

PCA Case N° 2014-02

IN THE MATTER OF THE ARCTIC SUNRISE ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII TO
THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

- between -

THE KINGDOM OF THE NETHERLANDS

- and -

THE RUSSIAN FEDERATION

THIRD SUPPLEMENTAL WRITTEN PLEADINGS OF
THE KINGDOM OF THE NETHERLANDS
(Replies to Further Questions from the Arbitral Tribunal Arising out of the Netherlands'
Second Supplemental Submission dated 12 January 2015)

ARBITRAL TRIBUNAL:

Judge Thomas Mensah (President)
Mr. Henry Burmester
Professor Alfred Soons
Professor Janusz Symonides
Dr. Alberto Székely

REGISTRY:

Permanent Court of Arbitration

25 February 2015

**FURTHER QUESTIONS FROM THE ARBITRAL TRIBUNAL ARISING OUT OF THE
NETHERLANDS' SECOND SUPPLEMENTAL SUBMISSION DATED 12 JANUARY
2015**

General

A. Throughout their answers the Netherlands appear to take the position that Greenpeace's actions did not in fact have an effect that could justify the measures taken by Russia, but it does not address the right of the coastal State to take preventive action. Could the Netherlands address this issue?

1. As demonstrated in its oral submissions¹ and below in the replies to Questions D and G, the Netherlands is of the view that a coastal State has the right to prevent or end a protest action in its exclusive economic zone provided that a three-pronged test has been met: (1) the response action to prevent or end the protest action must have a legal basis in international law; (2) such response action must be carried out in accordance with international law; and (3) any subsequent law-enforcement actions related thereto must be in accordance with international law.

Question 2²

B. Can the Netherlands further clarify the bases on which the Tribunal is invited to apply Articles 9 and 12.2 of the ICCPR? In particular, is the Netherlands inviting the Tribunal to:

- (i) determine that there has been a breach of these treaty provisions as requested in para. 397 of the Netherlands' Memorial; or,**
- (ii) have regard to these provisions in the course of interpreting relevant provisions of the UNCLOS, in the same way that regard may be had to rules**

¹ Transcripts from the hearing held in Vienna on 10 and 11 February 2015, Day 1, at 5(18)-6(3), 17(19)-18(7), 34(7-16) and 49(2-10).

² These question-number headings refer to the Questions Posed by the Arbitral Tribunal to the Netherlands dated 28 November 2014 Pursuant to Section 2.1.4.1 of Procedural Order No. 2.

of international law, such as those relating to the use of force or State responsibility; or,

(iii) both (i) and (ii)?

1. In Section V.2.3 of its Memorial and in its oral submissions,³ the Netherlands has demonstrated that the principle of reasonableness applies to any law-enforcement actions that are taken under the Convention. The Netherlands is not inviting the Tribunal to determine that there is a breach of Articles 9 and 12.2 of the International Covenant on Civil and Political Rights if the Tribunal considers that the content of these provisions, as interpreted and applied by international courts and tribunals, are an integral part of the principle of reasonableness as applicable to law-enforcement actions under the Convention.

2. As demonstrated by the Netherlands in Section V.2.3 and V.2.4 of its Memorial and in its Second Supplemental Written Pleadings,⁴ the following law-enforcement actions of the Russian Federation do not meet the requirements of the principle of reasonableness:

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

³ Transcripts from the hearing held in Vienna on 10 and 11 February 2015, Day 1, at 18(8)-19(14), 31(1)-32(14), 53(5-17); Transcripts from the hearing held in Vienna on 10 and 11 February 2015, Day 2, at 24(2-12) and 25(5-21).

⁴ Second Supplemental Written Pleadings, Replies to Questions 4 and 5.

Question 5

C. In its answer to question 5, the Netherlands submits that the detention of Ms. Sini Saarela and Mr. Marco Paolo Weber only began upon their return to the Arctic Sunrise on 19 September 2013. However, in Appendix 20 to the Greenpeace Statement of Facts (as filed with the Netherlands' Memorial), it is indicated that the date of "factual arrest" of Ms. Saarela and Mr. Weber was 18 September 2013. Could the Netherlands comment on this apparent contradiction?

