The Arctic Sunrise Incident and the International Law of the Sea

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Decision commented on: The “Arctic Sunrise” Case (Kingdom of the Netherlands v Russian Federation, Request for the prescription of provisional measures, Order of 22 November 2013.

Introduction
The Arctic in recent years has been the scene of increased efforts to exploit offshore oil and gas resources. All Arctic coastal states – Canada, Denmark/Greenland, Norway, the Russian Federation and the United States have been granting oil companies licenses to operate in their Arctic waters. The risk oil spill incidents pose to the fragile Arctic ecosystem has led to strong opposition to these activities from environmentalists. For instance, both the World Wildlife Fund (WWF) and Greenpeace International have called for a moratorium on offshore activities. Greenpeace International in this connection has been targeting the activities of oil companies in Arctic waters. On 18 September 2013, during one of these actions involving the vessel Arctic Sunrise Greenpeace activists tried to access the Prirazlomnaya oil rig, which was operating within the Russian Federation’s exclusive economic zone in the Pechora Sea between the Russian mainland and Novaya Zemlya. The following day the Russian authorities boarded and arrested the Arctic Sunrise vessel and detained its crew. The vessel and crew were subsequently transferred to the Russian port of Murmansk and the crew was charged with various offenses. The detention of the Arctic Sunrise and its crew prompted the immediate reaction of its flag state, the Netherlands. The Netherlands informed the Russian Federation that it considered that through the detention of the Arctic Sunrise the Russian Federation breached its obligations towards the Netherlands as the flag state of the Arctic Sunrise. According to the Netherlands the vessel when boarded was exercising the freedom of navigation guaranteed by the United Nations Convention on the Law of the Sea (LOSC), to which the Netherlands and the Russian Federation are both parties. The Netherlands’ position implied that only the Netherlands itself as the flag state was entitled to take enforcement action against the Arctic Sunrise.

After diplomatic contacts between the Netherlands and the Russian Federation failed to resolve the issue the Netherlands, on 4 October 2013, commenced an arbitration against the Russian Federation under the LOSC (available as Annex 1, of the request for provisional measures). The Netherlands requested a determination that the arrest and detention of the Arctic Sunrise without the prior consent of the Netherlands were illegal. In reply, the Russian Federation informed the Netherlands that it did not accept the arbitration procedure, invoking a declaration the Russian Federation had made in becoming a party to the Convention. On 21 October 2013 the Netherlands requested provisional measures from the International Tribunal
for the Law of the Sea (ITLOS) in Hamburg. The relief requested included the immediate release of the *Arctic Sunrise* and its crew by the Russian authorities. Consistent with its position on the arbitration the Russian Federation informed the ITLOS that it did not intend to participate in the ITLOS proceedings for the prescription of provisional measures. The proceedings went ahead without the participation of the Russian Federation and the ITLOS rendered its decision on 22 November 2013. The Tribunal’s order to a large extent granted the measures requested by the Netherlands.

The present post will look at the issues of international law raised by the arrest of the *Arctic Sunrise* and the arbitration initiated by the Netherlands. It will first of all provide an overview of the events leading up to the arrest of the *Arctic Sunrise* and its crew, after which the Dutch and Russian positions on the applicable legal framework will be presented and assessed. Two subsequent sections will look at the arbitration initiated by the Netherlands and the order of the ITLOS on provisional measures and some concluding remarks.

**The events leading up to the arrest of the *Arctic Sunrise* and its crew**

A detailed account of the events leading up to the arrest of the *Arctic Sunrise* and its crew prepared by Greenpeace International has been annexed by the Netherlands to its application instituting the arbitration under the LOSC (and available as Annex 2 of the request for provisional measures). A Russian view on the unfolding of events can be gleaned, in a rather cursory form, from a judgment of 8 October 2013 in an administrative procedure against the master of the *Arctic Sunrise* (available as Annex 6 to the statement of claim that is annexed to the request for provisional measures).

On 16 September 2013, the Russian Federation’s Coast Guard vessel *Ladoga* warned the crew of the *Arctic Sunrise* over the radio that an infringement of the provisions of the LOSC for the protection of the safety of shipping in the vicinity of the *Prirazlomnaya* would not be tolerated. On the following day, when the *Arctic Sunrise* changed course towards the *Prirazlomnaya*, the *Ladoga* once again communicated over the radio that regulations had to be complied with and that it was not permitted to enter the area with a radius of 3 nautical miles around the rig where there was a danger to shipping and the 500-meter safety zone around the rig. The next day, the *Arctic Sunrise* launched 5 boats near the perimeter of the 3-nautical-mile zone that moved in the direction of the *Prirazlomnaya*. Three of the boats were carrying a large object with them. According to Greenpeace this ‘safety pod’ was intended to hang from the side of the rig and offer shelter to Greenpeace activists. There is no indication the *Arctic Sunrise* itself at any time entered the safety zone around the rig, but it did enter the 3-nautical-mile zone at one point. A number of persons attempted to board the *Prirazlomnaya* from the boats launched by the *Arctic Sunrise* and two of them were arrested by the Russian Coast Guard.

