

## DISSENTING OPINION OF JUDGE KULYK

While voting against, I believe it is necessary to clarify certain points with respect to the present case. The following observations meant to explain briefly my position on requirements of the 1982 UN Convention on the Law of the Sea (“the Convention”) related to the prescription of provisional measures and my reservations regarding the use of a bond or other security as provisional measures.

1. The option of prescription of provisional measures is well-known to both domestic and international proceedings. Their main purpose is to ensure that pending settlement of a dispute, its subject or the relevant rights and interests of the parties are not transformed or distorted so much that the prevailing party would be prevented from recovering the subject or enjoying claimed rights and interests. Thus, provisional measures are intended to restrain or otherwise direct actions of parties prior to a decision on the merits of a dispute itself.

2. Pursuant to paragraph 5 of article 290, the International Tribunal for the Law of the Sea (“the Tribunal”) may prescribe provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted, in this case an arbitral tribunal under Annex VII of the Convention, would have jurisdiction and that the urgency of the situation so requires. Reference in paragraph 5 to the prescription of provisional measures “in accordance with this article” limits the range of discretionary authority of this Tribunal which the Convention confers upon it to those provisional measures that are “appropriate under the circumstances to preserve respective rights of the parties to the dispute or prevent serious harm to the marine environment”.

3. It is also well established in the practice of the Tribunal that respective rights are preserved against irreparable prejudice or irreversible damage and that prescribed measures are appropriate under the particular circumstances. The Tribunal stated in the *MOX Plant* case

that according to article 290, paragraph 5, of the Convention, provisional measures may be prescribed pending the constitution of the Annex VII arbitral tribunal if the Tribunal considers that the urgency of the situation so requires in the sense that action prejudicial to the rights of either party or causing serious harm to the marine environment is likely to be taken before the constitution of the Annex VII arbitral tribunal

[...]

that the Tribunal must, therefore, decide whether provisional measures are required pending the constitution of the Annex VII arbitral tribunal.

*(MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, par. 64 and 65)*

4. It highlighted in the *Land Reclamation* case that there has to be “a risk that the rights it [Malaysia] claims with respect to an area of territorial sea would suffer irreversible damage pending consideration of the merits of the case by the Annex VII arbitral tribunal” (*Land Reclamation in and Around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, par. 72*). The Tribunal further developed its jurisprudence on provisional measures in the “*M/V Louisa*” case requiring existence of “a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute” (*M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010, p. 58, par. 72*).

5. The above jurisprudence in practice means that for the provisional measures, which are essentially exceptional and discretionary in nature, to be granted, it is not sufficient for the party merely to claim that it is suffering injury to its rights due to the continued wrongfulness of the actions of the other party. The burden upon the party is to prove to the Tribunal that there exists irreparable prejudice or irreversible damage to its rights or at least that these rights are under real, if not imminent, risk of suffering prejudice or damage. The prejudice or damage to the rights have to be irreparable as this notion is understood in international adjudication, meaning in practical terms that the rights of the injured party cannot be restored by “the payment of an indemnity or by compensation or restitution in some other material form” (*Denunciation of the Treaty of 2 November 1865 between China and Belgium, Order of 8 January 1927, P.C.I.J. Series A, No. 8, p. 7*). It could be possible also to argue that prejudice or damage shall even be further qualified as “serious”, since paragraph 1 of article 290 provides for “serious harm to the marine environment”. In addition, the urgency of the situation under paragraph 5 of article 290 requires that

prejudice or damage to the rights is expected to occur before the arbitral tribunal has been constituted and given a chance to consider a request on prescription of provisional measures (but the urgency does not mean that the effect of the prejudice is confined only to the period before the constitution of the arbitral tribunal).

6. Thus, one of the questions before the Tribunal in this case was whether the rights claimed by the Kingdom of the Netherlands were under the risk of suffering irreparable prejudice or irreversible damage before the constitution of the Annex VII tribunal from alleged continued breaches by the Russian Federation of its obligations owed to the Kingdom of the Netherlands. In my view the Order should have specifically addressed this matter.

