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IS HOT PURSUIT ENOUGH? THE ENFORCEMENT RIGHTS OF COASTAL STATES IN LIGHT OF THE *ARCTIC SUNRISE* ARBITRATION

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ABSTRACT

The *Arctic Sunrise* arbitration highlighted the difficulties inherent in balancing the competing rights of coastal States and flag States in the exclusive economic zone and over the continental shelf. In a comprehensive decision, the Tribunal canvassed the area of law and provided much needed guidance on the enforcement rights of coastal States within these maritime zones. However, this paper argues that the Tribunal's recognition of enforcement rights places significant limitations on a coastal State's ability to protect its sovereign rights in the exclusive economic zone and over the continental shelf.

First, this paper addresses the Tribunal's pragmatic interpretation of the doctrine of hot pursuit, confirming that such an interpretation is consistent with academic commentary and State practice. The second part of this paper looks more critically at the Tribunal's decision, concluding that the Tribunal's recognition enforcement rights over the non-living resources in the continental shelf may be too harsh on coastal States.

Key Words: *Arctic Sunrise*, law of the sea, hot pursuit, enforcement rights**,** non-living resources

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I Introduction

Central to the development of the law of the sea is the age old tension between the freedom of the high seas and the exclusive rights of coastal States within their adjacent waters.[1] This is especially pertinent in relation to the exclusive economic zone (EEZ) and the continental shelf, where the rights of the coastal State exist in tandem with some remaining freedoms of the high seas, including the freedom of navigation.[2] For centuries, the doctrine of hot pursuit has been embraced as a way to balance these competing claims.[3] Hot pursuit is the right of a coastal State to pursue a foreign vessel out of its adjacent waters onto the high seas and carry out enforcement measures for violations of coastal State laws or regulations committed while within the adjacent waters.[4]

The *Arctic Sunrise* arbitration, heard by the Permanent Court of Arbitration, shed some light on what hot pursuit might look like in the modern maritime environment.[5] Taking a pragmatic approach to interpreting the preconditions set out in art 111 of the United Nations Convention on the Law of the Sea (UNCLOS; the Convention), the Tribunal's jurisprudence added much to the area of law. This authoritative evaluation of the doctrine is likely to be heavily relied on in decades to come.

However, while taking a liberal approach to a coastal State's ability to lawfully commence hot pursuit, overall the Tribunal took an arguably conservative approach to recognising a coastal State's right to protect its offshore platforms and exploit the natural resources in its continental shelf. Often such platforms are used to excavate oil and gas, as was the situation in the *Arctic Sunrise* case. Platforms of this nature are vulnerable and any interference with

[1] D Anderson *Modern Law of the Sea* (Martinus Nijhoff, Leiden, 2008) at 6.
[2] Donald R Rothwell and Tim Stephens *The International Law of the Sea* (Hart Publishing, Portland, 2010) at 84.
[3] Craig H Allen "Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices" (1989) 20(4) Ocean Dev. & Int'l L. 309 at 310.
[4] United Nations Convention on the Law of the Sea UNTS 1833 (concluded 12 December 1982, entered into force 16 November 1994), art 111; N.M. Poulantzas *The Right of Hot Pursuit in International Law* (AW Sijthoff, Leiden,1969) at 39.
[5] *The Arctic Sunrise (The Kingdom of the Netherlands v The Russian Federation) (Merits)* PCA 14 August 2015.

them could lead to dire environmental consequences.[6] It seems that the Tribunal's recognition of enforcement rights may be insufficient to protect against interference.[7]

This paper will argue that the Tribunal's pragmatic interpretation of art 111 is consistent with current academic commentary and the case law available. Also, that it does not strain the requirements for the lawful commencement of hot pursuit, as set out in the provision. However, it is submitted that even with a pragmatic interpretation, the right of hot pursuit alone is insufficient protection for coastal States in situations such as the *Arctic Sunrise* case. Therefore, the Tribunal's limited recognition of enforcement rights in the EEZ and continental shelf over non-living resources is likely to have harsh consequences for coastal States.

