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The Russian Federation and the *Arctic Sunrise* Case: Hot Pursuit and Other Issues under the LOSC

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I. INTRODUCTION

The *Arctic Sunrise* case¹ was brought unilaterally by the Netherlands against the Russian Federation under the United Nations Convention on the Law of the Sea (LOSC or the Convention) on October 4, 2013.² The claim stated that in September 2013, the Russian Federation had boarded and arrested the *Arctic Sunrise* and detained its crew. The actions taken by the Russian Federation were in response to a protest staged involving the by boats of the *Arctic Sunrise*, which was chartered and operated by the environmental organization Greenpeace, in the vicinity of *Prirazlomnaya*, an offshore oil rig located in the Russian Federation's exclusive economic zone operating under a Russian license. Although the arrest and detention of the *Arctic Sunrise* and its crew raise significant human rights law issues, the arbitration initiated by the Netherlands under the LOSC was primarily concerned with the law of the sea.³ According to the Netherlands, the flag State of the *Arctic Sunrise*, the vessel was exercising the freedom of navigation guaranteed by the LOSC, to which the Netherlands and the Russian Federation are both parties. Thus, in the view of the Netherlands, the Russian Federation's actions against the *Arctic Sunrise* constituted a violation of the LOSC.⁴ The Dutch position is based on the premise that only the

1. The Arctic Sunrise arbitration thus far comprises two judgments, the first on jurisdiction and the second on further jurisdictional matters and the merits. See respectively, The Arctic Sunrise Arbitration (Neth v. Russ), Case No. 2014-02, Award on the Merits (Perm. Ct. Arb. 2015) [hereinafter Award on the Merits]; The Arctic Sunrise Arbitration (Neth v. Russ), Case No. 2014-02, Award on Jurisdiction (Perm. Ct. Arb. 2014) [hereinafter Award on Jurisdiction]. The case summary with links to the judgments can be found at <https://pcacases.com/web/view/21> (last visited Aug. 8, 2016).

2. Submission of Dispute to Arbitration, The Arctic Sunrise Arbitration (Neth v. Russ), Case No. 2014-02 (Oct. 4, 2013), www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Request_provisional_measures_en_withtranslations.pdf [hereinafter Submission of Dispute]. United Nations Convention on the Law of the Sea, arts. 280–82, Dec 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC].

3. For a further discussion of the background to the *Arctic Sunrise* incident and its human rights dimension, see Alex G. Oude Elferink, *The Arctic Sunrise Incident: A Multi-Faceted Law of the Sea Case with a Human Rights Dimension*, 29 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 244 (2014).

4. Submission of Dispute, *supra* note 2, ¶¶ 4–5.

Netherlands, as the vessel's flag State, was entitled to take enforcement action against the *Arctic Sunrise* in the location where the boarding took place, and that the Russian authorities could therefore only have boarded the vessel with its consent.⁵ In dealing with the legality of the arrest of the *Arctic Sunrise*, the arbitral tribunal focused in particular on the question whether the Russian Federation had effected the arrest after a hot pursuit from the safety zone around the *Prirazlomnaya*. Article 111 of the LOSC states that where the conditions for hot pursuit are met, a coastal State can effect the arrest of a vessel without the consent of the flag State in maritime areas where such consent would otherwise be required.

In reaction to the initiation of the arbitral proceedings by the Netherlands, the Russian Federation stated that it did not accept the arbitral procedure under Annex VII of the LOSC and that it refused to participate in the proceedings.⁶ Nevertheless, the Russian Federation commented a number of times on the legal aspects of the arbitration. The Russian Federation set out why it rejected the jurisdiction of the tribunal and, just prior to the tribunal's award on the merits in August 2015, the Russian Federation issued a position paper commenting on various aspects of the case.⁷ Furthermore, a spokesperson of the Russian Ministry of Foreign Affairs commented on the award on the merits immediately after it was rendered.⁸

This article assesses the interaction of the Russian Federation with the arbitral proceedings in the *Arctic Sunrise* case despite its non-participation in the proceedings. The article focuses on the legal arguments advanced by the Russian Federation. To place these arguments in proper perspective, the article also considers the reasoning and conclusions of the arbitral tri-

5. See Note from Legal Affairs Directorate, The Ministry of Foreign Affairs of the Kingdom of the Netherlands, to the Embassy of the Russian Federation (Sept. 29, 2013), www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Request_provisional_measures_en_withtranslations.pdf.

6. See Note No. 11945 from the Ministry of Foreign Affairs of the Russian Federation to the Embassy of the Kingdom of the Netherlands in Moscow (Oct. 22, 2013), www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Note_verbale_Russian_Federation_eng.pdf [hereinafter Note No. 11945].

7. The Ministry of Foreign Affairs of the Russian Federation, *On Certain Legal Issues Highlighted by the Action of the Arctic Sunrise Against Prirazlomnaya Platform* (Aug. 5, 2015), www.mid.ru/documents/10180/1641061/Arctic+Sunrise.pdf/bc7b321e-e692-46eb-bef2-12589a86b8a6 [hereinafter *Certain Legal Issues*].

8. Commentary of the Official Spokesperson of the Ministry of Foreign Affairs of the Russian Federation M.V. Zakharova Regarding the Arbitral Award in the Case of the *Arctic Sunrise* (Aug. 25, 2015) (transcript in Russian available at http://www.mid.ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/1707214).

bunal and makes its own assessment of the applicable law. Before turning to the legal arguments, Section II first provides a brief overview of the rules applicable to compulsory third party dispute settlement under the LOSC and introduces the different stages of the *Arctic Sunrise* case. Section III then discusses the Russian Federation's views on the jurisdiction of the tribunal in the *Arctic Sunrise* case. Section IV considers the arbitral tribunal's reasoning in relation to a number of aspects of the regime of hot pursuit. Section V then examines the Russian arguments that the arrest of the *Arctic Sunrise* was possible without a hot pursuit from the safety zone of the *Prirazlomnaya*. Finally, Section VI sets out some concluding remarks.

II. COMPULSORY THIRD PARTY DISPUTE SETTLEMENT UNDER THE LOSC AND THE ARCTIC SUNRISE PROCEEDINGS

Part XV of the LOSC establishes an elaborate dispute settlement regime. To a large extent, Part XV defers to the Convention's States parties in determining the means to settle disputes concerning its interpretation or application.⁹ However, Article 286 provides that "[s]ubject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section." Section 3 of Part XV limits the applicability of compulsory dispute settlement procedures and allows States to exclude certain matters from these procedures.¹⁰ As will be set out below, these limitations and exceptions played a role in the *Arctic Sunrise* case.

The LOSC offers States parties a number of options in submitting a dispute to a third party, but in a case where the State initiating the proceedings and the defendant have not opted for the same procedure, arbitration in accordance with Annex VII to the Convention is the default mechanism.¹¹ This was the case in the *Arctic Sunrise* proceedings. Annex VII provides that the arbitral tribunal shall in principle be constituted by the parties, but also provides for a procedure in case the parties fail to agree on the constitution of the tribunal.¹² The Netherlands nominated an arbitrator in its application for the institution of proceedings, while the other arbitrators were chosen by the President of the International Tribunal for the Law

9. See, e.g., LOSC, *supra* note 2, arts. 280–82.

10. *Id.*, arts. 297–98.