1. The Netherlands is of the view that it has not been established in the present proceedings that Ms. Saarela and Mr. Weber have been arrested in accordance with Russian domestic law and international human rights standards before the arrival of the *Arctic Sunrise* in the Port of Murmansk. It appears from the facts that Ms. Saarela and Mr. Weber were deprived of their liberty outside formal arrest and detention as of 18 September 2013. In its Statement of Facts, Greenpeace International made an attempt to describe this state of affairs by using the term "factual arrest". After the aborted attempt to scale the *Prirazlomnaya*, Ms. Saarela and Mr. Weber remained within the effective control of the authorities of the Russian Federation and could have been arrested at any time.

Question 6

D. What is the position of the Netherlands on the question of whether the response by Russia to Greenpeace's announced actions on 18 September 2013 was reasonable given that the Russian authorities could not know that the actions of Greenpeace would remain totally peaceful and would not pose a threat to (1) the safety of persons and property; (2) the operations of the *Prirazlomnaya*; and (3) the environment. See, for example, Appendix 39 to Annex N-44 (Addendum and Corrigendum to Greenpeace's Statement of Facts), page 8, para. 2:

"[From the report by the commander of coastal patrol ship "Ladoga" to the Border

Department of the Russian Federal Security Service for Murmansk], the [Arctic Sunrise RHIBs], with unidentified individuals onboard, were heading in the direction of OIFP ‘Prirazlomnaya,’ thereby creating, in the opinion of [the commander] a real threat to a facility representing part of the oil-and-gas complex of the Russian Federation – a facility classified as a hazardous site.”

1. The reasonableness of the law-enforcement actions carried out by the authorities of the Russian Federation on 18 September 2013 must be assessed on the basis of the three-pronged test referred to in reply to Question A above. The Netherlands considers that there was a legal basis for the Russian Federation to respond to the protest action against the *Prirazlomnaya*, but it has concerns about the force used to make an end to the protest action. The Netherlands has further demonstrated that the subsequent law-enforcement actions, in particular the serious criminal charges brought against the persons on board and the length of their pre-trial detention, did not meet the requirements of the principle of reasonableness and, consequently, were not in accordance with international law.

2. The assessment of the events of 18 September 2013 above is without prejudice to the assessment of the boarding of the *Arctic Sunrise* on 19 September 2013.

Question 8

E. In light of the Addendum and Corrigendum to Greenpeace’s Statement of Facts (Annex N-44) and the most recent information available, could the Netherlands provide their best estimate of the exact moment when:

- (i) the last of Greenpeace’s RHIBs left the 500-metre safety zone; and,**
- (ii) the first order to stop was given by the Ladoga to the Arctic Sunrise?**

1. At the hearing on Wednesday 11 February 2015 the Netherlands indicated in its preliminary answer that, based on the complete factual account available at that time, it appeared that the last of the RHIBs of the *Arctic Sunrise* left the safety zone of 500 meters around the *Prirazlomnaya* no later than 6:07 hours Moscow Standard Time (MST) and that the first stop

order of the *Ladoga* to the *Arctic Sunrise* was not given before 6:15 hours MST. Therefore it seemed safe to conclude that the RHIBs of the *Arctic Sunrise* had left a safety zone of 500 meters around the *Prirazlomnaya* at the time the first stop order was given. On the basis of witness testimony provided at the hearing, our best estimate of the exact moment when the first order to stop by radio was given by the *Ladoga* to the *Arctic Sunrise* was 6:25 hours MST.

2. After the hearing the Netherlands obtained from Greenpeace International further video material of the events of 18 September 2013 which is included as Annex N-46 to this reply. On the basis thereof, the Netherlands is able to present more precise answers to the questions raised by the Tribunal.