The accounts of the arrest of the *Arctic Sunrise* differ. The Russian judgment of 8 October 2013 indicates that, the master of the vessel was instructed to stop and allow an inspection by the Coast Guard in response to the actions against the *Prirazlomnaya* by the *Arctic Sunrise* and its boats. This order was given over an hour after the last reported incident took place.
The judgment further notes that this order and subsequent orders were not obeyed by the master of the *Arctic Sunrise* and that “[e]ventually the *Arctic Sunrise* was forced to stop for inspection on 19 September 2013”. The account by Greenpeace suggests an even longer gap between the last reported incident and the order to the master of the *Arctic Sunrise* to stop for boarding. The Greenpeace account reports subsequent negotiations between the *Ladoga* and the *Arctic Sunrise* in which release of the arrested activists is offered in return for allowing voluntary inspection of the *Arctic Sunrise* by the Coast Guard. Later, the *Ladoga* orders the *Arctic Sunrise* to move away from the *Prirazlomnaya*, suggesting that this is a condition for discussing the transfer of the arrested activists. After the *Arctic Sunrise* has moved away from the rig nothing happens and the vessel subsequently moved back within a distance of five nautical miles of the rig. At no time did the *Arctic Sunrise* move back into the 3-nautical-mile zone around the rig. The boarding of the *Arctic Sunrise* took place the next day from a helicopter.

**The Dutch and Russian positions on the applicable legal framework**

As is apparent from the Dutch application instituting the arbitration under the LOSC, the Russian Federation has invoked a number of different grounds to justify its actions against the *Arctic Sunrise*. The Russian Coast Guard initially justified its order to the master of the *Arctic Sunrise* to stop and allow an inspection by referring to the fact that the actions of the vessel and its boats constituted terrorism. A Russian diplomatic note of 18 September 2013 relied on the same grounds while a court order of 7 October 2013 of a Russian district court concerning the seizure of the *Arctic Sunrise* referred to the provision on piracy contained in the 1958 Convention on the High Seas to which the Russian Federation and the Netherlands are parties. The court order concluded that the Russian Coast Guard took control of the *Arctic Sunrise* in accordance with the Convention on the High Seas “since there was a reasonable suspicion that the ship was engaged in piracy.” The court order also pointed out that the documents that had been submitted noted that the crew of the *Arctic Sunrise* had attacked the *Prirazlomnaya*, using threats of violence and using objects as weapons, with the aim of taking possession of property belonging to another person. Finally, the judgment of 8 October by a Coast Guard official and a Russian diplomatic note of 1 October 2013 invoked articles 56 and 60 of the LOSC as a basis for the Russian action.

The Dutch view on the relevant legal framework is based in article 58 of the LOSC, which refers to the freedom of navigation of all states in the exclusive economic zone of the coastal state. Ships exercising the freedom of navigation are in principle only subject to the jurisdiction of the flag state – the Netherlands in the case of the *Arctic Sunrise*. The Dutch position has to be understood by reference to the circumstances in which the boarding of the *Arctic Sunrise* took place. According to the Netherlands none of the exceptions to the exclusiveness of flag state jurisdiction was present at the time the boarding and arrest were carried out, making them contrary to international law.

**The Applicable Legal Framework**

The claim that the actions of Greenpeace constituted terrorism has to be reviewed in the context of the 1988 Protocol for the suppression of unlawful acts against the safety of fixed
platforms located on the continental shelf (SUA Protocol) to which the Netherlands and the Russian Federation are parties. The Protocol (to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation) might seem to cover the actions of the Arctic Sunrise against the Prirazlomnaya. Article 2 of the Protocol provides that if a person unlawfully and intentionally “seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation” (s)he commits an offense under the Protocol. This also extends to persons who attempt to commit such an offense. In the aftermath of the incident, Greenpeace argued that there had been no attempt to seize or exercise control over the Prirazlomnaya. However, it could well be argued that unlawfully and intentionally entering the safety zone of a platform, which in accordance with industry standards means that operations on a rig have to be suspended, amounts to taking control of a rig in accordance with article 2 of the SUA Protocol. The SUA Protocol and its parent convention, do not provide an independent basis for exercising enforcement jurisdiction over foreign-flagged vessels. The LOSC is the primary frame of reference for making that assessment in case an action falls under the SUA Convention or the SUA Protocol.