7. It may be also concluded that the Tribunal has chosen not to rely on the standards of “irreparability” or “irreversibility” and instead to emphasise the urgency of the situation in this case. The requirement of urgency as mentioned above is a direct consequences of paragraph 5 of article 290 of the Convention. The Tribunal may not prescribe provisional measures unless it is satisfied that under the particular circumstances of the case the situation of urgency exists in accordance with the strict conditions on the time frame envisaged in the relevant provisions, meaning that not just potentially the prejudice and damage to the rights might exist but rather that the prejudice and damage could reasonably be expected to happen in the period before the constitution of the Annex VII tribunal. I believe that these standards along with the limits of “appropriateness” outline the constraints of the discretionary nature of the provisional measures which should be prescribed with prudence and according to their purposes. They may not be dismissed lightly.

8. Emphasis on the urgency has some parallel with the most recent case on provisional measures, the *“ARA Libertad”*, when the Tribunal did not directly refer to “irreparable prejudice” or “imminent risk” while ascertaining that under the circumstances of that case “the urgency of the situation requires the prescription by the Tribunal of provisional measures that will ensure full compliance with the applicable rules of international law, thus preserving the respective rights of the Parties” (*“ARA Libertad” (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012*, para. 100). However, I do not consider that it is applicable to this

case. Evidently detention of the warship calls for urgency and runs the risk of causing irreparable prejudice and damage to the rights of all the parties involved into the dispute.

9. Both in its written and oral pleadings the Kingdom of the Netherlands argued that the vessel required intensive maintenance and was at risk of perishing and that continued detention of the crew would have irreversible consequences. As far as the vessel, an ageing icebreaker, is concerned reference was made to the Memorandum of the Ministry of Infrastructure and the Environment, Human Environment and Transport Inspectorate, of 18 September 2013 (Annex VII of the Request for the prescription of provisional measures). But relevant provisions of the Memorandum are not themselves unambiguous. It stated in the relevant part that

Leaving a vessel that is not in operational condition at the quayside does not in itself necessarily give rise to problems, provided that the ship has been sufficiently prepared for this. If no preparations are made a ship cannot be laid up directly after being fully operational without the risk of damage. Substantial problems may arise in such a case upon putting the ship back into operation, particularly in view of local weather conditions.

It is necessary to point out several aspects. First, nothing is said about irreversible damage. Second, if proper maintenance procedures are carried on the risk of suffering damages is lower. And third, there is no indication that irreversible damage to the ship is likely to occur before constitution of the Annex VII tribunal. Almost the same arguments were repeated during the oral hearing with some additional references to claims of the operator of the *Arctic Sunrise*, which had expressed concern “that keeping a vessel unmanned for extended periods in cold weather may cause damage to machinery, and may cause fire, flooding, pollution, security and health risks.”

10. Regrettably the Tribunal did not have an opportunity to consider the arguments of the other party on the facts of the dispute and applicable law. In this regard it had to evaluate the available information, facts and evidence, especially those concerning the risk or continued prejudice and damage to the rights of the parties, mainly on an uncontested basis. This however does not mean that some or parts of the documents submitted within this case may be discounted. Annex 4 to the

Request for provisional measures contains the Official Report of seizure of property, dated 15 October 2013, also referred to in the Order, which clearly stipulates responsibility and liability of the appropriate authorities and persons in the Russian Federation for security measures regarding the *Arctic Sunrise* and for any loss to the vessel. Bearing in mind that it is an official document attributed to one of the parties, until proven otherwise, its provisions have to be considered as sufficient confirmation of the obligation which had been undertaken by the Russian Federation upon itself. Taking different approach in this regard could amount to defeating by the Tribunal of the presumption of good faith with regard to at least one of the parties.

11. Therefore I would have preferred that other options on provisional measures beyond straightforward release of the vessel were looked into by the Tribunal, for instance in the direction of granting to the operator of the *Arctic Sunrise* access to the vessel in order to perform necessary preservation and maintenance procedures to ensure operability of the vessel.

12. The situation with the crew and other persons detained on the *Arctic Sunrise* tends to be different. I see merits in invoking by the Kingdom of the Netherlands of the rights of those detained on board to liberty and to security as well as to leave the territory and maritime zone of a coastal state as provided by Articles 9 and 12 of the 1966 International Covenant on Civil and Political Rights and customary international law. In virtue of article 293 of the Convention it could not be found *a priori* that relevant rules will not apply in the present case. That might also affect considerations at the stage of provisional measures. Apart of this, it is not my intention to elaborate on the matter within this Opinion since in light of the recent developments, when most of the detained persons from *Arctic Sunrise* are being released on bail, I believe the Request for provisional measures has lost its object in this part. It should be recalled that the Tribunal dealt with a request for prescription of provisional measures to preserve the respective rights and not with the prompt release procedure.