11. *Id.*, art. 287(5).

12. *Id.*, Annex VII, art. 3.

of the Sea (ITLOS), in accordance with Article 3 of Annex VII of the Convention.

Non-appearance in international legal procedures is not unique to the *Arctic Sunrise* case. In the recent Annex VII arbitration initiated by the Philippines against China's claims in the South China Sea, China similarly rejected the jurisdiction of the tribunal and refused to participate.¹³ In another high-profile case before the International Court of Justice, *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America*), the United States did not participate in the merits stage of the proceedings after losing in the jurisdictional stage.¹⁴ A State's decision not to appear, however, does not prevent proceedings from moving forward. Article 9 of Annex VII of the Convention provides that when a party fails to appear, the "other party may request the tribunal to continue the proceedings and to make its award." In doing so, the tribunal is required to establish jurisdiction over the dispute and satisfy itself that "the claim is well founded in fact and law." Furthermore, when there is a dispute concerning the jurisdiction of a court or tribunal, as will invariably be the case if one of the parties refuses to participate in the proceedings, the court or tribunal concerned is competent to determine its jurisdiction.¹⁵ This provision is similar to the rules on non-appearance of other international courts and tribunals.¹⁶

In the *Arctic Sunrise* case, the Netherlands asked the tribunal to determine that the Russian Federation breached the LOSC by failing to participate in the proceedings.¹⁷ The award, however, does not contain a ruling on this point.¹⁸ While non-appearance of a party does not affect the bind-

13. The South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award (Perm. Ct. Arb. 2016), <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>.

14. *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.) 1986 I.C.J. 226 (June 27). The terms "non-appearance" and "non-participation" are used interchangeably in this article.

15. LOSC, *supra* note 2, art. 288(4).

16. *See e.g.*, Statute of the International Court of Justice art. 53, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

17. Award on the Merits, *supra* note 1, ¶ 4.

18. The question as to whether there is a duty to appear in international law has never been decided by a court or tribunal. Different views have been advanced in the literature on the legal consequences of non-appearance. *See* Matthias Goldman, *International Courts and Tribunals, Non-Appearance*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL

ing nature of the final decision of the court or tribunal,¹⁹ it may complicate the determination of the relevant facts. As the tribunal in the *Arctic Sunrise* case observed, the non-participation of the Russian Federation “made the Tribunal’s task more challenging than usual. In particular, it has deprived the Tribunal of the benefit of Russia’s views on the factual issues before it and on the legal arguments advanced by the Netherlands.”²⁰ As will be set out below, the non-participation of the Russian Federation may have had a significant impact on the outcome of the arbitration.²¹

The *Arctic Sunrise* case played out in a number of stages. Prior to the establishment of the Annex VII tribunal, the Netherlands asked for provisional measure to preserve its rights from the ITLOS.²² The ITLOS indicated provisional measures through an order of November 22, 2013. The order largely granted the provisional measures as requested by the Netherlands, ordering the Russian Federation to release the *Arctic Sunrise* and its crew.²³ The Russian Federation communicated the reasons for its non-participation in the proceedings to the Netherlands, the ITLOS and the arbitral tribunal, invoking a declaration it had made on becoming a party to the Convention, which excluded certain types of disputes from the compulsory settlement mechanisms under the Convention in accordance with its Article 298.²⁴ The Annex VII tribunal in response to the communication of the Russian Federation decided to treat it as a plea on jurisdiction,²⁵

LAW, ¶ 14 (Aug. 2006), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e39>.

19. LOSC, *supra* note 2, art. 296(1). This was explicitly confirmed by the tribunal in the *Arctic Sunrise* case. Award on the Merits, *supra* note 1, ¶ 10.

20. See Award on the Merits, *supra* note 1, ¶ 19.

21. See *infra* text accompanying notes 64 to 70.

22. This possibility exists under LOSC, *supra* note 2, art. 290(5).

23. The “Arctic Sunrise” Case (Neth v. Russ), Case No. 22, Order of Nov. 22, 2013, ¶ 105, http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Order_22_11_2013_orig_Eng.pdf [hereinafter Order]. For further discussion on the Tribunal’s order see, e.g., Richard Caddell, *Platforms, Protestors and Provisional Measures: The Arctic Sunrise Dispute and Environmental Activism at Sea*, 45 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 358 (2014); Oude Elferink, *supra* note 3, at 280–87. For a discussion of the Russian Federation’s reaction to the Tribunal’s order, see *id.* at 286–87.

24. Note No. 11945, *supra* note 6; Note No. 3838 from the Embassy of the Russian Federation in Berlin to the International Tribunal for the Law of the Sea (Oct. 22, 2013), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Note_verbale_Russian_Federation_eng.pdf [hereinafter Note No. 3838]; Note No. 487 from the Embassy of the Russian Federation in The Hague to the Permanent Court of Arbitration (Feb. 27, 2014), <http://www.pcacases.com/web/sendAttach/1315> [hereinafter Note No. 487].

25. Award on Jurisdiction, *supra* note 1, ¶¶ 5–6, 48.

notwithstanding the fact that the Russian Federation had indicated that it continued to refuse to take part in the proceedings and abstained from commenting on matters of substance and procedure.²⁶ The tribunal issued an award on the significance of the Russian declaration for its jurisdiction on November 26, 2014, finding that the declaration did not prevent it from exercising jurisdiction.²⁷ The tribunal ruled on other issues of jurisdiction and admissibility and the merits in its award of August 24, 2015. A decision on the amount of compensation that is due to the Netherlands under a number of items was reserved for a subsequent stage of the proceedings.²⁸

III. THE RUSSIAN FEDERATION'S VIEW ON THE JURISDICTION OF THE TRIBUNAL

The only legal ground the Russian Federation invoked to reject the arbitration initiated by the Netherlands was its declaration under Article 298 of the LOSC. A couple of points are to be noted about the Russian Federation's invocation of the declaration in the context of the arbitral proceedings. First, the Russian diplomatic note only refers to the fact that the declaration indicated that the Russian Federation "does not accept the procedures, provided for in section 2 of Part XV of the [LOSC], entailing binding decisions with respect to disputes . . . concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction."²⁹ The diplomatic note does not refer to the fact that the declaration provides that it is made in "in accordance with article 298 of the Convention."³⁰

Article 298 does indeed allow States parties to exclude disputes concerning law enforcement activities from compulsory dispute settlement mechanisms.³¹ However, the Article specifies that this is only the case for "disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or

26. See Note No. 487, *supra* note 24. It may be noted that the tribunal in any case would have had to assess the impact of the Russian declaration as per LOSC, Annex VII, art. 9.