Defining the actions of the crew of the Arctic Sunrise as piracy resolves the issue of the exercise of enforcement jurisdiction. Article 105 of the LOSC provides that every state may seize a pirate ship and arrest the persons on board on the high seas and in the exclusive economic zone. However, relying on piracy also raises a number of problems. Article 101 of the LOSC is only applicable if the act is carried out by the crew of a ship or aircraft against another ship or aircraft, and thus excludes similar actions directed against a fixed platform. Secondly, the acts have to be committed for private ends. It would seem difficult to maintain that the actions of the crew of the Arctic Sunrise were carried out for private ends.

Articles 56 and 60 of the LOSC offer a basis for the Russian Federation to regulate activities on a rig involved in oil activities in its exclusive economic zone. Article 60(2) provides that the coastal state has exclusive jurisdiction over such installations. The wording of article 60(2) indicates that this jurisdiction is all-inclusive. Article 60 also entitles the coastal state to establish a safety zone around installations. Such safety zones shall not exceed a distance of 500 meters around them. Ships are required to respect this safety zone. A ship entering this safety zone is in violation of this provision of the LOSC and cannot invoke the freedom of navigation. Article 60 indicates that a safety zone may also extend beyond 500 meters if it is authorized by generally accepted international standards or recommended by the competent international organization, i.e. the International Maritime Organization. No such standards or recommendations have been developed to date. The fact that the Russian Federation distinguished the 3-nautical-mile zone from the 500-meter safety zone around the Prirazlomnaya indicates that the Russian Federation has not relied on article 60 in establishing the 3-nautical-mile zone. The only other basis for establishing this zone could be article 234 of the LOSC, which allows a coastal state to adopt non-discriminatory rules and regulations in ice-covered areas within the limits of its exclusive economic zone. However, the fact that the Russian Federation justified the 3-nautical-mile zone by reference to the danger to shipping might suggest that it is not intended to implement article 234, which is concerned with laws and regulations for the prevention, reduction and control of marine
pollution from vessels. Moreover, there may be doubts whether the area in which the *Prirazlomnaya* was operating meets the definition of ice-covered areas contained in article 234. Finally, at no point does the Russian Federation seem to have relied on article 234. It seems thus safe to conclude that the 3-nautical-mile zone does not have any relevance in determining the applicable international legal framework.

Article 60 of the LOSC does not explicitly address enforcement jurisdiction in relation to infractions of the rules and regulations of the coastal state in relation to installations. In the light of the full jurisdiction of the coastal states over such installations, enforcement jurisdiction has to be presumed to also exist over the installation. Article 111 of the LOSC is relevant in determining the issue of enforcement jurisdiction in the safety zone of installations. Article 111 accords the coastal state the so-called right of hot pursuit. This right entails that where the competent authorities of the coastal state have good reason to believe that a ship has violated its laws and regulations it may pursue a ship and stop it and take enforcement actions. Article 111 in this connection explicitly refers to hot pursuit from safety zones around continental shelf installations. This reference includes a rig like the *Prirazlomnaya* since it is both located in the exclusive economic zone and over the continental shelf of the Russian Federation and is used in connection with the exploitation of the resources of the continental shelf. This explicit reference to the safety zone of installations implies that the coastal state only has enforcement jurisdiction in relation to a foreign-flagged ship that has violated the coastal state’s legislation in relation to the installation or its safety zone if that enforcement action is taken inside the safety zone or after a hot pursuit starting from that safety zone.