- The last RHIB of Greenpeace, the 'Suzy Q', departed from the vicinity of the *Prirazlomnaya* at 6:10 hours MST. It was traveling at high speed and should have covered more than 500 meters in one minute. Allowing for a margin of error, this RHIB was outside the safety zone no later than 6:12 hours MST.
- Based on the video material, the Netherlands concludes that an order to stop was given by radio at approximately 6:23 hours MST and repeated several times thereafter. Whether any stop order was given before this time cannot be determined on the basis of the available video material. On the basis of this video material, our best estimate of the exact moment when the first order to stop was given by the *Ladoga* to the *Arctic Sunrise* is 6:24 hours MST.
- Annexed to the answers (Annex N-47) is a description of the newly made available video material, as well as a reconstruction of the sequence of events at the end of the protest as seen on video.

The Netherlands would further note that, in its Memorial, it has erroneously referred to the wrong time zone, namely Coordinated Universal Time (UTC). All times given in the Memorial should be read as Moscow Standard Time.

3. On the basis of the video material the following time table of the final stages of the demonstration can be presented:

Time	of Event	Source 1	Source 2
05:48	Video 29c (filmed from GP RHIB 'Suzie Q') begins		
05:49			
05:50			
05:51			
05:52			
05:53			
05:54			
05:55			
05:56			
05:57			
05:58			
05:59	Both climbers have descended into CG RHIB	Video 29c 11'11	
06:00	Video 28a (filmed from GP RHIB 'Hurricane') begins; CG RHIBs head to <i>Ladoga</i>	Video 28a 0'20	Video 29c 12'15
06:01			
06:02	CG RHIB with both climbers alongside <i>Ladoga</i>	Video 28a 2'23	Video 29c 14'22
06:03	CG RHIB fires salvo in water; GP RHIB 'Hurricane' begins return to <i>MYAS</i> , with GP RHIB 'Novi 2' in its wake	Video 28a 3'15	Video 29c 15'14
06:04			
06:05	GP RHIB 'Hurricane' passes north face of <i>Prirazlomnaya</i> and slows down	Video 28a 5'00	
06:06	GP RHIB 'Hurricane' leaves <i>Prirazlomnaya</i> behind at speed; CG RHIBs head from <i>Ladoga</i> towards <i>Prirazlomnaya</i>	Video 28a 5'45	Video 29c 17'48
06:07	Approximate time at which GP RHIB 'Hurricane' leaves 500m zone	Video 28a 7'00	
06:08	GP RHIB 'Hurricane' encounters GP RHIB 'Parker' and comes to a halt; GP RHIB 'Suzie Q' is ordered to return to <i>MYAS</i>	Video 28a 8'22	
06:09	GP RHIB 'Suzie Q' begins heading back to <i>MYAS</i> at speed		Video 29c 20'46
06:10	GP RHIB 'Suzie Q' passes along north face of <i>Prirazlomnaya</i> at speed, passing by CG RHIBs; GP RHIB 'Hurricane' resumes return to <i>MYAS</i>	Video 28a 9'45	Video 29c 22'00
06:11	GP RHIB 'Hurricane' encounters GP RHIB 'Novi 1'		Video 28a 11'26
06:12	Approximate time at which GP RHIB 'Suzie Q' leaves 500m zone		Video 29c 24'00
06:13	GP RHIB 'Suzie Q' encounters GP RHIB 'Parker'; Action Coordinator Mr. Hewetson on GP RHIB 'Parker' informs <i>MYAS</i> : "all boats returning"	Video 28a 13'12	Video 29c 24'31
06:14			
06:15			
06:16	GP RHIB 'Suzie Q' encounters GP RHIBs 'Novi 1' and 'Novi 2'; GP RHIB 'Novi 2' steams ahead		Video 29c 27'55
06:17	Video 28b (filmed from GP RHIB 'Hurricane') begins		
06:18	GP RHIB 'Parker' overtakes GP RHIB 'Suzie Q'		Video 29c 29'38
06:19			
06:20			
06:21			

