DISSENTING OPINION OF JUDGE GOLITSYN

1. It is with great regret that I submit the present dissenting opinion. I am unable to lend support to the present Order because in my view, for the reasons explained below: the request submitted by the Kingdom of the Netherlands (hereinafter "the Netherlands") is inadmissible; the Tribunal wrongly concludes that the arbitral tribunal, to be constituted, would have *prima facie* jurisdiction; and a decision by the Tribunal on provisional measures does not conform to the requirements set out in article 290, paragraphs 1 and 5, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention").

Prima facie jurisdiction and admissibility

2. The Netherlands and the Russian Federation take differing positions on the question of whether a disagreement between them on the Russian Federation's rights and obligations as a coastal State in its exclusive economic zone and on the continental shelf may be subject to the procedures contained in Section 2 of Part XV of the Convention.

3. Clarifying its position in connection with a request by the Netherlands for the prescription of provisional measures under article 290, paragraph 5, of the Convention, the Russian Federation stated in its communication to the Tribunal that

> upon the ratification of the Convention on the 26th February 1997 the Russian Federation made a statement, according to which, *inter alia*, "it does not accept procedures provided for in Section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes [...] concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction"

and consequently it "does not accept the arbitration procedure under Annex VII to the Convention initiated by the Netherlands in regard to the case concerning the vessel 'Arctic Sunrise' ..." (note verbale from the Embassy of the Russian

Federation in the Federal Republic of Germany to the International Tribunal for the Law of the Sea, dated 22 October 2013).

4. Despite the divergence of views between the two States on the availability in this case of the procedures contained in Section 2 of Part XV of the Convention, the Tribunal, nevertheless, has come to the conclusion, with which I disagree, that *prima facie* jurisdiction exists and therefore the Tribunal may decide whether it would be appropriate to prescribe provisional measures.

5. In my view the Tribunal should not have even considered the issue of *prima facie* jurisdiction because the request for the prescription of provisional measures submitted by the Netherlands should have been declared inadmissible, as the requirements of article 283, paragraph 1, of Section 1 of Part XV of the Convention have not been met in the present case.

6. Article 283 of the Convention, entitled "*Obligation to exchange views*", in paragraph 1 provides the following:

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

7. It follows from this provision that, when a dispute arises between States Parties, they must first make every effort to try to settle it by **negotiations** or **other peaceful means.** In other words **negotiations** or efforts to find a settlement of a dispute by **other peaceful means** must take place.

8. The Tribunal in the past has emphasized the importance of the requirements laid down in article 283, paragraph 1, which constitute an integral element of the dispute-settlement procedures contained in Part XV of the Convention (*Case concerning Land Reclamation by Singapore in and around the Straits of Johor* (*Malaysia* v. *Singapore*), *Provisional Measures, Order of 8 October 2003*, paragraphs 37 and 38; Judge Chandrasekhara Rao in his Separate Opinion in that case emphasized that "[t]he requirements of this article regarding exchange of views is not an empty formality, to be dispensed with at the whims of a disputant", paragraph 11). The International Court of Justice while noting that the exhaustion of diplomatic negotiation does not constitute a precondition for a matter to be referred to the Court, has clearly proceeded on the understanding that such negotiations are supposed to take place (*Land and Maritime Boundary between Cameroon and Nigeria*

(*Cameroon* v. *Nigeria*), *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 303, paragraph 56). Judge Wolfrum in his dissenting opinion (*The M/V "Louisa" Case* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain, Request for Provisional Measures*, paragraph 27) drew attention to the fact that the reference to negotiations in article 283, paragraph 1, of the Convention has "a distinct purpose clearly expressed in this provision namely to solve the dispute without recourse to the mechanisms set out in Section 2 of Part XV of the Convention".

9. It appears from the information provided by the Netherlands that the Dutch authorities have never tried to undertake an exchange of views with the Russian authorities regarding settlement of a dispute between the two States by negotiation or other peaceful means.

10. The *Arctic Sunrise* was detained by the Russian authorities on 19 September 2013. On 23 September 2013 the Netherlands, as the flag State of the *Arctic Sunrise*, by note verbale requested the Russian Federation to provide information concerning the actions of the Russian Federation's authorities against the vessel and its crew (Statement of Claim, paragraphs 21 and 22). This request was reiterated by the Netherlands in its note verbale of 26 September 2013 (Statement of Claim, paragraph 24). In a note verbale, dated 1 October 2013 sent in response to these requests for information, the Russian Federation stated that the boarding, investigation and detention of the *Arctic Sunrise* and its crew were justified on the basis of general provisions of the Convention related to the exclusive economic zone and the continental shelf. In this regard the Russian Federation referred to the provisions of the Convention contained in its articles 56, 60 and 80 (Annex 7 to the Statement of Claim and Statement of Claim, paragraph 26).