In view of the fact that the boarding and arrest of the *Arctic Sunrise* took place outside the safety zone, assessing the legality of these actions by the Russian Federation essentially entails an assessment of the factual question of whether the boarding and arrest were carried out after a hot pursuit from the safety zone. A number of conditions of article 111 have undoubtedly been met by the Russian Federation. For instance, the fact that the *Arctic Sunrise* itself did not enter the safety zone is immaterial, in view of the fact that its boats did enter the safety zone. Article 111 provides that in such a case the right of hot pursuit also applies to the vessel concerned. However, two points seem to be problematic. The accounts of the incident that are available do not make it possible to establish with certainty whether the requirement that a pursuit was commenced after a visual or auditory signal was given while the boats of the *Arctic Sunrise* were still in the safety zone of the *Prirazlomnaya*. As was observed above, a considerable time elapsed between the events near and on the rig and the order by the Coast Guard vessel *Ladoga* to the master of the *Arctic Sunrise* to stop for inspection. Secondly, article 111 requires that the pursuit is not interrupted. The somewhat opaque description contained in the judgment of the Russian Coast Guard authorities of 8 October 2013 does not suggest that there was an interruption of the pursuit. However, the more detailed account provided by Greenpeace International suggests that the hot pursuit was interrupted. That account refers to contacts concerning the voluntary inspection of the *Arctic Sunrise* and a request to the vessel to move away from the *Prirazlomnaya*. These events seem difficult to square with a continued hot pursuit. The Netherlands in its pleadings before the ITLOS
broached this topic and submitted that the pursuit in fact had been interrupted. The only argument the Netherlands provided in this connection is that “[a]pproximately 36 hours elapsed between the decision to seize the vessel and its boarding by agents of the Russian Federal Security Service.” The mere passage of time is however not a criterion allowing the conclusion that a pursuit has been interrupted. Interestingly, the argument of the Netherlands seems to imply an admission that the hot pursuit had been instituted in accordance with article 111 of the LOSC.

The Dutch position that the boarding and arrest of the *Arctic Sunrise* were illegal under international law is based on the premise that the Russian Federation does not have enforcement jurisdiction over infractions of the legislation applicable to an installation and its safety zone beyond that safety zone, unless such boarding and arrest are effected after a hot pursuit from the safety zone. This view is in accordance with the applicable law as discussed above. Interestingly, this point was also implicitly confirmed by Judge Golitsyn in his dissenting opinion to the Order of the ITLOS on provisional measures of 22 November 2013. Judge Golitsyn concluded (at para. 37) that:

> If the Russian Federation in detaining the *Arctic Sunrise* and its crew acted in accordance with the respective provisions of the Convention (articles 60 and 111), then there are no grounds for a claim that the freedom of navigation was violated in the present case.

Judge Golitsyn did not offer any other bases that would allow concluding that the freedom of navigation had not been violated in the present case.

The arbitration process
The Netherlands instituted proceedings under Part XV of the LOSC on 4 October 2013. In view of the fact that the Netherlands and the Russian Federation have not chosen the same third party dispute settlement body, the case will be considered and decided by an arbitral tribunal constituted in accordance with Annex VII to the LOSC. As noted above the Russian Federation did not accept the arbitration initiated by the Netherlands in this specific case. To justify this course of action the Russian Federation referred to the fact that upon ratification of the LOSC in 1997, it had made a declaration indicating that it did not accept compulsory dispute settlement mechanisms in relation to among others “disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction”.

At face value, this declaration would seem to allow the Russian Federation to reject arbitration in this particular case. However, if read in conjunction with the relevant provisions of the LOSC the Russian position collapses. First of all, the declaration has to be classified as a reservation or exception to the LOSC. Article 309 of the LOSC provides that reservations or exceptions may only be made if they are expressly permitted by the Convention. Article 298 of the LOSC allows a state to exclude only certain disputes concerning law enforcement activities, namely those activities that are mentioned paragraphs 2 and 3 of article 297 of the LOSC. These paragraphs are concerned with respectively marine scientific research and
fisheries and thus have no relevance for this specific case. On the other hand, paragraph 1 of article 297 is relevant to this specific case as it in principle excludes disputes concerning the exercise of jurisdiction by a coastal state of its sovereign right and jurisdiction. No reservation or exception to this paragraph is allowed by the Convention. The paragraph also provides that these disputes are subject to compulsory procedures in a number of specific cases. One of those cases concerns the situation in which it is alleged that the coastal state has acted in contravention of the provisions of the Convention in regard to the freedom of navigation. This case would apply to the Arctic Sunrise incident, unless it were to be proved that the Russian Federation in effecting the boarding and arrest of the Arctic Sunrise had acted in accordance with the requirements for hot pursuit contained in article 111 of the LOSC.