II The Arctic Sunrise *Arbitration*

A Facts

On 17 September 2013, the *Arctic Sunrise* arrived in the vicinity of the *Prirazlomnaya*, an oil rig located in the Russian Federation's (Russia) EEZ.[8] The *Arctic Sunrise* was chartered by Greenpeace and was flagged to the Netherlands.[9] There were thirty persons on board (the Arctic 30).[10] The intention was to stage a non-violent direct action protest on the oil rig to convince Gazprom, the operator of the rig, to drop its plans of oil drilling in the Arctic.[11]

Aware of this intention and having dealt with Greenpeace protest action in the past,[12] a Russian coast guard vessel, the *Ladoga*, was near the *Prirazlomnaya* waiting.[13] The *Ladoga*

[6] Gemma Andreone "The Exclusive Economic Zone" in Donald R Rothwell and others (eds) *The Oxford Handbook of the Law of the Sea* (Oxford University Press, Oxford, 2015) 159 at 173.
[7] At 173.
[8] *Arctic Sunrise*, above n 5, at [70].
[9] At [74]–[75].
[10] At [78].
[11] At [84].
[12] *The Ministry of Foreign Affairs of the Russian Federation on certain legal issues highlighted by the action of the Arctic Sunrise against Prirazlomnaya platform* (Ministry of Foreign Affairs, 5 August 2015) at [4.1]–[4.6].
[13] *Arctic Sunrise*, above n 5, at [82].

radioed the *Arctic Sunrise* warning them that a 500 metre safety zone had been established around the rig, in which navigation was prohibited.[14]

In the early hours of 18 September 2013, the *Arctic Sunrise* faxed through a letter to the *Prirazlomnaya*'s management confirming its intention to stage a protest and detailing its proposed actions.[15] This included scaling the platform and establishing camp in a survival capsule they would bring with them. This would be done safely and non-violently. The protest would continue until Gazprom agreed to abandon its plans of oil drilling at the rig, or until Gazprom published an oil spill response plan that explained how it would undertake such drilling without creating an unacceptable risk to the environment.

At approximately the same time as the letter was faxed through, five rigid hulled inflatable boats (RHIBs) were launched from the *Arctic Sunrise* and headed towards the *Prirazlomnaya*. Arriving at the base of the *Prirazlomnaya*, those on board the RHIBs attempted to climb upon the platform.[16] At this time, two RHIBs were launched from the *Ladoga* to prevent the Greenpeace campaigners from boarding the platform.[17] Two activists managed to scale the platform, however they were quickly removed and detained by Russian officials.[18]

By 06.00, less than two hours later, the protest ended and the *Arctic Sunrise* RHIBs began their return to the *Arctic Sunrise*. The *Arctic Sunrise* had remained outside the safety zone at all times.[19] At sometime between 06.15 and 06.45, all five RHIBs arrived alongside the *Arctic Sunrise*.[20] During this time, the *Ladoga* began radioing the *Arctic Sunrise*, ordering them to stop and allow boarding.[21]

The orders from the *Ladoga* continued over the next few hours and included threats to open fire on the *Arctic Sunrise* if it did not stop and allow boarding.[22] The *Arctic Sunrise* continued

[14] At [80] and [82].
[15] At [84].
[16] At [87].
[17] At [87].
[18] At [91].
[19] At [83].
[20] At [93].
[21] At [93].
[22] At [93]–[94].

to ignore these orders. Around 11.00, the two vessels agreed on a delivery of necessities for the two activists that had been picked up by the *Ladoga*.[23] Subsequently, the *Arctic Sunrise* moved 20 nautical miles north of the *Prirazlomnaya* in an attempt to "cool down" the situation and negotiate the return of the two captured activists.[24]

Over eight hours later, the *Arctic Sunrise* returned to the *Prirazlomnaya*.[25] It began circling the platform at a distance of four nautical miles while the *Ladoga* positioned itself between the *Arctic Sunrise* and the *Prirazlomnaya*. Both vessels stayed in this formation until the evening of 19 September 2013.

