

CHAPTER V CONCLUSIONS, LIMITATIONS AND RECOMMENDATIONS

A. Conclusions

1. ITLOS has jurisdiction to try the case

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

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

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

The Tribunal in its order quoted Article 298 which allows States to opt for exceptions to binding dispute settlement. However,

they may only do so in the following categories of disputes. The first category of disputes, in paragraph 1(a), concerns sea boundary delimitations or historic bays or titles. The Arctic Sunrise dispute does not fall in this category. The second category of disputes, in paragraph 1(b), concerns military activities. The Arctic Sunrise dispute does not fall in this category either. The third category of disputes, in paragraph 1(c), concerns disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations. There is no Security Council involvement and the Arctic Sunrise dispute does not fall in this category.

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

2. Russia is not allowed to ban the Arctic Sunrise to enter the Northern Sea Route

The high seas are open to all States for navigation and, hence, the exclusive economic zones of coastal States are open to all States for navigation: Article 58, paragraph 1, and Article 87 of the Convention.

Unlike the territorial sea, the sovereignty of a State does not extend to that area. The sovereign rights of a coastal State in maritime

areas beyond its territorial sea are resource-oriented and limited in scope. The exercise of jurisdiction to protect these sovereign rights is functional. As explained in Chapter II, the law of the sea restricts the right of a coastal State to exercise jurisdiction in these areas. A coastal State cannot unilaterally extend such a right. The Russian Federation has not exercised similar restraint.

As a monist state, the UNCLOS places itself higher than a State's municipal law in regulating its rights to ban the entering of a ship. The UNCLOS regulates the rights and obligations of the coastal State very explicitly for the Russian Federation, as a Party to the Convention, to comply.

3. The boarding, imprisonment of the activists and seizure of the ship are illegal according to United Nations Convention on the Law of the Sea

As a general rule, a coastal State may not exercise its enforcement jurisdiction over a vessel flying the flag of a third State within its exclusive economic zone. By boarding the Arctic Sunrise, the Russian Federation has overstepped its rights as a coastal State and violated its obligations owed to the flag State of the Arctic Sunrise, the Kingdom of the Netherlands. The Convention prohibits the boarding of foreign vessels on the high seas: Article 110. This prohibition applies to the boarding of foreign vessels in the exclusive economic zone: Article 58, paragraph 2. The right of visit and search

is an exception to the freedom of navigation and flag State jurisdiction, and thus needs a specific justification in every instance.

Hence, the boarding of the Arctic Sunrise is internationally wrongful, all subsequent acts are internationally wrongful as well. Accordingly, the usurpation of control over the Arctic Sunrise is internationally wrongful; the transfer of the Arctic Sunrise to the internal waters of the Russian Federation is internationally wrongful; the inspections and investigations of the Arctic Sunrise are internationally wrongful; the arrest, continuing detention and seizure of the Arctic Sunrise are internationally wrongful; and the arrest and continuing detention of the crew of the Arctic Sunrise are internationally wrongful. Even if the unlawful capture of a person may result in lawful detention under the domestic law, it does not preclude its wrongfulness under international law.

The Tribunal released its Order for the case on 22 November 2013 which ruled as follow:

- a. The Russian Federation shall immediately release the vessel Arctic Sunrise and all persons who have been detained, upon the posting of a bond or other financial security by the Netherlands which shall be in the amount of 3,600,000 euros, to be posted with the Russian Federation in the form of a bank guarantee;

- b. Upon the posting of the bond or other financial security referred to above, the Russian Federation shall ensure that the vessel Arctic Sunrise and all persons who have been detained are allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation;

B. Limitations

This research may still be far of being perfect, particularly because:

1. The research is not supported by the primary data which is difficult to collect due the distance of either Russia or Netherlands from Indonesia, so researcher is only able to get the information from the reliable sources of internet.
2. The limitation of the time in preparation of this research with the existing format because the deadline given by the study program is limited.

C. Recommendations

Based on the result of research conducted by Researcher, Researcher recommends the following:

1. Russian Federation:

- a. Russia should aware of its position as a monist state. It should incorporate its municipal law with the international laws that it had ratified so there will be no further complications such as the problems on safety zones.

b. Russia should participate in the trial by the Tribunal so that it can make its stance clear to the Tribunal in order to have a just judgment.

2. Kingdom of Netherlands

a. Netherlands should impose a strict law on ships flying its flag so that those ships will not violate the other States' safety zones.

b. Netherlands should emphasize its good will in having a peaceful settlement in times of conflict of interest with other States.