The Russian Federation could have raised the issues raised by article 297(1) either by starting preliminary proceedings under article 294 of the LOSC or by making preliminary objections in the context of the arbitration. Recourse to article 294 in all likelihood would not have been successful. Article 294 allows a state to ask for a determination that a claim in a dispute that is covered by article 297 of the LOSC is an abuse of legal process or is prima facie well founded. In the former case a court or tribunal shall take no further action in the case. In the light of the circumstances of the case, it would seem to be unlikely that a tribunal would have concluded that the application of the Netherlands constituted an abuse of process. This is confirmed by the fact that the ITLOS in its Order on provisional measures concluded that the arbitral tribunal prima facie had jurisdiction. The Russian Federation could also have raised preliminary objections during the arbitration procedure, arguing that it had not acted in contravention of the LOSC and that consequently, article 297(1) of the LOSC did not offer a basis for jurisdiction. It is not known why the Russian Federation did not opt for this approach. It can be noted that these preliminary objections go to the heart of the dispute on the merits. In that sense, raising the preliminary objections would in any case not have avoided a discussion of and judgment on the law enforcement activities of the Russian authorities.

The refusal of the Russian Federation to participate in the arbitral proceedings does not put a stop to them. A first step in this procedure is the constitution of the tribunal. The Netherlands in its application instituting the proceedings nominated its arbitrator. Annex VII also provides for a procedure to nominate the remaining four arbitrators if the respondent state refuses to participate in the procedure. This procedure allows the Netherlands to request the nomination of a full tribunal within two weeks after 4 December 2013. Once the tribunal has been constituted it can start its work. Annex VII to the LOSC requires, in a case of non-appearance that 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”. As the ITLOS hinted at in its Order on provisional measures of 22 November 2013, the non-appearance of a party may make it more difficult for a tribunal to establish the law and the facts. The ITLOS at the same time noted (at para 56) “the Netherlands should not be put at a disadvantage because of the non-appearance of the Russian Federation in the proceedings”.

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Unless the Netherlands and the Russian Federation reach a settlement out of court, the arbitration will continue until the tribunal renders its decision. In view of the non-appearance of the Russian Federation, the procedure may be limited to one round of written pleadings and one round of oral pleadings by the Netherlands and a decision may still be rendered in late 2014 or early 2015.

The decision on the Netherlands requests from the tribunal implies that the focus of the arbitration will be on whether or not the boarding and detention of the *Arctic Sunrise* by the Russian authorities was carried out in accordance with the LOSC. The legality of the actions of the *Arctic Sunrise* will only have to be assessed to the extent this is required to determine whether or not the Russian authorities acted in accordance with article 111 in commencing the hot pursuit of the *Arctic Sunrise*.

**The order of the ITLOS on provisional measures**

In filing its application instituting proceedings on 4 October 2013, the Netherlands also asked the Russian Federation to take provisional measures to ensure the release of the *Arctic Sunrise* and its crew. This request has to be viewed in the light of article 290 of the LOSC, which provides that if a dispute has been duly submitted to the court or tribunal and that court or tribunal has *prima facie* jurisdiction it “may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision”. Because the Russian Federation did not comply with the Dutch request to release the *Arctic Sunrise*, the Netherlands availed itself of the possibility to request provisional measures from the ITLOS. In a case like the present one, in which an arbitral tribunal that will be dealing with the case has not yet been constituted, article 290(5) of the LOSC provides for the possibility of requesting provisional measures from any court or tribunal agreed upon by the parties to the dispute. If the parties do not reach agreement one of them may unilaterally apply to the ITLOS for provisional measures. ITLOS may prescribe provisional measures in accordance with article 290 “if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.” The Netherlands requested provisional measures from the ITLOS under article 290(5) of the LOSC on 21 October 2013. The Netherlands requested the Tribunal to prescribe that the Russian Federation:

- immediately release the *Arctic Sunrise* and its crew;
- immediately suspend all national proceedings and refrain for commencing new proceedings;
- refrain from taking or enforcing judicial or administrative measures against the *Arctic Sunrise*, its crew, its owners and operators; and
- ensure that no other action which might aggravate or extend the dispute would be taken.

In light of the Russian Federation’s refusal to accept arbitration in this specific case, it did not come as a surprise that it informed the Tribunal that it did not intend to participate in the proceedings for the prescription of provisional measures. The hearings on the provisional measures took place on the 6 November 2013 and consisted of one round of pleadings by the Netherlands. The ITLOS issued its Order on provisional measures on 22 November 2013 and prescribed that the Russian Federation immediately had to release the *Arctic Sunrise* and the
detained crew upon the posting of a bond or other financial security of € 3,600,000 by the Netherlands and that the Russian Federation had to ensure that the Arctic Sunrise and the persons that had been detained would be allowed to leave the territory and maritime areas under its jurisdiction. The Order was adopted by a majority of 19 to 2, with only judges Golitsyn and Kulyk voting against.