27. Award on Jurisdiction, *supra* note 1, ¶ 79(1).

28. Award on the Merits, *supra* note 1, ¶ 401(I).

29. See Note no. 11945, *supra* note 6; Note No. 487, *supra* note 24.

30. Declaration of the Russian Federation upon Ratification of the LOSC, Mar. 12, 1997, www.un.org/Depts/los/convention_agreements/convention_declarations.htm (last visited Aug. 8, 2016).

31. LOSC, *supra* note 2, art. 298(1)(b).

tribunal under article 297, paragraph 2 or 3.”³² Paragraphs 2 and 3 of Article 297 are concerned with marine scientific research and fisheries, two aspects that were not at issue in the *Arctic Sunrise* incident. On the other hand, paragraph 1 of Article 297, to which no reservations or exceptions are allowed by the LOSC, is relevant in this incident. Although Article 297(1) in principle excludes disputes pertaining to the interpretation or application of the LOSC concerning the exercise by a coastal State of its sovereign rights and jurisdiction as defined in the LOSC, the section goes on to state that these disputes are nonetheless subject to compulsory procedures in a number of specific cases. One of those specific cases concerns situations 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. The *Arctic Sunrise* incident falls under this provision.³³ Summarizing this argument, the dispute involving the *Arctic Sunrise* was not covered by the declaration of the Russian Federation excluding certain types of disputes from compulsory settlement.

Second, invoking a declaration under Article 298 does not lead to an automatic termination of proceedings. Rather, the court or tribunal that is seized of the dispute will have to make a decision on this matter in connection with the determination of its jurisdiction.³⁴ As far as can be ascertained, the Russian government did not issue an official statement following the Annex VII tribunal’s award on jurisdiction in relation to the article 298 declaration.

The matter of the tribunal’s jurisdiction was revisited in a commentary by Maria Zakharova, an official spokesperson of the Russian Ministry of Foreign, after the tribunal issued its award on the merits. Her statement was limited to stating that the Russian Federation “remains of the view that the tribunal does not have jurisdiction in relation to this case.”³⁵ No further explanation was offered as to why the Russian Federation retained that view. The spokesperson’s commentary does raise a number of points that appear to challenge the award on the merits. The commentary observes that the award does not take into account all aspects of the incident and

32. *Id.*

33. Oude Elferink, *supra* note 3, at 277.

34. See also Caddell, *supra* note 23, at 367; Oude Elferink, *supra* note 3, at 276–78. For the Annex VII tribunal’s discussion of the implications of the Russian declaration for its jurisdiction, see Award on Jurisdiction, *supra* note 1, ¶¶ 39–45.

35. Zakharova, *supra* note 8.

ignores the legal norms and practice of court's applicable to the case.³⁶ In this connection, the commentary expresses regret that the award on the merits does not take into account the Russian position paper, which sets out extensive State practice reacting to the illegal actions of Greenpeace at sea.³⁷ In light of the timing of the position paper, which was issued a couple of weeks before the tribunal was to render its award on the merits, this complaint sounds rather hollow.³⁸ The commentary further adds that the award on the merits on a whole range of matters is not beyond reproach and contains clear errors, specifically mentioning that the award does not properly characterize the legal status of the Russian Federation as a continuer State of the Soviet Union.³⁹ Indeed, footnote 186 of the award refers to the Russian Federation as a successor State of the Soviet Union. At the same time, it may be noted that this qualification in no way affects the award's reasoning to reach its decision on the merits.

Determining whether the possibility exists to challenge the award on the merits in the *Arctic Sunrise* case, as is suggested by the spokesperson of the Russian Ministry of Foreign Affairs, requires identifying the possible grounds for such a challenge. The Model Rules on Arbitral Procedure adopted by the International Law Commission in 1958 list the following grounds:

- (a) That the tribunal has exceeded its powers;
- (b) That there was corruption on the part of a member of the tribunal;
- (c) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;

36. The commentary refers to the fact that the Russian authorities are in the process of making a detailed assessment of the award (*id.*). At the time of writing of this article the website of the Russian Ministry of Foreign Affairs (<http://www.mid.ru/home>) did not contain any further information on this matter (based on a search of the website for the term "Арктик Санрайз" on June 1, 2016). The most recent hit was the commentary of August 25, 2015.

37. Zakharova, *supra* note 8. The Tribunal, in its Award on the Merits, resolved to not take formal action on the position paper. The Tribunal pointed out that the paper had been brought to its attention at a very late stage, while the Russian Federation previously had not participated in the case; that the Russian Federation did not consider the paper to be a formal submission; and that the Tribunal was "satisfied that the relevant issues [were] fully addressed in this Award." (Award on the Merits, *supra* note 1, ¶ 68).

38. As will be further set out below in Section V, the legal arguments contained in the position paper are not altogether convincing.

39. Zakharova, *supra* note 8.

(d) That the undertaking to arbitrate or the *compromis* is a nullity.⁴⁰

The commentary of the Foreign Ministry's spokesperson does not even start to make a case that any of these grounds is met. An Annex VII tribunal is competent to deal with issues concerning the interpretation and application of the LOSC and in that connection may also apply other rules of international law not incompatible with it.⁴¹ The award is fully reasoned and there is no indication that the tribunal departed from its rules of procedure. As a matter of fact, the tribunal offered the Russian Federation every opportunity to participate in the proceedings and in its award took care to fully take into account all available evidence.⁴² The award considers all possible grounds for exercising jurisdiction over the *Arctic Sunrise* the Russian Federation might have invoked, had it participated in the proceedings.⁴³ The basis for the undertaking to arbitrate in this case is provided by the LOSC, to which both the Russian Federation and the Netherlands are a party, and the application of the Netherlands instituting proceedings is in accordance with Article 286 of the Convention.

IV. HOT PURSUIT

The right of hot pursuit provides an important tool for coastal States undertaking law enforcement actions at sea. The difficulties involved in such actions may make it impossible to arrest a vessel in the coastal State zone in which an infraction has occurred. Once a ship has left that zone, the coastal State in principle does not have a right to effect an arrest. To address this situation, international law recognizes the right of hot pursuit. This right allows a coastal State to effect an arrest beyond the zone in which the infraction took place, including on the high seas and in the maritime zones of other States that are beyond the outer limits of their territorial seas.⁴⁴

40. Model Rules on Arbitral Procedure (*Yearbook of the International Law Commission*, 1958, vol. II, ¶ 22 at 83), art. 35. For a further discussion of this topic, see, e.g., Karin Oellers-Frahm, *Judicial and Arbitral Decisions, Validity and Nullity*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (July 2013), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e53?rskey=herE7w&result=1&prd=OPIL>.

41. LOSC, *supra* note 2, arts. 288(1), 293(1).

42. Award on the Merits, *supra* note 1, ¶¶ 19, 71.

43. *Id.*, ¶¶ 236–333.