06:22	GP RHIBs 'Hurricane', 'Novi 2' and 'Parker' are approaching <i>MYAS</i> ; Video 29d (filmed from GP RHIB 'Suzie Q') begins	Photos 535-537	Photos 1016-1019
06:23	Video 27 (filmed on <i>MYAS</i> bridge) begins; GP RHIB 'Novi 2' arrives at <i>MYAS</i>		Photos 538-540
06:24	<i>Ladoga</i> : "Heave to, stop your vessel"	Video 27 0'47	
06:25	GP RHIB 'Novi 2' hoisted on board <i>MYAS</i>		Photos 1020- 1030
06:26			
06:27	Captain Willcox of <i>MYAS</i> over radio: "Hey guys, the Russians are threatening to board..."	Video 27 4'00	Video 28b 9'58
06:28	Hurricane at <i>MYAS</i> pilot door (GP RHIB 'Parker' goes to the other side of <i>MYAS</i> to be hoisted onboard)	Video 28b 11'16	Photos 1041-1044
06:29			
06:30	GP RHIBs 'Novi 1' and 'Suzie Q' approaching <i>MYAS</i>	Photos 1047-1052	
06:31	GP RHIB 'Hurricane' hoisted on board	Photos 551-554	Photos 1052-1056
06:32			
06:33	GP RHIB 'Suzie Q' alongside <i>MYAS</i>	Video 29d 11'25	Photos 562, 1062-1084
06:34			
06:35			
06:36			
06:37	GP RHIB 'Suzie Q' hoisted on board <i>MYAS</i>	Photos 1088-1097	Video 29d 14'40
06:38	GP RHIB 'Novi 1' back on board <i>MYAS</i>	Photos 1097-1113	

Abbreviations

CG	Coast Guard
GP	Greenpeace
MYAS	MY Arctic Sunrise
RHIB	Rigid Hull Inflatable Boat

Question 9

F. In answer to question 9 concerning the circumstances in which a coastal State can take enforcement measures against a foreign ship, the Netherlands makes no reference to ensuring compliance with a coastal State's law. Having regard to the provisions of Article 73 of the UNCLOS in relation to laws concerning living resources in the EEZ, does the Netherlands consider that a similar right exists to ensure compliance with laws concerning the exploitation of non-living resources in the EEZ?

1. As indicated in the oral submissions,⁵ the United Nations Convention on the Law of the Sea signified the arrival in treaty-form of a new and important maritime area. Neither falling under State sovereignty, nor fully beyond States' jurisdictional reach, the exclusive economic zone is an area in which both the coastal State and other States have several rights and duties. The legal positions of these two groups of States are carefully balanced in Part V of the Convention. The following paragraphs set out the Netherlands' position on the different legal bases for the taking of law-enforcement actions by the coastal State in connection with the exploration and exploitation of living and non-living resources in this maritime area.

2. Article 56.1(a) UNCLOS provides that the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil. Article 56.1(b) provides that the coastal State has jurisdiction as provided for in the relevant provisions of the UNCLOS with regard to (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; and (iii) the protection and preservation of the marine environment.

3. The relevant provisions in the context of law-enforcement actions related to the exploration and exploitation of the living and non-living resources in the exclusive economic zone are Articles 56, 60, 73 and 80 of the Convention. These articles provide the coastal State with functional jurisdiction related to the exercise of its sovereign rights with respect to the

⁵ Transcripts from the hearing held in Vienna on 10 and 11 February 2015, Day 1, at 12(11-25).

living resources, and with exclusive jurisdiction over artificial islands, installations and structures.

4. Notwithstanding these specific, functional jurisdictional powers, foreign ships enjoy the freedom of navigation and other internationally lawful uses of the sea in the exclusive economic zone. Therefore, except when explicitly provided otherwise, foreign ships in these areas are subject to the exclusive jurisdiction of the flag State. Any such exceptions have to be interpreted in a restrictive manner.