Before being able considering the issue of provisional measures, the ITLOS had to establish that the arbitral tribunal prima facie had jurisdiction to consider the merits of the case. A first point in this respect concerned the reliance of the Russian Federation on its declaration excluding law enforcement measures from compulsory dispute settlement procedures. The Tribunal not only took note of the statements of the Netherlands, but also referred to the text of Russian Federation’s declaration upon ratification of the LOSC. In that declaration, the Russian Federation had also observed that the Russian Federation believed that declarations that were not in accordance with articles 309 and 310 of the LOSC – these articles imply that reservations and exceptions are only allowed to the extent that they are permitted by the LOSC and that declarations cannot modify or exclude the legal effect of the LOSC – cannot exclude or modify the legal effect of the provisions of the LOSC. The Tribunal then concluded that the Russian Federation’s declaration prima facie only excluded disputes under article 297 (2) and (3). In this way the ITLOS provided an interpretation of the Russian Federation’s declaration that was in accordance with articles 309 and 310 of the LOSC and the Russian Federation’s declaration on those articles. This implied that a dispute covered by article 297 (1), which refers to the freedom of navigation and on which the Netherlands relied, was not excluded by the Russian declaration. The Russian Federation’s reliance on its declaration was the only basis it had provided to reject the arbitration.

The Order also discussed the consequences of the non-participation of the Russian Federation in the proceedings. The Order observes that it does not constitute a bar to prescribing provisional measures and notes that the Russian Federation was given ample opportunity to present its views, but did not do so. The ITLOS also confirmed that a non-appearing state remains a party to the proceedings and is bound by the ensuing decision. After spelling out these consequences for the Russian Federation, the Tribunal considered the impact of the non-appearance on the Tribunal’s consideration of the facts and the law. The reasoning of the Tribunal indicates that the fact that the Russian Federation had been given ample opportunity to present its views, but had declined to do so made it more difficult “to evaluate the nature and scope of the respective rights of the Parties to be preserved by provisional measures.” To avoid that the Netherlands would be put at a disadvantage by this state of affairs, the Tribunal decided to “identify and assess the respective rights of the Parties involved on the best available evidence.” A number of the separate opinions to the Order also were critical of the Russian Federation for its non-appearance.

In order to make the determination that the arbitral tribunal prima facie had jurisdiction, the Order first considered whether there existed a dispute between the Netherlands and the Russian Federation concerning the interpretation or application of the LOSC. As article 279 of the Convention indicates, only disputes of this nature that can be settled under the dispute
settlement provisions of the LOSC. After considering the positions of the parties, the ITLOS concluded that the Netherlands and the Russian Federation had different views on a number of provisions of the LOSC concerned with the coastal state and the flag state jurisdiction and that this implied a dispute concerning the interpretation or application of the LOSC. The Tribunal also concluded that the provisions invoked by the Netherlands provided a basis for jurisdiction and since it was not required to definitively establish the rights of the Netherlands at this stage of the proceedings, the ITLOS concluded that the arbitral tribunal *prima facie* had jurisdiction. This conclusion in principle allowed the ITLOS to consider the indication of provisional measures. The Tribunal’s conclusion that the arbitral tribunal *prima facie* had jurisdiction was challenged by Judge Golitsyn in his dissenting opinion. Golitsyn in this connection considered the implications of the right of hot pursuit that exists under article 111 of the LOSC and argued that the factual accounts provide by Greenpeace International and the Russian authorities provided sufficient grounds to conclude that the Russian Coast Guard vessel *Ladoga* was carrying out a hot pursuit. Consequently, the Russian Federation (at para. 36) “acted in full conformity with the Convention”. As Golitsyn also indicated, the only logical conclusion to draw from the Russian Federation acting in accordance with article 111 would be that there was no basis to assert that it had infringed the freedom of navigation enjoyed by the Netherlands, as that freedom in this case did not exist. As a consequence, ITLOS (at para. 1) “wrongly conclude[d] that the arbitral tribunal, to be constituted, would have prima facie jurisdiction”.

As was argued above, the question whether or not the Russian Federation acted in accordance with article 111 of the LOSC is probably the most fundamental issue in dealing with the dispute between the Netherlands and the Russian Federation. As Judge Golitsyn’s argument illustrates it is also a key element in determining whether the arbitral tribunal will have jurisdiction.