44. LOSC, *supra* note 2, art. 111(3).

The LOSC addresses certain specific conditions that apply in exercising the right of hot pursuit. First, the right of hot pursuit commences when the foreign ship or its boats are still inside the maritime zones in which the infraction is believed to have taken place. Second, hot pursuit may only be continued beyond that zone if it has not been interrupted. Third, hot pursuit may be undertaken “only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.”⁴⁵

The right of hot pursuit was first codified in Article 23 of the United Nations Convention on the High Seas.⁴⁶ The substantive regime of Article 23 is reflected in Article 111 of the LOSC, but Article 111 extends beyond the territorial sea and the contiguous zone to the exclusive economic zone and the continental shelf and makes explicit reference to the safety zone around continental shelf installations.⁴⁷

In the *Arctic Sunrise* case, the award on the merits interprets and applies a number of aspects of Article 111, thus making the case an important contributor to the law of hot pursuits. Apart from the general interest and interpretation of the regime of hot pursuit, the findings of the tribunal are also of interest for the Russian Federation’s legal characterization of the incident. In this regard, this section will comment on the following issues: safety zones as a separate zone under the regime of hot pursuit; the condition that the pursuit has to be started in the zone in which the infraction takes place; the requirement that the pursuing vessel or aircraft has to be clearly marked and identifiable; and the condition that the pursuit may not be continued after it has been interrupted.

The arrest of the *Arctic Sunrise* took place beyond the safety zone of the *Prirazlomnaya*, in which the alleged violations of Russian legislation occurred. This raised the question whether the safety zone is a separate zone for the purposes of the regime of hot pursuit in the sense that infractions of legislation applicable to an installation or in its safety zone may only be enforced inside the safety zone or after a hot pursuit from that zone. The award rather laconically confirms that this is the case, observing that:

The first prerequisite for the legitimate exercise of the right of hot pursuit, set out in Article 111(1) of the Convention, is that the competent authorities of the coastal State must have good reason to believe that the

45. *Id.*, arts. 111(1), 111(4).

46. Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11.

47. LOSC, *supra* note 2, art. 111(2).

vessel being pursued has violated the laws or regulations of that State. The laws and regulations in question are those applicable under the Convention in the area at hand. In the present case, the applicable laws and regulations are those applicable in safety zones established around artificial islands, installations, and structures in the [exclusive economic zone].⁴⁸

Some further clarification of this conclusion by the tribunal perhaps would have been called for. First, it may be noted that Article 111 refers to the safety zones around continental shelf installations but does not include a reference to artificial islands and structures on the shelf nor does it reference any of these three types of construction in the exclusive economic zone. The award, on the other hand, does make reference to artificial islands, installations and structures in the exclusive economic zone. It could be said that this is a reasonable interpretation of Article 111(2) of the Convention, as there would seem no justification to distinguish between these three types of constructions or between the continental shelf and the exclusive economic zone. However, Articles 60 and 80 of the LOSC do make separate reference to the three types of constructions. At the same time, the Convention is not completely coherent in its references to man-made constructions. For instance, Article 87 refers to “artificial islands and other installations.”

Second, while Article 111 does include a separate reference to continental shelf installations, the implication of this is not completely clear. Article 111(2) indicates, by using the word “or,” that it applies, on the one hand, to the exclusive economic zone and, on the other hand to the continental shelf, *including* safety zones around continental shelf installations, which might seem to suggest that safety zones are subsumed in the continental shelf. At the same time, that interpretation would make the separate reference to the safety zone of continental shelf installations superfluous. The tribunal’s view that the safety zone of installations has to be treated as a separate zone in the regime of hot pursuit is supported by the general approach to enforcement jurisdiction in coastal State maritime zones.⁴⁹ The coastal State may take enforcement actions if a ship is in the maritime zone

48. Award on the Merits, *supra* note 1, ¶ 247.

49. See Oude Elferink, *supra* note 3, at 259. It may be noted that Article 111 is not very carefully drafted on this point. Under Article 80 of the LOSC the coastal State has jurisdiction over artificial islands, installations and structures on its continental shelf. A literal interpretation of Article 80 would imply that the coastal State only has a right of hot pursuit from the safety zone of installations.

in which the infraction took place. This might suggest that the coastal State could take enforcement action against the infraction of legislation applicable in a safety zone anywhere in its continental shelf or exclusive economic zone. However, a safety zone is a special zone within the continental shelf or exclusive economic zone, in which the coastal State has additional rights that it does not otherwise have in the continental shelf or exclusive economic zone.⁵⁰ This indicates that enforcement jurisdiction in relation to these rights only exists inside the safety zone, just like enforcement jurisdiction in relation to maritime zones in general cannot be exercised beyond their outer limits, absent a hot pursuit.⁵¹ This same argument is applicable to the exercise of enforcement jurisdiction by the coastal State on the installation itself.

On the basis of the evidence before it, the tribunal reached the conclusion that the first order to stop, a requirement to start a hot pursuit, had probably only been given after the boats of the *Arctic Sunrise* had left the safety zone around the *Prirazlomnaya*.⁵² As the tribunal observed, Article 111(1) provides that the pursuit “must be commenced when the foreign ship or one of its boats” is within the maritime zone concerned. However, the tribunal then continued by observing that paragraphs 1 and 4 of Article 111 set out a slightly different test.⁵³ Article 111(4) indicates that the pursuit may only begin after the “pursuing ship has satisfied itself by such practicable means as may be available” that the pursued ship or its boats are within the limits of the maritime zone concerned. According to the tribunal the “latter formulation suggests that the location of the foreign ship at the time of the first stop order should not be evaluated with the full benefit of hindsight, but rather looked at from the perspective of the pursuing ship.”⁵⁴ On the basis of the available facts and evidence, the tribunal concluded that the Russian coast guard vessel *Ladoga* “should be seen” as having satisfied the latter text.⁵⁵

50. See also *Summary Records of the 69th Meeting*, [1950] 1 Yearbook of the International Law Commission 231, ¶¶ 59–60, U.N. Doc. A/CN.4.SER.A/1950.

51. The exception of course being the territorial sea, in which case the coastal State may also take enforcement action in the contiguous zone. LOSC, *supra* note 2, art. 33. However, this point rather confirms the position in relation to the safety zone. Unlike in the case of the territorial sea and the contiguous zone, no provision is made for exercising enforcement jurisdiction beyond the safety zone, save for the exception of hot pursuit.

52. Award on the Merits, *supra* note 1, ¶ 266.

53. *Id.*, ¶ 267.

54. *Id.*

55. *Id.*

It is questionable whether the tribunal's interpretation of Article 111 on this point is correct. Moreover, the tribunal's interpretation seems to introduce an undesirable measure of subjectivity. Article 111(1) is concerned with the question as to what requirements have to be met for the right of hot pursuit to exist. This includes the objective test that the foreign ship or its vessels "must be" in the maritime zone concerned. Article 111(4) on the other hand is concerned with an altogether different matter. It establishes the conditions under which hot pursuit will have been deemed to have begun, and it does not address the parameters of the right of hot pursuit itself. While allowing the coastal State a margin of discretion in the latter case, due to the practical difficulties a vessel may have while operating at sea, that margin of discretion should not be used to change the nature of the right of hot pursuit. The tribunal supports its interpretation by referring to the limited dimensions of the safety zone, which leave the coastal State little time to make the relevant determinations for starting a hot pursuit if a vessel or its boats leave that zone.⁵⁶ First, it should be questioned whether practical considerations in relation to one specific zone should play a role in interpreting the provisions on hot pursuit that are generally applicable to all coastal State maritime zones. Second, this practical argument would not seem to be relevant either in the present case, or arguably in other similar cases that would warrant a hot pursuit from a safety zone of an installation. In the present case, the actions of the *Arctic Sunrise* were directed at the *Prirazlomnaya* and played out over a considerable period of time. A determination whether a hot pursuit should eventually be initiated or not could have been made in that time frame and did not have to wait until the moment the boats started leaving the safety zone.