On the evening of 19 September 2013, the *Ladoga* repeated its orders to the *Arctic Sunrise* to stop, heave to and admit an inspection team on board.[26] At the same time a helicopter (unmarked, except for a red star on its bottom side) approached the *Arctic Sunrise*.[27] According to Greenpeace, about 15 or 16 unmarked men in balaclavas descended onto the *Arctic Sunrise* from the helicopter.[28]

On 20 September 2013, the *Arctic Sunrise* and those onboard were towed by Russian officials to the port of Murmansk, Russia.[29] For the next few months, both the *Arctic Sunrise* and the Arctic 30 were detained in Murmansk pending criminal proceedings.[30]

B The Netherlands' Request for Relief

The Netherlands commenced proceedings, claiming that Russia had breached its obligations under international law in "boarding, investigating, inspecting, arresting, detaining and seizing the *Arctic Sunrise* without the prior consent of the Netherlands".[31] Under the UNCLOS, to which both the Netherlands and Russia are parties, foreign vessels within the EEZ enjoy freedom of navigation, subject only to the rights and interests of the coastal State

[23] At [95].
[24] At [95].
[25] At [97].
[26] At [100].
[27] At [100].
[28] At [100].
[29] At [104].
[30] At [106], [131] and [136].
[31] At [140].

within the EEZ.[32] The Netherlands assert that as the flag State of the *Arctic Sunrise*, it had exclusive jurisdiction over the vessel.[33] As none of the exceptions to exclusive flag State jurisdiction applied only it had enforcement powers over the *Arctic Sunrise* in the EEZ.[34]

C The Russian Federation's Position

Russia refused to participate in the proceedings on the basis of a declaration it made on becoming party to the UNCLOS.[35] However, the Convention provides that a State may not make a declaration excluding compulsory dispute resolution mechanisms in relation to situations where it is alleged that the coastal State has acted inconsistently with the right to freedom of navigation.[36] Therefore, the Tribunal had jurisdiction to hear the dispute. Further, failure of a party to participate in the proceedings does not prevent them from going ahead.[37]

The Russian Ministry of Foreign Affairs published a position paper on the situation.[38] This paper was not formally considered by the Tribunal in the proceedings.[39] Nevertheless, it provides useful commentary on the implications of the Tribunal's conservative recognition of a coastal State's enforcement rights in the EEZ and continental shelf. In the paper, Russia explicitly denied that it was undertaking hot pursuit.[40] Russia claimed that it was entitled to take enforcement action against the *Arctic Sunrise* for interference with its sovereign rights to safely exploit mineral resources in its continental shelf and EEZ.[41] Russia contended:[42]

> When a coastal State faces an unauthorised interference from the foreign-flagged vessel with the installation in its EEZ (on its continental shelf), as well as any other violation of the laws adopted by this State with a view to give effect to its sovereign rights and exclusive jurisdiction in respect of resource exploitation and installations, this State is empowered by the

[32] UNCLOS, above n 4, art 58.
[33] Art 92.
[34] *Arctic Sunrise*, above n 5, at [140]; Alex G Oude Elferink "The *Arctic Sunrise* Incident: A Multifaceted law of the sea case with a human rights dimension" (2014) 29(2) IJMCL 244 at 253.
[35] At [5].
[36] UNCLOS, above n 4, art 297(1)(a); Douglas Guilfoyle and Cameron Miles "Provisional Measures and the MV Arctic Sunrise" (2014) 108(2) AJIL 271 at 277.
[37] UNCLOS, above n 4, Annex VII art 9.
[38] *The Ministry of Foreign Affairs of the Russian Federation*, above n 12.
[39] *Arctic Sunrise*, above n 5, at [68].
[40] *Ministry of Foreign Affairs of the Russian Federation*, above n 12, at [11.1].
[41] At [11.6].
[42] At [11.3].

international law to pursue such an offending vessel with a view to enforce its respective laws and regulations.

D The Tribunal's Findings

All States enjoy freedom of navigation in the EEZ.[43] Protest at sea has been recognised as an internationally lawful use of the sea related to the freedom of navigation.[44] However, the right to protest is not unlimited.[45] Flag States must have "due regard to the rights and duties of the coastal State and [must] comply with the laws and regulations adopted by the coastal State in accordance with the Convention" when exercising their rights in the EEZ.[46]

Coastal States have sovereign rights to explore and exploit the natural resources in the water, the seabed and the subsoil in their EEZ and continental shelf.[47] The Tribunal confirmed that arts 56 and 60 of the Convention gave Russia the exclusive right to construct an oil rig in its EEZ and establish a 500 metre safety zone around it.[48] Russia was entitled to prohibit navigation within this safety zone.[49] Any ship that enters a safety zone in which navigation has been prohibited is in violation of the UNCLOS and cannot justify its actions on the basis of freedom of navigation.[50]