5. Article 73 of the Convention grants the coastal State powers to enforce its laws and regulations related to the exercise of its sovereign rights to explore, exploit, conserve and manage living resources in its exclusive economic zone. For several reasons, the Article cannot be applied *mutatis mutandis* to the exploration and exploitation of non-living resources in the exclusive economic zone.

6. First, Article 73 grants the coastal State the power to take law-enforcement actions, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with its laws and regulations adopted in conformity with the Convention. However, it specifically dictates that the coastal State's penalties for violations of fisheries laws and regulations may not include imprisonment or any other form of corporal punishment. Furthermore, the Article prescribes that arrested vessels and their crews must, upon the posting of a reasonable bond or other security, be promptly released.

7. Disputes concerning law-enforcement actions in regard to the coastal State's exercise of sovereign rights or jurisdiction related to the living resources in its exclusive economic zone cannot, in case of a dispute, be unilaterally submitted by the flag State to compulsory settlement under the Convention (Articles 298.1(b) and 297.3 UNCLOS). However, in case of the detention of a ship, Article 292 UNCLOS provides for the possibility to initiate prompt release proceedings before a competent international court or tribunal. It appears from the *Camouco* case that the scope of the jurisdiction of a court or tribunal in prompt release proceedings is limited to

situations related to living resources or the protection of the marine environment.⁶ Hence, prompt release proceedings do not seem to be available in the event of the arrest and detention of a foreign ship in connection with alleged infringements of the rights of a coastal State with respect to the exploration and exploitation of non-living resources in its exclusive economic zone.

8. Second, at the Third United Nations Conference on the Law of the Sea, proposals were made to extend the enforcement powers with respect to living resources to non-living resources.⁷ These proposals were not accepted. The *travaux préparatoires* of the Convention, as reflected in the Virginia Commentary, show that

“[t]he extensive enforcement powers set out in article 73 do not relate to the sovereign rights of the coastal State over the nonliving resources of the exclusive economic zone (where those rights are ‘exclusive’ following article 77, paragraph 2), which are governed by Part VI, or to the matters over which the coastal State has ‘jurisdiction’ or ‘other rights’ under article 56, paragraph 1(b) and (c), respectively”.⁸

9. Thus, having regard to the provisions of Article 73 of the Convention in relation to laws concerning living resources in the exclusive economic zone, the Netherlands concludes that no similar right exists for the coastal State to ensure compliance with laws concerning the exploration and exploitation of non-living resources in the exclusive economic zone.

G. In paragraph 2, the Netherlands states that the first part of the two-pronged test is that it “must be established by plausible evidence that the conduct in question had . . . an adverse impact” (emphasis added). By this, does the Netherlands mean that it would only be appropriate for the coastal State to take action without the consent of the flag State where an adverse impact has actually occurred?

⁶ *The "Camouco" Case (Panama v. France)*, *Prompt Release, Judgment of 7 February 2000*, para. 59.

⁷ M. Nordquist, S. Nandan & S. Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Virginia Commentary), Vol. II, pp. 791-793.

⁸ Virginia Commentary, Vol. II, p. 794.

1. The Netherlands does not consider that it would only be appropriate for the coastal State to take action without the consent of the flag State where an adverse impact has actually occurred. The Netherlands considers that the coastal State may also take such action where there is a *grave and imminent threat* of such adverse impact.

2. The requirement of a *grave and imminent threat* can be found in several international instruments that provide for response actions to incidents involving oil pollution damage. These instruments include (a) the 1992 International Convention on Civil Liability for Oil Pollution Damage; (b) the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage; and (c) the 1996 International Convention on Liability and Compensation in connection with Carriage of Hazardous and Noxious Substances by Sea.