The tribunal also seems to stretch the applicable law in relation to the requirement that the pursuing vessel or aircraft has to be "clearly marked and identifiable as being on government service." The *Arctic Sunrise* was boarded from a helicopter that, as the tribunal observes, "was unmarked save for a red star on its bottom side."⁵⁷ The tribunal then concludes that although "the helicopter was unmarked and the men descending from it did not, in the recollection of the crew of the *Arctic Sunrise*, identify themselves, the Tribunal is satisfied, in context, that the vessel was boarded by Russian officials. *This is apparent from their subsequent actions.*"⁵⁸ This conclusion clearly contradicts Article 111(4), which in no way indicates that the

56. *Id.*, ¶ 267.

57. *Id.*, ¶ 100.

58. *Id.*, ¶ 101 (emphasis added).

requirements set out in it may be met or replaced by a test of subsequent conduct.⁵⁹

The last point in the tribunal's assessment as to whether or not hot pursuit provided the Russian Federation with a legal basis to arrest the *Arctic Sunrise* was whether the hot pursuit had been continuous or had been interrupted. Once a pursuit is interrupted beyond the zone in which it is initiated, it may not be recommenced at a later stage.⁶⁰ The tribunal held that the actions of the Russian coast guard vessel *Ladoga* at first were in line with a hot pursuit.⁶¹ However, according to the tribunal, it was apparent that the *Ladoga's*

later conduct is not consistent with continuous pursuit, the final objective of which would have been to board, as soon as possible, the pursued ship. The conduct of the *Arctic Sunrise* was also not consistent with that of a pursued ship, as it remained in the area and did not try to flee.⁶²

In this connection, the tribunal pointed out that there were discussions between the *Ladoga* and the *Arctic Sunrise* concerning two of the crew of the latter that were on board the *Ladoga* and that the *Arctic Sunrise* was allowed to deliver items for these crew members to the *Ladoga*.⁶³

The tribunal also entertained the option that the *Ladoga* may have considered that it was not in a position to effect an arrest by itself and may have awaited reinforcements—previous attempts by the *Ladoga* to board the *Arctic Sunrise* having failed.⁶⁴ The tribunal rejected this possibility, referring to a witness statement of one of the officers of the *Ladoga*, gunnery officer Marchenkov. According to the tribunal, gunnery officer Marchenkov:

described the moment when the *Ladoga's* conduct changed as follows:

59. It should be acknowledged that this finding of the tribunal is included in its factual overview of the case and not its discussion of the law. Still, it does imply an assessment, which is not a factual description and that moreover is relevant to the interpretation of Article 111. In addition, it was not necessary to make this finding as it was not relevant to determining the claims of the parties.

60. LOSC, *supra* note 2, art. 111(1).

61. Award on the Merits, *supra* note 1, ¶ 270.

62. *Id.*, ¶ 271.

63. *Id.*

64. *Id.*, ¶ 272.

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

It is noteworthy that, after recording both the initial authorisation to fire warning shots and the order to unload the gun mounts received by the *Ladoga*, Mr. Marchenkov does not refer to any further orders received after 9:30 on 18 September 2013.⁶⁵

The events as described by the tribunal could be said to support its conclusion that the *Ladoga* remained in the vicinity of the *Arctic Sunrise* to prevent further actions against the *Prirazlomnaya* and not to continue the hot pursuit.⁶⁶ However, a number of considerations suggest that this conclusion may be more problematical than would appear at first sight. First, the tribunal observes that the final objective of a hot pursuit should be to board the pursued ship as soon as possible. No such requirement is included in the LOSC and, as the tribunal's observations indicate, a pursuing ship may need to wait for reinforcements to effect a boarding. Second, the tribunal refers to the fact that, based on gunnery officer Marchenkov's statement, the *Ladoga* apparently did not receive any further orders after the order to unload its gun mounts. However, neither does the statement indicate that there was an order to discontinue the hot pursuit. In addition, the fact that the gunnery officer was aware of the order to unload the gun mounts does not necessarily imply that he was informed of all communications between the commanding officer of the *Ladoga* and his superiors. Finally, remaining in the vicinity of the *Arctic Sunrise* to prevent further actions against the *Prirazlomnaya* does not necessarily exclude the continuation of the hot pursuit at the same time.

It would seem that in judging the question whether a hot pursuit is interrupted or not, the intent of the coastal State authorities, who are responsible for deciding on the matter, should in principle be decisive. The *Arctic Sunrise* was eventually boarded by Russian authorities. That is a clear indication on the part of the Russian authorities that there was an intent to go through with the enforcement action that had been initiated by the hot

65. *Id.*, ¶¶ 272–73 (citations omitted).

66. Oude Elferink, *supra* note 3, at 276. See Award on the Merits, *supra* note 1, ¶ 270.

pursuit. The fact that the *Ladoga* continued to follow the *Arctic Sunrise* may be explained in different ways, but does not positively point to an intention to interrupt the pursuit. On the other hand, the dealings between the *Arctic Sunrise* and the *Ladoga* in relation to the two crew members of the *Arctic Sunrise* on board the *Ladoga* indeed seem difficult to square with the intention to continue a hot pursuit.

There is a paucity of material on the matter how to determine when a hot pursuit has been interrupted in the circumstances described above. Martens submits that when there exists doubt on this point, the intention of the master of the ship carrying out the pursuit should be determinative.⁶⁷ On the other hand, Poulantzas criticizes this position, observing that it

would be precarious . . . to base such an element as the continuity of the pursuit on such subjective factors as the intention of the master of the pursuing vessel, [who] is one of the parties involved in the pursuit. The determination of element of continuity of pursuit should rely on objective and real criteria.⁶⁸

This observation would seem to be equally applicable to other authorities of the coastal State. However, Poulantzas also indicates that intention may be made objective, by e.g. recording the intent to continue the pursuit in the logbook of the pursuing vessel.⁶⁹ As the award in the *Arctic Sunrise* case indicates, intention may not always be readily ascertainable on the basis of the available evidence. In the final analysis, the main difficulty in making a determination whether or not the hot pursuit was continuous or not in the *Arctic Sunrise* case was the non-participation of the Russian Federation in the proceedings. The tribunal largely had to rely on a witness statement of gunnery officer Marchenkov of the *Ladoga*, which only provides a cursory account of the communications between the vessel and the Russian authorities. It has to be assumed that the Russian Federation would have been in a position to shed further light on this matter, had it participated in the proceedings.⁷⁰

67. NICHOLAS M. POULANTZAS, *THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW* 214 (1969).

68. *Id.* at 214–15.