11. Following receipt of the above note verbale from the Russian Federation, the Netherlands, by note verbale, dated 3 October 2013, informed the Russian Federation that it did not consider that the provisions of the Convention referred to in the Russian note justified the actions taken against the *Arctic Sunrise*. The Dutch note verbale further states: "it appears therefore that the Russian Federation and the Kingdom of the Netherlands have diverging views on the rights and obligations of the Russian Federation as a coastal state in its exclusive economic zone".

12. The Dutch note verbale does not suggest that the Russian Federation and the Netherlands should proceed expeditiously to an exchange of views regarding the settlement of a dispute, the existence of which was for the first time specifically

defined in the note, by negotiations or other peaceful means, as provided for in article 283, paragraph 1, of the Convention. There is not even a hint in the note verbale of an attempt to undertake consultations with a view to solving the dispute by negotiations or other peaceful means. Quite the contrary, the note verbale simply states straightforwardly and rather bluntly in conclusion that "there seems to be merit in submitting this dispute to arbitration under the United Nations Convention on the Law of the Sea" and that "the Kingdom of the Netherlands is considering to initiate such arbitration as soon as possible". Immediately after sending this note verbale the Ministry of Foreign Affairs of the Netherlands on the next day by a note verbale, dated 4 October 2013, notified the Russian Federation through its Embassy in The Hague that "it submits the dispute between the Kingdom of the Netherlands and the Russian Federation, set out in the 'Statement of the claim and the grounds on which it is based' annexed to this notification, to the arbitral tribunal procedure provided for in Annex VII of the 1982 United Nations Convention on the Law of the Sea".

13. The reference by the Netherlands to the fact that

> [t]he Ministers of Foreign Affairs of the Kingdom of the Netherlands and the Russian Federation discussed the dispute thrice: before its submission to arbitration (28 September 2013 and 1 October 2013) and once before the submission of this Request (17 October 2013)
> (Request, paragraph 16)

is both misleading and not convincing evidence that the requirements under article 283, paragraph 1, of the Convention have been met. First, the last exchange of views, as acknowledged by the Netherlands, took place after the dispute had been submitted on 4 October 2013 to arbitration. Second, the exchange of views between the Ministers on 1 October 2013 was held one day before the Russian Federation conveyed to the Netherlands its position regarding the grounds for detaining the *Arctic Sunrise* and its crew, in other words before the dispute crystallized and its existence could be ascertained. Consequently, these exchanges of views were not conducted for the purpose defined in article 283, paragraph 1, of the Convention.

14. In the light of the foregoing, in my view there has never been any serious attempt to exchange views regarding the settlement of the dispute between the two States by negotiations or other peaceful means. Consequently, the obligation laid down in article 283, paragraph 1, of the Convention has not been met and the request for the prescription of provisional measures should be considered inadmissible.

Whether provisional measures are appropriate in the present case

15. Irrespective of whether the request for provisional measures is admissible and whether the there is *prima facie* jurisdiction, the question arises whether it is appropriate to prescribe any provisional measures in this case.

16. The Netherlands states in its request that "**[t]he principal reason** (emphasis added) for requesting provisional measures is that the Russian Federation's actions constitutes internationally wrongful acts having a continuing character" (Request, paragraph 19). The Netherlands argues that

> the Russian Federation, in boarding, investigating, inspecting, arresting and detaining the "*Arctic Sunrise*" in its exclusive economic zone as well as in subsequently seizing the vessel in Murmansk Oblast, without the prior consent of the Kingdom of the Netherlands, breached its obligations owed to the Kingdom of the Netherlands in regard to the freedom of navigation and its right to exercise jurisdiction over the "*Arctic Sunrise*"

and that "[t]hese actions are prohibited under the Convention, in particular Part V and Part VII, notably Article 56, paragraph 2, Article 58, paragraph 2, Article 110, paragraph 1, as well as customary international law" (Request, paragraph 20).

17. In support of its request for provisional measures the Netherlands claims that "[a]s a result of the continued detention of the '*Arctic Sunrise*' in Kola Bay, Murmansk Oblast, its general condition is deteriorating" (Request, paragraph 37).

18. It follows from article 290, paragraphs 1and 5, of the Convention that the Tribunal, in deciding under the circumstances on the appropriateness of prescribing any provisional measures to preserve the respective rights of the parties, should determine whether the urgency of the situation so requires. Consequently, the Tribunal is not supposed to rule on the merits of the dispute.