In the EEZ, exclusive flag State jurisdiction operates.[51] The Tribunal accepted that Russia did not seek the Netherlands' consent to board the *Arctic Sunrise*.[52] Therefore the boarding and arrest may have only been justified if an exception to exclusive flag State jurisdiction applied.[53] Although taking a conservative approach to recognising exceptions to exclusive flag State jurisdiction in the EEZ, the Tribunal did not limit the exceptions to those explicitly provided for in the Convention.[54] This can be contrasted with the joint separate opinion of

[43] *Arctic Sunrise*, above n 5, at [226]; UNCLOS, above n 4, arts 58 and 87.
[44] At [227]; International Maritime Organisation "Assuring Safety During Demonstrations, Protests or Confrontations on the High Seas" Res MSC303(87) 17 May 2010.
[45] At [228].
[46] UNCLOS, above n 4, art 58(3).
[47] Articles 56(1) and 77(1).
[48] *Arctic Sunrise*, above n 5, at [229].
[49] At [249].
[50] Oude Elferink, above n 34, at 256.
[51] *Arctic Sunrise*, above n 5, at [231].
[52] At [232]; UNCLOS, above n 4, arts 58 and 92.
[53] At [231].
[54] At [283]–[284].

Judge Wolfrum and Judge Kelly in the International Tribunal for the Law of the Sea (ITLOS) proceedings for provisional measures.[55]

Due to Russia's non-participation, the Tribunal considered the various allegations Russia had made against the *Arctic Sunrise* and whether any of these justified Russia's actions in the absence of flag State consent.[56] The Tribunal also considered any other legal bases that may have justified Russia's actions.[57] The Tribunal accepted that the *Arctic Sunrise* had breached Russia's law in entering the safety zone.[58] However, the issue here was that at the time of boarding and arrest, the *Arctic Sunrise* was no longer within the safety zone. It was within Russia's EEZ. The Tribunal was explicit:[59]

> …the alleged commission of the offences of hooliganism and unauthorised entry into a safety zone, unlike the alleged commission of piracy […], does not provide a basis under international law for boarding a foreign vessel in the EEZ without the consent of the flag State. The boarding, seizure, and detention of a vessel in the EEZ on suspicion of such offences finds a basis under international law only if the requirements of hot pursuit are satisfied.

This implies that in the Tribunal's opinion, there is no right to take enforcement measures for violations of a safety zone, outside the safety zone, unless hot pursuit has been undertaken.[60] This has restrictive consequences for the coastal State, as will be discussed below. However, this view may be justified by the fact that art 60 confers more extensive rights to coastal States over installations and within the safety zone, than within the EEZ or continental shelf.[61] Further, the explicit reference to hot pursuit from safety zones in art 111 of the Convention suggests that there are enforcement rights within a safety zone that do not exist outside the safety zone.[62]

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[55] *The Arctic Sunrise (The Kingdom of the Netherlands v The Russian Federation) (Request for Provisional Measures)* ITLOS 22 November 2013 Separate Opinion of Judge Wolfrum and Judge Kelly at [12]-[13].
[56] *Arctic Sunrise*, above n 5, at [234].
[57] At [234]–[235].
[58] At [244].
[59] At [244].
[60] Joanna Mossop "Protests against Oil Exploration at Sea: Lessons from the *Arctic Sunrise* Arbitration" (2016) 31 IJMCL 60 at 68.
[61] *Arctic Sunrise*, above n 5, at [211]; Oude Elferink, above n 34, at 259.
[62] Mossop, above n 60, at 68.

The Tribunal then proceeded to undertake an informative analysis of the doctrine of hot pursuit, illustrating how the requirements can be interpreted pragmatically to achieve the fundamental policy goals underlying the doctrine.