69. *Id.* at 215.

70. The Russian Federation submitted that Russian authorities were not exercising the right of hot pursuit in boarding and arresting the *Arctic Sunrise*. See *Certain Legal Issues*, *supra* note 7, ¶¶ 11.1, 11.5–11.6.

V. THE RUSSIAN FEDERATION'S POSITION PAPER

The position paper of the Ministry of Foreign Affairs of the Russian Federation, which was circulated shortly before the award on the merits in the *Arctic Sunrise* case was rendered, rejects the view that hot pursuit had a role to play in the boarding and arrest of the *Arctic Sunrise*.⁷¹ Instead, the paper submits that, in the circumstances of the case, the Russian Federation could arrest the *Arctic Sunrise* anywhere in its exclusive economic zone.⁷² The paper sets out a number of arguments to support this position. First, because the actions of Greenpeace were directed against an installation and posed a threat to the rights and interests of the Russian Federation and the operator, they “are incompatible with the freedom of navigation, may not be regarded as an exercise thereof and fall under the exclusive jurisdiction of Russia as the coastal State over installations in its [exclusive economic zone].”⁷³ Or as the paper also argues, the *Arctic Sunrise* “was deliberately violating law and order rather than exercising the freedom of navigation.”⁷⁴ Second, apart from claiming that specific actions may lead to a loss of the freedom of navigation, the position paper seeks to excise the rights to freedom of expression and of peaceful assembly from the freedoms of the high seas.⁷⁵ Third, the paper submits that the actions of the Russian Federation were aimed at protecting “its sovereign right to safely exploit mineral resources of its continental shelf and its [exclusive economic zone] without unauthorized illegal interference and to exercise to this end the exclusive jurisdiction over installations in its [exclusive economic zone] vis-à-vis the vessel.” Finally, the position paper points out that the limited size of the safety zone around an installation makes it “hardly possible” to intercept boats acting from a vessel in the safety zone. Moreover, the Russian Federation also had an interest in arresting the *Arctic Sunrise* itself, which had remained outside the safety zone.⁷⁶

The arguments of the position paper to justify the boarding and arrest of the *Arctic Sunrise* without a hot pursuit from the safety zone merit some comment. The first and third arguments are both based on the assumption that legislation created pursuant to a coastal State's prescriptive jurisdiction

71. *Id.*, ¶¶ 11.1, 11.4.

72. *Id.*, ¶¶ 11.6, 12.1.

73. *Id.*, ¶ 12.1.

74. *Id.*, ¶ 11.6.

75. *Id.*, sec. 8.

76. *Id.*, ¶ 12.9.

over installations and their safety zones can be enforced throughout the coastal State's entire exclusive economic zone. In this connection, the third argument conflates the rights a coastal State generally has over the resources of the exclusive economic zone and the continental shelf with the specific jurisdiction the coastal State has over installations under Article 60 of the LOSC. This position is problematical. As Article 56 of the LOSC, which recognizes the sovereign rights of the coastal State over the resources of the exclusive economic zone, indicates, the coastal State has jurisdiction over installations "as provided for in the relevant provisions" of the Convention. Article 60 provides that the coastal State has exclusive jurisdiction over installations. There is no indication in Article 60 that this jurisdiction extends beyond the installation.⁷⁷ To the contrary, Article 60 indicates that even in the safety zone of an installation the coastal State only has limited enforcement powers. In that zone the coastal State "may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures."⁷⁸ This qualification would not have been necessary if the argument of the Russian Federation concerning enforcement jurisdiction in relation to installations would be correct. The approach of the Russian Federation also is difficult to square with the separate reference to the safety zones of continental shelf installations in Article 111.⁷⁹

The Russian Federation's suggestion that the actions of the *Arctic Sunrise* led to a loss of its freedom of navigation is only true in a limited sense. Ships of all States enjoy the freedom of navigation and "other internationally lawful uses of the sea" related to that freedom.⁸⁰ In this connection, Article 58(2) provides that Articles 88 to 115, setting out the regime of the high seas, apply also to the exclusive economic zone to the extent they are not incompatible with Part V of the Convention, which sets out the regime for that zone. Article 92(1) of the LOSC provides that on the high seas ships shall be subject to the exclusive jurisdiction of their flag State, "save in exceptional cases expressly provided for in international treaties or this

77. The position paper of the Russian Federation does make the explicit claim that "[u]nder the circumstances of the case and in view of the exclusive nature of the Russian jurisdiction over the platform, the consent of the flag State was not required for boarding and detention of the Arctic Sunrise by the Russian authorities." *Id.*, ¶ 12.8.

78. LOSC, *supra* note 2, art. 60(4).

79. See *supra* text accompanying note 48.

80. Award on the Merits, *supra* note 1, ¶ 227. See LOSC, *supra* note 2, art. 58(1).

Convention.”⁸¹ In the exclusive economic zone and the continental shelf this may concern cases of infraction of legislation of the coastal State applicable to those zones.⁸² However, that legislation has to be in accordance with the Convention.⁸³ In consequence, there is no loss of the freedom of navigation as such, but only specific limitations on the exclusive jurisdiction of the flag State as provided for in the Convention.

The Russian Federation’s position paper provides a number of arguments to support the view that the freedom of expression and peaceful assembly do not form part of the freedom of navigation.⁸⁴ First, it is submitted that these human rights belong to individuals, while the freedom of navigation, as is indicated by Articles 86 and 87, belong to States.⁸⁵ This is a surprising argument. Activities on the high seas in most instances are carried out by private actors, not State organs. The link with the State is established through the rules on attribution of nationality contained in the Convention and other rules of international law. Second, the position paper submits that human rights “are individual rights governed by a cluster of international law separate from the law of the sea”.⁸⁶ Such a compartmentalization of international law is not supported by the Convention. For instance, Article 58 of the Convention provides that the freedom of navigation in the exclusive economic zone comprises other lawful uses of the sea related to that freedom and paragraph 2 of Article 58 provides that “other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with Part V.” There is an extensive body of human rights case law confirming that human rights can apply beyond the territory of States and that they are not incompatible with the law of the sea.⁸⁷

The Russian argument on the separate nature of human rights and freedom of navigation seems to derail when the paper submits that it is possible to exercise human rights at sea without at the same time exercising the freedom of navigation, for instance when a ship is in the territorial sea in which foreign ships do not enjoy the freedom of navigation.⁸⁸ However,

81. Article 110 of the LOSC specifies the situations in which a warship has a right of visit of foreign ships on the high sea. LOSC, *supra* note 2, art. 110.

82. *See id.*, arts. 58(3), 60, 73, 77.

83. *See id.*, art. 58(3).

84. *Certain Legal Issues*, *supra* note 7, ¶ 8.1.