19. However, it is obvious from the explanations given by the Netherlands with regard to what constitutes the "primary reason" for its request for provisional measures that the Netherlands in effect asks the Tribunal to rule on the merits of the dispute: this is contrary to what is provided for in article 290 of the Convention.

20. Under the circumstances, by deciding on the prescription of provisional measures the Tribunal actually indirectly supports the position of the Netherlands in the present dispute.

21. In the light of the foregoing it is therefore necessary to analyze whether the position of the Netherlands is consistent with the Convention and therefore justified.

22. Pursuant to article 60, paragraphs 1 and 2, of the Convention, in the exclusive economic zone and on the continental shelf "the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of . . . artificial islands, . . . installations and structures for the purposes provided for in article 56 and other economic purposes" and "shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations".

23. Laws and regulations enacted by the coastal State in furtherance of its exclusive jurisdiction under article 60, paragraph 2, of the Convention would be meaningless if the coastal State did not have the authority to ensure their enforcement. Consequently, it follows from article 60, paragraph 2, of the Convention that the coastal State has the right to enforce such laws and regulations, including by detaining and arresting persons violating laws and regulations governing activities on artificial islands, installations and structures.

24. Under article 60, paragraph 4, of the Convention

> [t]he coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.

25. Reference in article 60, paragraph 4, to the right of the coastal State **to take appropriate measures** means that under the Convention the coastal State has the authority to take appropriate measures to ensure compliance with its regulations governing activities within safety zones, in other words to take the necessary enforcement measures.

26. As provided for in article 60, paragraph 5, of the Convention, the Federal Law on the Continental Shelf of the Russian Federation adopted on 30 November 1995 states in article 16 that the aforementioned safety zones shall extend for not more

than 500 metres from each point on the outer edge of artificial islands, installations and structures. The Decree of the Ministry of Transport of the Russian Federation adopted on 10 September 2013 further to the authority given to the Ministry by the Decree of the President of the Russian Federation No. 23 of 14 January 2013 states in paragraph 2 that

> as a security measure in respect of navigation in safety zones around artificial islands, installations and structures established on the continental shelf of the Russian Federation, it is forbidden for all kinds of ships, including small ones, to stay in or sail through safety zones, except for ships performing rescue operations, cleaning up oil spills, carrying out ice-breaking operations for the artificial islands, installations and structures, or performing repair works on the artificial islands, installations and structures, and for ships proceeding towards the artificial islands, installations and structures to board or disembark people or to load or unload cargo.

Paragraph 4 of the same Decree further provides that "ships mentioned in paragraph 2 of the present Decree are forbidden to enter the safety zone before receiving permission from responsible persons to enter the safety zone."

27. It is worthy of note that there have been at least three national court rulings against Greenpeace – two in the Netherlands and one in the United States of America (Alaska) – which declare Greenpeace's actions against oil rigs in the Arctic to be illegal, covered by neither the freedom of expression nor the freedom of demonstration. An essential element in all these cases was that the actions were carried out in the safety zones and an attempt was made to climb the rigs.

28. According to one of the rulings, rendered by the Dutch Judge on 9 June 2011, Greenpeace International is prohibited to enter the 500-metre zone surrounding the platform *Leiv Eiriksson* situated in the exclusive economic zone around Greenland. Greenpeace International was also ordered to pay *Capricorn* c.s. (the operator of the platform) 50.000 Euro for each day or part thereof they enter the 500-metre zone up to a maximum of 1,000,000 Euro (Rechtbank Amsterdam, 491901/KGZA 11-870 Pee/PV, dated 9.06.2011, pp. 8 and 9); Rechtbank Den Haag, 09/797035-13, dated 23.08.2013).

29. In the present case, according to the note verbale of 18 September 2013 from the Ministry of Foreign Affairs of the Russian Federation to the Embassy of the Netherlands in Moscow, the *Arctic Sunrise*, sailing the flag of the Netherlands, had been continuously engaged in provocative activities in waters off the Russian Federation's northern coastline and on 18 September 2013 four speedboats carrying crew members were lowered from the ship, entered the safety zone, approached the drilling platform *Prirzlomnaya* and attempted to gain admittance and force entry using special equipment. The note further states that as the speedboats travelled in the direction of the platform they trailed an unidentified, barrel-shaped object (Statement of Claim, Annex 2).