Question 11

H. Having regard to the memorandum of the Netherlands' Shipping Inspectorate (Annex N-45), which states that "an offence may have been committed when the [RHIBs] sailed to the platform and dropped the crew off at the platform" and suggests that the matter be submitted to the Public Prosecutor if a criminal investigation is desired, could the Netherlands clarify whether, in their view:

- (i) the RHIBs committed an offence under Russian law by entering the 500-metre safety zone;**
- (ii) the RHIBs committed an offence under Dutch law by entering the 500-metre safety zone; and,**
- (iii) if so, whether the Netherlands have, or should have, prosecuted the persons responsible for the violation of the 500-metre safety zone.**

1. Although the Shipping Inspectorate of the Netherlands observed that "an offence may have been committed when the [RHIBs] sailed to the platform and dropped the crew off at the platform", my Government is not able to assess whether or not the RHIBs committed an offence under Russian law by entering a duly established safety zone of 500 meters around the

Prirazlomnaya.

2. In contrast, we can authoritatively state that the RHIBs did not commit an offence under Dutch law by entering the safety zone of 500 meters around the *Prirazlomnaya*; there is a prohibition in Dutch legislation to enter safety zones established around a mining installation, but it only applies to maritime areas under the jurisdiction of the Netherlands (Articles 1(c), 2.1 and 43 Mining Act in conjunction). The Shipping Inspectorate, entrusted with the supervision and enforcement of national and international maritime regulations, can make inquiries and may conclude that “an offence may have been committed”. Such conclusion could be the basis for the Netherlands, as a flag State, to “take action, where appropriate, in accordance with its national legislation” on the basis of IMO Resolution A.671(16) on Safety Zones and Safety of Navigation Around Offshore Installations and Structures and in accordance with Article 94.5 UNCLOS, in particular in the case of bad seamanship. Whether the entry of the safety zone amounts to bad seamanship depends on the particular circumstances of such entry.

I. [Does] [t]he Netherlands consider that it is the responsibility of the flag State to take steps to prevent the violation of safety zones and to prosecute those responsible for such violations?

1. The Netherlands considers that it is the responsibility of the flag State to take steps to ensure safety at sea in accordance with generally accepted regulations, procedures and practices under Article 94.5 of the Convention, and to take any steps which may be necessary to secure their observance. These generally accepted regulations, procedures and practices include the International Regulations for Preventing Collisions at Sea. If the violation of a safety zone endangers the safety at sea, the flag State should consider prosecuting those responsible for such violations. However, the prosecution of those responsible for a mere violation of a safety zone is the responsibility of the coastal State. Only the coastal State is competent to establish a safety zone up to 500 meters and to determine the conditions for entry. In the absence of a generally accepted regulation, procedure or practice on the establishment, breadth and entry conditions, only the coastal State is in a position to prosecute the violation of a safety zone it has established.

2. Bearing in mind generally accepted regulations, procedures and practices to ensure safety at sea under Article 94.5 of the Convention as well as other relevant international instruments, such as IMO Resolution A.671(16) on Safety Zones and Safety of Navigation Around Offshore Installations and Structures, my Government regularly meets with representatives of non-governmental organizations that operate ships flying the flag of the Netherlands. During such meetings, the Netherlands clearly outlines its expectations with respect to the conduct of ships during protest actions at sea, including compliance with duly established safety zones. Ships flying the flag of the Kingdom of the Netherlands should comply with international maritime legislation to secure safety at sea and the protection of the marine environment.

The Hague, 25 February 2015

Liesbeth Lijnzaad
Agent for the Kingdom of the Netherlands

LIST OF ANNEXES SUBMITTED BY THE KINGDOM OF THE NETHERLANDS

Annex N-46

A USB Flash Drive containing 5 video's from the hard disk of Mr. Kieron Bryan, a freelance videographer who was contracted by Greenpeace International to join the *Arctic Sunrise* in order to document its voyage in the Pechora Sea, including the protest at the *Prirazlomnaya*.

Annex N-47

A document containing a description of newly available information and a reconstruction of the sequence of events at the end of the protest at the *Prirazlomnaya*.