85. *Id.*

86. *Id.*

87. *See Oude Elferink*, *supra* note 3, at 261–63.

88. *Certain Legal Issues*, *supra* note 7, ¶ 8.1.

from the fact that a ship may be used in connection with a protest in a zone in which it does not enjoy the freedom of navigation, it does not logically follow that a ship does not enjoy the freedom of navigation in zones in which that freedom exists, because it is used in connection with the exercise of a human right. The remainder of section eight of the position paper is concerned with setting out the limitations that may apply to the exercise of human rights at sea and is premised on the position that “[t]he Russian Federation respects the rights to freedom of expression and peaceful assembly exercised in accordance with international law, including when they are exercised at sea.”⁸⁹ Section eight does not spell out the consequences of the separate nature of human rights and the freedom of navigation. Presumably, the Russian Federation’s respect for human rights exercised in accordance with international law by a vessel engaged in the freedom of navigation, implies that in this instance it would defer to the exclusivity of flag State jurisdiction.⁹⁰

Finally, the position paper’s argument concerning the difficulty of carrying out an arrest in a safety zone to justify arrest beyond the zone is of a practical nature. This argument does not justify reconfiguring the jurisdictional framework set out in the LOSC. In addition, as was set out above, the limited size of a safety zone may be less of a problem to exercising the right of hot pursuit than would appear at first sight.⁹¹

In addition to arguing that the arrest of the *Arctic Sunrise* without a hot pursuit from the safety zone of the *Prirazlomnaya* was in accordance with the LOSC, the paper submits there is an

emerging pattern of coastal States’ practice with respect to (a) unacceptability and illegality of those Greenpeace malicious activities and (b) legality and necessity of protective and law enforcement measures undertaken by a coastal State against foreign vessels and their crews involved into these activities, without the need to seek prior consent of a flag State.⁹²

89. *Id.*, ¶ 8.2.

90. The author shares the view of the tribunal in stating that on the high seas and the exclusive economic zone the right to protest “is necessarily exercised in conjunction with the freedom of navigation.” Award on the Merits, *supra* note 1, ¶ 227.

91. See *supra* text accompanying note 56.

92. *Certain Legal Issues*, *supra* note 7, ¶ 12.2. It may be noted that the reference to an “emerging pattern” of practice seems to suggest that this constitutes a development that is a departure from the legal framework contained in the LOSC.

To substantiate this claim the position paper refers to an International Maritime Organization (IMO) Assembly resolution and reviews national court cases dealing with incidents involving similar actions by Greenpeace.⁹³ According to the position paper, IMO Assembly Resolution A.671 (16) “is silent about the need for the coastal State to seek the flag State’s consent before taking action.”⁹⁴ This is true but disingenuous. As the paper acknowledges, the resolution provides that in case of an infringement of a safety zone, the coastal State “should take action in accordance with international law.”⁹⁵ That is, the resolution does not define the scope of enforcement jurisdiction of the coastal State, but refers to relevant rules of international law, which are primarily those contained in the LOSC.⁹⁶

Second, the position paper presents an impressive range of statements of government representatives condemning similar actions at sea by Greenpeace and it discusses a number of national court cases concerned with those actions.⁹⁷ Impressive as this practice may seem at face value, in reality it does not provide any support for the Russian position that it was entitled to arrest the *Arctic Sunrise* anywhere in its exclusive economic zone for the infraction of Russian legislation applicable to installations and their safety zones.⁹⁸ A couple of examples suffice to illustrate this point.⁹⁹ The paper refers to a 1994 case involving the Norwegian authorities.¹⁰⁰ However, this case was involved with a Greenpeace action directed against whaling in Norway’s exclusive economic zone. The Convention accords the

93. *Id.*, ¶¶ 12.3–12.5; *id.*, sec. 9.

94. *Id.*, ¶ 12.5.

95. International Maritime Organization Res. A.671(16), ¶ 3.1 (Oct. 19, 1989); *Certain Legal Issues*, *supra* note 7, ¶ 11.4 [hereinafter Res. A.671(16)].

96. In its preamble, the resolution refers to Article 5 of the Convention on the Continental Shelf and Articles 60 and 80 of the LOSC. Res. A.671(16), *supra* note 95, pmbl.

97. *Certain Legal Issues*, *supra* note 7, sec. 9.

98. In addition, the practice invoked in section nine of the paper does not support the kind of charges the crew of the *Arctic Sunrise* were facing in the Russian Federation, including a prison term of up to seven years. *See* Oude Elferink, *supra* note 3, at 269–70. This practice does indicate that coastal States exercise enforcement jurisdiction over installations on a regular basis. However, the existence of such jurisdiction over installations is not controversial and does not need corroboration by State practice.

99. For a discussion of the two cases mentioned in the position paper (*Certain Legal Issues*, *supra* note 7, ¶¶ 9.9, 9.10), see Oude Elferink, *supra* note 3, at 263–64. Neither of these cases supports the position that the coastal State may take enforcement action without the consent of the flag State beyond the safety zone of an installation without hot pursuit from that zone.

100. *Certain Legal Issues*, *supra* note 7, ¶ 9.5.

coastal State enforcement jurisdiction in relation to living resources in its entire exclusive economic zone, making this case irrelevant for the relation between jurisdiction over installations and in the exclusive economic zone generally.¹⁰¹

The position paper also refers to an incident involving the rig *Stena Don* in the exclusive economic zone of Greenland and describes how the Greenlandic police arrested a number of activists and seized a helicopter used by Greenpeace in connection with the action.¹⁰² As is apparent from the source that is cited in this connection,¹⁰³ the activists were arrested while they were at the rig and the helicopter was seized in the town of Qeqertarsuaq, in Greenlandic territory.¹⁰⁴ It may also be noted that in two cases involving similar incidents, Greenlandic courts distinguished between the jurisdiction of Greenland over continental shelf installations and their safety zones and the continental shelf generally. According to the courts, the extended jurisdiction over such installations and their safety zones implies that they “are regarded as Danish territory as far as the extent of the sphere of application of Danish law is concerned [. . .] even though [they] are located in the area of the shelf outside the outer territorial waters.”¹⁰⁵

At this point, it is appropriate to briefly consider why the position paper tries to argue that the Russian Federation was entitled to arrest the *Arctic Sunrise* without the consent of its flag State beyond the safety zone of the *Prirazlomnaya*, without relying on hot pursuit. As the discussion above about hot pursuit indicates, it would well have been possible to make a case that the Russian Federation had properly exercised the right of hot pursuit.¹⁰⁶ This position would have been uncontroversial as regards the appli-

101. For a summary of the law and facts relating to this incident, see Drieman and Others v. Norway, App. No. 33678/96, (2000) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-5290>.

102. *Certain Legal Issues*, *supra* note 7, ¶ 9.6.

103. *Id.*, at 21 n.57.

104. Severin Carrell & Kirsty Scott, *Greenpeace Activists Arrested after Abandoning Occupation of Arctic Oil Rig*, THE GUARDIAN (Sept. 2, 2010), <https://www.theguardian.com/environment/2010/sep/02/greenpeace-abandons-oil-rig>.