30. The facts described in the note verbale are more or less confirmed by the description of the events provided by Greenpeace International, the operator of the *Arctic Sunrise* (Request, Annex 2). According to this information five rigid-hull inflatable boats were launched from the *Arctic Sunrise* and, when the first boat arrived at *Prirazlomnaya,* two activists attempted to climb the outside structure of the platform with the aim of unfurling a banner some distance below the main deck (Request, Annex 2, paragraph 12 and 13). At the same time a group of three boats further back towed a "safety pod", a foam tube, towards the platform with the intention of hanging it from the side of the platform as a cover under which the climbers could hide from the elements and fire hoses (Request, Annex 9, paragraph 14).

31. The factual account of the events having occurred on 18 September 2013 confirms that the *Arctic Sunrise* crew members taking part in the actions described above clearly disregarded the Russian laws and regulations governing activities within the safety zone and on the platform. **It is worthy of note that such disregard has been intentional.**

32. During the hearings Greenpeace International's legal counsel was asked whether the crew members had been advised before they undertook the trip on inflatable boats that their activities in the safety zone and on the platform might constitute violations of the safety regulation governing the zone and also the regulations governing the continental shelf installations enacted by the Russian Federation in exercise of Russian jurisdiction under article 60 of the Convention. His response was that Greenpeace International "always conduct[s] an assessment of the legal risks that may be involved in advance of any protest at sea" and such "assessment is made available to management" and "to prospective participants in

such a protest", who "have the ability to opt out of the action if they are not comfortable with the risks that are entailed". The legal counsel declined to disclose the content of the assessment in this case because of the ongoing prosecution of the crew members by the Russian authorities.

33. It appears that Greenpeace International's activities in the present case constitute part of a general campaign conducted by this non-governmental organization in various parts of the Arctic. Reference has already been made to two rulings by the Dutch courts. In the judgment handed down by the United States Court of Appeals, Ninth Circuit, on 12 March 2013 in the case *Shell Offshore, Inc. v. Greenpeace, Inc.* the court observed that "the record before the district court contained evidence that Greenpeace activities used illegal 'direct action' to interfere with legal oil drilling on many occasions". The court further noted that " 'stop Shell' is not merely a campaign of words and images" and that "Greenpeace USA also uses so-called 'direct actions' to achieve its goals, and its general counsel has conceded that direct action can include illegal activity". According to the ruling of the Court of Appeals the district court acted within its discretion in determining that the balance of equities favored a preliminary injunction to prevent the environmental organization from interfering with the oil company's off-shore drilling in the Arctic. The Court of Appeals concluded that the district court acted within its discretion in determining that it was in the public interest to issue a preliminary injunction to prevent the environmental organization from interfering with the oil company's off-shore drilling in Arctic. (United States Court of Appeals, Ninth Circuit, *Shell Offshore, Inc. v Greenpeace, Inc.*, No. 12-35332, dated 12 March, 2013).

34. It follows from the above that in the light of the events that took place on 18 September 2013 within Russian Federation's safety zone and on the continental shelf platform, the Russian authorities had the right to take the necessary enforcement measures against violators of its applicable laws and regulations.

35. It should be observed in this regard that the ship from which the activities violating the laws and regulations of the coastal State have been launched cannot claim to be free of responsibility for these activities because it exercised freedom of navigation by staying outside the safety zone. The Convention is quite clear in article 111 on the right of hot pursuit that a mother ship is responsible for the activities of its boats or other craft as they work as a team. In the present case the *Arctic*

Sunrise and the inflatable boats launched from it acted as a team and the *Arctic Sunrise* is equally responsible for the violations committed and therefore cannot claim that it simply exercised freedom of navigation. Consequently, the Russian authorities have the authority to take enforcement measures against the *Arctic Sunrise* as the mother ship.

36. The factual account of events given by the Russian authorities in their note verbale of 1 October 2013 and by Greenpeace International in its Statement of Facts contained in Annex 2 to the Request provide sufficient grounds to conclude that the Russian coastguard vessel *Ladoga*, which detained the *Arctic Sunrise* on 19 September 2013 was exercising the right of hot pursuit of the ship for violations committed within the safety zone and on the continental shelf platform. The Russian Federation therefore acted in full conformity with the Convention, which provides in article 111, paragraph 2:

> the right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, **including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones** (emphasis added).

37. If the Russian Federation in detaining the *Arctic Sunrise* and its crew acted in accordance with the respective provisions of the Convention (articles 60 and 111), then there are no grounds for a claim that the freedom of navigation was violated in the present case and consequently such a claim cannot serve as the principal reason for requesting provisional measures.

38. As to the statement that the *Arctic Sunrise* should be release because the continued detention of this ship is causing its general condition to deteriorate, it appears that the Russian authorities have taken all appropriate measures to prevent any significant deterioration of the ship by assigning responsibility for its maintenance to the competent authorities of the Russian Federation.