13. The procedure on prompt release of a vessel or its crew upon posting of a reasonable bond or other financial security appeared in the Convention as one of the mechanisms to balance the new extended rights of the coastal States in the

exclusive economic zone (EEZ) with the interests of continued operation and protection of ships, primarily fishing vessels, and their crews. It also serves as an assurance at the international level against unreasonable conditions for release of ships or crew or excessive penalties that might be imposed by national courts. The purpose of a bond or other financial security basically is, on the one hand, to make certain that the accused will duly appear before the court and the judgement can be effectively executed against vessel or crew, and, on the other hand, to safeguard the ship owner, operator, other interested persons and crew against damages and hardships of the prolonged periods of detention pending trial. In general the effect of ordering release on the posting of a bond is to transfer custody and subsequent obligation to ensure appearance of the accused from the competent law enforcement authorities to the person who assumed that obligation pursuant to the conditions of the bond.

14. The procedure of the prompt release of a vessel or its crew may be invoked irrespective of whether there is an underlying dispute between states on the application or interpretation of the Convention; consequently I do not consider that the Tribunal is formally precluded from prescribing “release of vessel or its crew upon posting of reasonable bond” also as the provisional measure. It is the specific function of the “bond” to ensure effective compliance with the jurisdiction of the national court that draws inconsistency to the situations when that jurisdiction is particularly contested at the international level. The Tribunal should be careful not to undermine the rights of the parties through prescribing provisional measures that in practice may imply recognition of the very issue that is contested. In addition, I had the opportunity to read the Separate Opinion of Judge Jesus and want to register my concurrence with the reservations on the applicability of a bond within provisional measures in cases when eventual penalties include imprisonment.

15. In the note verbale of 26 September 2013, addressed to the Embassy of the Russian Federation to the Kingdom of the Netherlands, the Ministry of Foreign Affairs of the Kingdom of the Netherlands enquired “whether such release [of the vessel *Arctic Sunrise* and its crew] would be facilitated by posting of a bond or other financial security and, if so, what the Russian Federation would consider to be a reasonable amount for such bond or other financial security”. The Kingdom of the

Netherlands specifically referred to that enquiry during the oral hearing and apparently the option of prescribing a bond or other financial security in order to release the *Arctic Sunrise* and its crew has never been rejected in the present case. I, therefore, would have probably considered a bond acceptable under the particular circumstances of this case if not for its form outlined in the provisions of the Order. Paragraph 97 of the Order provides that

the issuer [bank present in the Russian Federation] of the bank guarantee undertakes and guarantees to pay the Russian Federation such sum up to 3,600,000 Euros as may be determined by a decision of the Annex VII arbitral tribunal or by agreement of the Parties ... .

In my view set linkage of the “bond in the form of a bank guarantee” to the Annex VII tribunal confuses two separate objectives – to obtain release of the *Arctic Sunrise* and persons who were detained on board against a bond and to guarantee implementation of the future decision of the Annex VII tribunal in the part of possible payment to the Russian Federation. These conditions undercut what was the essential purpose for introduction of the bond into this case, namely to achieve release of the vessel and crew and through that release preserve the respective rights. In other words the Russian Federation is supposed to release the vessel and crew upon posting of a bond by the Kingdom of the Netherlands; the latter receives the vessel and crew and assumes obligation to deliver the appropriate persons under the jurisdiction of the court inasmuch as the Annex VII tribunal decides in favour of the Russian Federation, which, in its turn, in the event of non-performance of the above obligation would be in a position to receive satisfaction from the bond. The guarantee to pay the Russian Federation the sum determined by a decision of the Annex VII tribunal has nothing to do with the preservation of the rights of the Kingdom of the Netherlands that it claims to be under prejudice or risk of damage due to the alleged breaches of obligations by the Russian Federation and continued detention of the vessel *Arctic Sunrise*, its crew and other persons which had been on board.

(signed)

M. Kulyk