An assessment of the law and available facts indicates that Judge Golitsyn’s conclusion on the implications of article 111 is questionable. As was set out above, contrary to what he asserts, the available information strongly suggests that the Russian authorities interrupted the hot pursuit, if it was indeed initiated from the safety zone of the *Prirazlomnaya*. In view of this uncertainty, concluding that the Russian Federation had acted in accordance with article 111 would have required going into the merits of the case, something that is beyond the remit of the ITLOS. The only possible conclusion was that there exists a dispute concerning this matter between the parties, just as is the case for the other provisions of the LOSC mentioned by the ITLOS and to uphold the *prima facie* jurisdiction of the arbitral tribunal. It is somewhat of a missed opportunity that the ITLOS refrained from considering the implications of article 111 in its Order. As was pointed out above, the Netherlands in its oral pleadings had put this matter before the Tribunal, as it had raised the question as to whether the Russian Federation could successfully rely on article 111 of the LOSC in an arbitration. By not ruling on this significant issue in determining the existence of *prima facie* jurisdiction, the ITLOS opened the door for the criticism that its Order was not well-founded in the facts and the law.

Before moving to the indication of provisional measures, the Tribunal also considered the implications of article 283(1) of the LOSC, which provides that:
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.

The Tribunal noted that there had been diplomatic correspondence between the parties and that the Dutch and Russian Ministers of Foreign Affairs had discussed the matter a number of times. The Tribunal attached significant weight to the fact that the Netherlands in its request for provisional measures had indicated that in its view (at para. 17) “[t]he possibilities to settle the dispute by negotiation or otherwise have been exhausted”. Referring to its earlier case law, the Tribunal observed that a party in those circumstances was not required to continue an exchange of view and consequently held that article 283 had been complied with. This conclusion was criticized by Judge Golitsyn in his dissenting opinion, who concluded that since the conditions of article 283 had not been fulfilled the ITLOS should have concluded that the submission of the dispute to arbitration was inadmissible and the ITLOS should have declined to prescribe provisional measures. Golitsyn pointed out that only in a diplomatic note of 1 October 2013 had the Russian Federation indicated the provisions of the LOSC on which it relied to justify the legality of its actions. The Netherlands in a note of 3 October 2013 had indicated that it rejected this justification. According to Golitsyn this crystalized the dispute.

As the Netherlands already started the arbitral procedure on the following day, it had not complied with its obligation under article 283(1) of the LOSC.

It can be doubted whether Judge Golitsyn’s conclusion on non-admissibility is justified. In diplomatic correspondence predating 1 October 2013, the Netherlands had already indicated legal grounds on which it considered the boarding and arrest of the Arctic Sunrise illegal, although there was no explicit reference to the LOSC in this connection, the legal arguments advanced by the Netherlands (and the Russian Federation) cannot but have their basis in the LOSC. In addition, the fact that two notes of the Netherlands remained unanswered should also be taken into account in considering the fulfilment of the obligation contained in article 283. Judge Golitsyn’s conclusion also seems at odds with the reliance on the ITLOS’s jurisprudence on the significance of the view of the individual party whether the possibilities of article 283 have been exhausted. Most importantly, as this discussion also indicates, it should be clear that it was reasonable for the ITLOS to consider that the requirement of article 283 prima facie has been met. As was pointed out by Judge Anderson in his separate opinion, it will be on the arbitral tribunal to fully consider the implications of article 283.

The ITLOS indicated two closely related provisional measures. Upon the posting of a bond or other financial security of €3,600,000 by the Netherlands, the Russian Federation was required to immediately release the Arctic Sunrise and all detained persons; and upon the posting of the security the Russian Federation was to ensure that the vessel and detainees were allowed to leave its territory and maritime zones.

The ITLOS in indicating provisional measures concluded that the urgency of the circumstances of the case required the prescription of provisional measures. The Tribunal paid scant attention to the question how the indicated measures would preserve the respective
rights of the parties. Judge Golitsyn argued that the provisional measures as a matter of fact did not preserve the rights of the Russian Federation. At first sight, this criticism might seem to be justified. The arbitral tribunal could conclude that the arrest of the *Arctic Sunrise* and its crew were in accordance with the LOSC. In that case the Netherlands could be ordered to return the *Arctic Sunrise* and the former detainees to the Russian Federation and the Russian Federation would be entitled to take measures against the vessel and crew. If the Netherlands would not be willing or able, *e.g.* because the detainees would no longer be under its jurisdiction, to comply with that judgment, it would forfeit the bond or other financial security. To the extent that other than pecuniary sanctions might be imposed by a national procedure in the Russian Federation, this forfeiture would not fully maintain its rights. However, in assessing this point it should also be taken into account that if the position of the Netherlands were to be accepted by the tribunal, the detention of the *Arctic Sunrise* and its crew would have been illegal from the start. In that light the provisional measures of the ITLOS can certainly be said to have struck a reasonable balance.