39. According to the Official Report of seizure of property, dated 15 October 2013, the seized property – the Dutch-flagged ship *Arctic Sunrise* – was transferred to the representative of the Murmansk office of the Federal State Unitary Enterprise "*Roscomflot*". From the time the ship was moored at the berth until the conclusion of the custody agreement, the Coast Guard of the Federal Security Service of the

Russian Federation for Murmansk Oblast will be responsible for compliance with security measures. Representatives of *Roscomflot* and the Coast Guard Division of the Federal Security Service have been notified in accordance with the applicable law of their liability for any loss, deposal of, concealment or illegal transfer of property that has been sized (Request, Annex 2, Appendix 7).

40. In its comments on that Official Report submitted in response to a question addressed to it during the hearings, the Netherlands stated that in its view it was not clear whether "the security measures" referred to in the Report covered servicing, or whether it could invoke the liability referred to in the Report. It further stated that the Netherlands cannot be expected to avail itself of Russian procedures to enforce this liability under Russian law as the responsibility of the Russian Federation towards the Netherlands arises under international law.

41. It is my view that despite these reservations expressed by the Netherlands, the Official Report, by assigning respective responsibilities to the competent Russian authorities provides sufficient guarantees that the *Arctic Sunrise* will be properly maintained and will not "perish".

42. It is worth recalling that in the *The M/V "Louisa" Case* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain, Request for Provisional Measures*) the Tribunal decided that the assurances given by the State detaining the ship, in the present case in the form of the Official Report, should be placed on record and thus treated with due regard.

Inconsistency of the provisional measures prescribed by the Tribunal with the requirements contained in article 290, paragraphs 1 and 5, of the Convention

43. Even if it is assumed that the request is admissible and that *prima facie* jurisdiction exists, conclusions with which, as stated earlier, I totally disagree, analysis of the provisional measures prescribed in the present case by the Tribunal still proves that that they do not conform to the requirements set out in article 290, paragraphs 1 and 5, of the Convention.

44. Article 290, paragraph 1, clearly stipulates that any provisional measures that might be prescribed must preserve the respective rights of the parties pending the final decision. The provisional measures prescribed by the Tribunal do not comply with this requirement.

45. By ordering the release of the *Arctic Sunrise* and all detained members of its crew upon posting of a bond or other financial security, the Tribunal completely disregards the rights of the Russian Federation and its position according to which: (i) the ship and its crew have been lawfully detained by the Russian authorities for having been involved in activities violating the applicable Russian laws and regulations, enacted by the Russian Federation in exercise of its jurisdiction under article 60 of the Convention, governing the activities in safety zones and on continental shelf installations; (ii) the detention has been sanctioned by the competent Russian court, which *inter alia* determined that the *Arctic Sunrise* had been used "as a criminal instrument" (Order, Leninsky district court, Murmansk, Statement of Claim, Annex 3); and finally (iii), there is an ongoing criminal investigation in this regard. The position of the Russian Federation is quite clear. As the *Arctic Sunrise* has been involved in activities violating Russian laws and regulations governing activities in safety zones and on continental shelf installations, it will be for the competent Russian court to decide on the penalty that should be imposed in respect of the *Arctic Sunrise,* detained on account of violations committed, and also to determine with regard to each crew member to what extent, if at all, the individual has been involved in activities violating the applicable Russian laws and regulations and whether any penalty should be imposed in this regard.

46. What is utterly incomprehensible in this connection is how the Tribunal can prescribe a provisional measure calling for all detained persons to be allowed to leave the territory under the jurisdiction of the Russian Federation, including, and this is the most astounding, the Russian nationals among them.

47. The Tribunal cannot claim under the circumstances that it preserves the rights of the Russian Federation by prescribing the release of the ship and its crew upon the posting of a bond or other financial security.

Can posting of a bond as a provisional measure be prescribed under article 290, paragraph 5?

48. The authority of the Tribunal in respect of establishing a bond is defined by article 292 of the Convention. Under this article the Tribunal can take a decision prescribing the release of a detained or arrested ship and its crew upon the posting of a reasonable bond or other financial security only in limited cases explicitly

described in the Convention. According to the Convention these includes cases in which a ship and its crew have been detained or arrested by the coastal State in accordance with article 73, paragraph 2, of the Convention, or in which a ship has been detained for alleged pollution violations (article 220, paragraphs 6 and 7, and article 226, paragraphs (1) (b) and (c), of the Convention).

49. The present case does not fall under any of the above Convention provisions and therefore it is questionable whether the Tribunal can prescribe the release of the ship upon the posting of a bond under article 290, paragraph 5, of the Convention.

(*signed*) V. Golitsyn