105. Court of Greenland, Case nos. K S 186/11 to 206/11, the Prosecution v. Sigurd Roland Hafen and others, judgment, Sept. 23 2011; Court of Greenland, Case nos. K S 184/11 and 185/11, the Prosecution v. Hannah Brennan McHardy and Luke Alexander Jones, judgment, Sept. 23, 2011. English translation of the quotation is from a certified true copy of June 13, 2014 (on file with the author).

106. It may be noted that a leading Russian law of the sea expert, Judge Vladimir Golitsyn, argued that the factual accounts provided by Greenpeace and the Russian authorities provided sufficient grounds to conclude that the Russian Coast Guard vessel *Ladoga*

cable law and raises only the question whether the Russian Federation had, in fact, met all the requirements of Article 111 of the LOSC in the case at hand. Conversely, as is argued above, neither international law nor State practice support the alternative position that a vessel can be lawfully arrested without the consent of a flag State, beyond the safety zone of a continental shelf installation, without a hot pursuit from that zone, for infractions of legislation applicable only to the installation or its safety zone.

In the absence of further information on the internal deliberations of the Russian authorities leading up to the arrest of the *Arctic Sunrise*, the reason for the Russian Federation to not rely on the right of hot pursuit will remain speculative. One explanation for the Russian position may be that the Russian authorities concluded that the requirements for hot pursuit under Article 111 had not been met. However, in view of the fact that authors of the position paper do not seem to have been particularly troubled about ignoring difficult aspects of the Russian case, it would have been possible to deal with a hot pursuit scenario in the same way. Two other explanations, which are complementary, are possible. First, the Russian Federation may have wanted to avoid the impression that it was largely in agreement with the tribunal, by only disagreeing with respect to the factual circumstances relating to the execution of the hot pursuit. Second, the Russian Federation may have wanted to send a clear signal to Greenpeace and similar organizations that it would not let itself be constrained by the regime of hot pursuit in taking future enforcement actions. During a seminar in Saint Petersburg,¹⁰⁷ it was suggested that the position paper was primarily intended to stall the award of the tribunal. This explanation does not seem very likely. At the time the position paper was published, the tribunal very likely would have had completed or near-completed drafting its award and the position paper did not offer any new evidence that would have

was carrying out a hot pursuit. Consequently, the Russian Federation “acted in full conformity with the Convention.” Order, *supra* note 23, Dissenting opinion of Judge Golitsyn, ¶ 36, http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Order_22.11.2013_diss.op.Golitsyn_orig_Eng.pdf. An interview from October 2014 indicates that Golitsyn at that time still remained of this opinion. “*The Arctic Sunrise Case was Very Politicized*”; Interview with Vladimir Golitsyn, President of the International Tribunal for the Law of the Sea, ZAKON RU (Oct. 31, 2014), https://zakon.ru/discussion/2014/10/31/delo_arctic_sunrise_bylo_ochen_politizirovannym_intervyu_vladimira_golitsyna_prezidenta_mezhdunarodn.

107. *Pushing Boundaries: Potential Effects of International Adjudication on Treaty Practice in the Russian and Norwegian Context*, in Saint Petersburg, Russian Federation, April 15, 2016, (organized by the Pluricourts Centre of Excellence of the University of Oslo).

required the tribunal to reconsider its conclusion that the hot pursuit had been interrupted. This consideration reinforces the argument that the Russian authorities at the time were not interested in a meaningful dialogue with the tribunal, but rather wanted to distance themselves as much as possible from the tribunal's reasoning.¹⁰⁸

VI. CONCLUSION

The Russian Federation has justified its refusal to participate in the arbitral proceedings in the *Arctic Sunrise* case with reference to its declaration under Article 298 of the LOSC excluding compulsory dispute settlement in certain instances. A review of the declaration shows that it is not applicable in the circumstances of the case under consideration. At the same time, the Article 298 declaration probably offered the only pretext to provide some legal justification for the Russian Federation's non-participation. Similar conclusions apply to the commentary by an official spokesperson of the Russian Ministry of Foreign, after the tribunal had issued its award on the merits, which raised a number of issues that seemed to be intended to challenge the award. As is set out in section III of this article, when the award is assessed against legal criteria for challenging judicial decisions it can be concluded that the commentary does not even start to make a case that any of these grounds is met.

Section IV considers the reasoning of the tribunal in the *Arctic Sunrise* case in relation to the regime of hot pursuit. The award confirms that the safety zones around installations are separate zones in the context of Article 111 of the LOSC, although it would perhaps have been welcome if the award would have further developed this point. The award makes two controversial findings in relation to the regime of hot pursuit—one concerning the requirement for the initiation of hot pursuit by the pursuing vessel, and the other concerning the marking and identification of such vessels and aircraft. Both these findings allowed the tribunal not to reach conclusions

108. Another example of the critical approach to the award on the merits is provided by the statement of the spokesperson of the Russian Ministry of Foreign Affairs, who expresses serious worry that the award condones protests that are not peaceful and hinder lawful activities (Zakharova, *supra* note 8). However, it may be noted that the legality of the protests was not at issue before the tribunal and the tribunal did not make any ruling in this respect. As a matter of fact, the tribunal circumscribes the right to protest at sea with, among others, reference to the right of the coastal State to protect its legitimate interests. Award on the Merits, *supra* note 1, ¶¶ 324–28.

that would have gone against the Russian Federation. That might be a welcome outcome in the circumstances of the case, as it avoided giving the Russian Federation, as a non-participating State, additional grounds to criticize the award. However, as the findings of the tribunal actually shift the balance of rights between coastal States and the international community reflected in Article 111, a different outcome on these points would have been preferable. The non-participation of the Russian Federation in the proceedings almost certainly hindered the tribunal in assessing whether or not the hot pursuit of the *Arctic Sunrise* at some point had been interrupted by the Russian authorities. Although additional arguments could have been entertained by the tribunal, the award's conclusion that the hot pursuit was not continuous was not unreasonable in the light of the available evidence.

The Russian Federation's position paper commenting on the *Arctic Sunrise* incident, which is discussed in section V, rejects the tribunal's argument that hot pursuit from the safety zone of the *Prirazlomnaya* was required to allow arrest of the *Arctic Sunrise* without the consent of its flag State. Although the paper does an excellent job in setting out the limitations that apply to the right to protest at sea and presents abundant State practice in this respect, it fails to satisfactorily argue the main argument that reliance on hot pursuit was not required in the circumstances of this specific case. As a matter of fact, none of the national court cases that are discussed support this point. In considering the reasons for the Russian approach in the position paper, it is concluded that the Russian authorities at the time apparently were not interested in a meaningful dialogue with the tribunal, but rather wanted to distance themselves as much as possible from the reasoning of the tribunal. Finally, it may be noted that the Russian Federation's attempt to expand coastal State jurisdiction over foreign navigation in the exclusive economic zone concerns a very specific case and it does not necessarily mean that it will be applied by analogy to different cases.