At the time of the writing of this post, the Netherlands had complied with the condition for the release of the *Arctic Sunrise* and its crew, but the Russian Federation had not yet taken the measures required of it following the posting of a financial security.

**Some conclusions**

The present analysis suggests that the most likely outcome of the arbitration concerning the *Arctic Sunrise* will be that the arrest of the *Arctic Sunrise* was a breach of the LOSC. This conclusion which subscribes the Dutch view that the boarding and detention of the *Arctic Sunrise* were not in accordance with the relevant international legal framework might seem to be unsatisfactory from the perspective of the substantive law. The crew of the *Arctic Sunrise* has clearly acted contrary to provisions of the LOSC and the Russian Federation would be justified in prosecuting the crew and take measures against the vessel if they were under its jurisdiction. As a matter of fact, if the Russian authorities had complied with article 111 of the LOSC, the reliance on the Netherlands on the freedom of navigation would have stood no chance of success and it seems unlikely that the Netherlands in that case would have started an arbitration. Put differently, it could be argued that points of procedure prevented the Russian Federation from protecting its substantive rights in its exclusive economic zone. On closer consideration, this argument is unpersuasive. The procedural requirements in article 111 are carefully drafted to ensure that the balance of rights between the coastal state and the international community is maintained. Moreover, the facts of the case indicate that the Russian Federation had every opportunity to act in accordance with article 111 and protect its rights. This point is confirmed by the dissenting opinion of Judge Golitsyn to the Order of the ITLOS on provisional measures. The opinion points to the significance of article 111 and does not suggest that this right in any way should be expanded.

From the perspective of the Netherlands it is understandable that it has taken a principled approach to the *Arctic Sunrise* incident. As a nation with significant maritime interests, among others large seaborne trade flows, it stands much to lose if the balance of rights between coastal states and the international community is upset to the detriment of the latter. The
boarding and arrest of a vessel exercising the freedom of navigation goes to the heart of this matter.

The refusal of the Russian Federation to accept arbitration and to participate in the proceedings on provisional measures before the ITLOS might, together with the refusal of China to participate in a LOSC Annex VII initiated by the Philippines earlier in 2013, suggest that the compulsory dispute settlement procedures of the Convention are under strain. However, cases of non-appearance have happened in the past in international litigation without substantially affecting the system as such. Moreover, in view of the fact that both arbitrations will go ahead in any case and the impact they may eventually have is difficult to predict one should be careful in drawing conclusions in this respect.

The real reasons for the Russian Federation’s refusal to accept the arbitration are not known. The only reason that has been officially provided – the declaration of the Russian Federation upon ratifying the Convention – is unconvincing. The declaration is not relevant to the present dispute and it moreover does not justify the refusal to accept the arbitration. The Convention indicates that the Russian Federation could have invoked its declaration to contest the jurisdiction of the arbitral tribunal in preliminary proceedings or in a procedure under article 294 of the LOSC. In both cases success would probably have been unlikely. One reason why the Russian Federation may have decided to refrain from participating in the arbitration is that its enforcement authorities seem to have mishandled the incident on more than one count. First, the Russian Coast Guard could have acted in a manner that would have left no doubt that the arrest had been carried out in accordance with article 111 of the LOSC on hot pursuit. Secondly, the varying charges against the Arctic Sunrise and its crew suggest that the Russian authorities were ill-prepared to deal with this matter. The charge of piracy, that is difficult if not impossible to square with the definition of piracy under international law, as a matter of fact completely backfired. It allowed Greenpeace to present itself as the innocent victim of a State that was flouting the law, while it should be clear that in reality the Russian Federation had convincing grounds to act against the Arctic Sunrise. Possibly, the Russian Federation had little appetite to discuss the above points in detail in the course of an arbitration.

The conclusion of the ITLOS that the arbitral tribunal would have prima facie jurisdiction is reasonable in the circumstances of the case and its provisional measures strike a balance in respecting the rights of the Netherlands and the Russian Federation. The reasoning of the ITLOS might have been reinforced in a number of specific instances. As the dissenting opinion of Judge Golitsyn indicates, the Order left room to question a number of critical points. In particular in the light of the non-appearance of the Russian Federation it would have been preferable if the Order would have left as little room as possible to provide the Russian Federation with arguments that its course of action was justified.