we will provide answers in writing tomorrow by the end of the day. It is our understanding that our written replies to these questions will also be made public by the Tribunal on the internet site for the wider public to see our replies.

Mr President, Members of the Tribunal, it is now for me to conclude our oral statement with the final submissions by the Kingdom of the Netherlands in this case.

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

to declare that:

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

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

d) to immediately enable the *Arctic Sunrise* to be resupplied, to leave its place of detention and the maritime areas under the jurisdiction of the Russian Federation and to exercise the freedom of navigation;
e) to immediately release the crew members of the *Arctic Sunrise*, and allow them to leave the territory and maritime areas under the jurisdiction of the Russian Federation;
f) to suspend all judicial and administrative proceedings, and refrain from initiating any further proceedings, in connection with the incidents leading to the dispute concerning the *Arctic Sunrise*, and refrain from taking or enforcing any judicial or administrative measures against the *Arctic Sunrise*, its crew members, its owners and its operators; and

to ensure that no other action is taken which might aggravate or extend the dispute.

The President:
Thank you, Ms Lijnzaad, for the final submissions made under article 75, paragraph 2, of the Rules of the Tribunal. The written text of these submissions, signed by the Agent, shall be communicated to the Tribunal and a copy of it shall be transmitted to the other Party.

Closure of the Oral Proceedings
[ITLOS/PV.13/C22/1/Rev.1, p. 28–29; TIDM/PV.13/A22/1/Rev.1, p. 31–32]

The President:
I would like to ask the Registrar to make some administrative announcements.

Le Greffier :
Conformément à l'article 86, paragraphe 4, du Règlement du Tribunal, les parties peuvent, sous le contrôle du Tribunal, corriger le compte rendu de leurs plaidoiries ou déclarations, sans pouvoir toutefois en modifier le sens et la portée. Ces corrections concernent la version vérifiée du compte rendu dans la langue officielle utilisée par la partie concernée. Les corrections devront être transmises au Greffe le plus tôt possible, et au plus tard le mardi 12 novembre 2013 à 17 heures, heure de Hambourg.

Merci, Monsieur le Président.

The President:
On behalf of the Tribunal, I would like to take this opportunity to express our appreciation for the high quality of the presentations at the hearing.

The Tribunal will now withdraw to deliberate. The date for the delivery of the Order in this case is tentatively set as Friday, 22 November 2013. The Parties will be informed reasonably in advance of any change to this date. In accordance with the usual practice, I request the Agent to kindly remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberations prior to the delivery of the order. The hearing is now closed.

(The sitting closed at 12.40 p.m.)

"ARCTIC SUNRISE"

These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sittings held in *The "Arctic Sunrise" Case (The Kingdom of the Netherlands* v. *the Russian Federation), Provisional Measures.*

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal des audiences publiques de l'*Affaire de l'« Arctic Sunrise » (Royaume des Pays-Bas c. Fédération de Russie), mesures conservatoires.*

Le 25 mars 2014
25 March 2014

Le Président
Shunji Yanai
President

Le Greffier
Philippe Gautier
Registrar