E A Pragmatic Interpretation of the Right of Hot Pursuit

The doctrine of hot pursuit finds its legitimacy in customary international law.[63] It has been recognised universally as an essential right of coastal States for well over a century.[64] The right of hot pursuit allows coastal States to enforce their laws in a justified and conditional way. This works to minimise international conflict and fosters public order.[65] While the successful exercise of hot pursuit prima facie interferes with freedom of navigation on the high seas, this can be justified by the requirement that the coastal State must have "good reason" to believe that the foreign vessel has violated its laws.[66] Therefore, hot pursuit essentially allows for the continuation of jurisdiction outside the zone the pursuit was commenced in.[67] It would be unreasonable for valid jurisdiction over an offending vessel to terminate mid-pursuit due to the mere crossing of a maritime boundary onto the high seas.[68]

The right was first codified in an international treaty by the Geneva Convention on the High Seas 1958 (1958 Convention), in art 23.[69] This provision was the result of considerable discussion and deliberation, coming to what was at the time a carefully struck balance between the rights of coastal States and the rights of flag States within a coastal State's adjacent waters.[70] Without the right of hot pursuit, the high seas could be used as a safe haven for vessels that have intentionally interfered with a coastal State's rights.[71] Further, if

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[63] David Attard and Patricia Mallia "The High Seas" in David Attard (ed) The IMLI Manual on International Maritime Law Volume I Law of the Sea (Oxford University Press, Oxford, 2014) 239 at 263; Poulantzas, above n 4, at 39; *The Ship "North" v The King* (1906) 37 SCR 385 at 400.

[64] Allen, above n 3, at 309; D.P. O'Connell *The International Law of the Sea: Volume II* (Claredon Press, Oxford, 1984) at 1078; Poulantzas, above n 4, at 42.

[65] Allen, above n 3, at 311.

[66] At 311.

[67] O'Connell, above n 64, at 1077.

[68] Attard, above n 63, at 263; Robert Reuland "The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the law of the Sea Convention" (1993) 33 VJIL 557 at 560.

[69] Convention on the High Seas 450 UNTS 11 (opened for signature 29 April 1958, entered into force 30 September 1962), art 23; Rothwell and Stephens, above n 2, at 415; Susan Maidment "Historical Aspects of the Doctrine of Hot Pursuit" (1972 – 1973) 46 BYIL 365 at 365.

[70] Report of the International Law Commission on the Work of its Eighth Session (23-4 July 1956) [1956] II *Yearbook of the International Law Commission* 253 at 285; Poulantzas, above n 4, at 56.

[71] Allen, above n 3, at 309; Reuland, above n 68, at 559.

a coastal State is not empowered to arrest and punish vessels that violate its laws, it will not be able to deter future violations.[72]

The right of hot pursuit as defined in art 23 of the 1958 Convention was reproduced, virtually unaltered, in the UNCLOS as art 111.[73] The only notable change was the extension of the right to apply *mutatis mutandis* to violations in the EEZ or over the continental shelf, including safety zones around offshore installations.[74] Therefore, the doctrine in its codified form has not been substantially updated since the 1958 Convention.[75]

The exceptional nature of hot pursuit is reflected in the prescriptive and cumulative requirements for its lawful exercise, as set out in art 111.[76] These are:[77]

- the pursuit must be immediate;
- the coastal State must have good reason to believe that the ship has violated its laws and regulations;
- pursuit must be commenced while the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea, the contiguous zone, the EEZ, the continental shelf or a safety zone of the pursuing State;
- pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship;
- pursuit may only be continued outside of the zone the offending took place if it is uninterrupted;
- the right of hot pursuit ceases as soon as the foreign ship enters the territorial sea of its own State or of a third State; and
- hot pursuit may only be exercised by warships or military aircrafts, or other ships or aircrafts that are clearly marked and identifiable.

[72] Allen, above n 3, at 311.
[73]At 312; R.J. Baird "Arrests in a Cold Climate (Part 2) – Shaping hot pursuit through State practice" (2009) 13 Antarctic and Southern Ocean Law and Policy Occasional Papers 1 at 1.
[74] UNCLOS, above n 4, art 111(3).
[75] Rothwell and Stephens, above n 2, at 415; Baird, above n 73, at 1.
[76] *The M/V "Saiga" (No. 2) (Saint Vincent and The Grenadines v Guinea)* ITLOS 1 July 1999 at 146; Baird, above n 73, at 3.
[77] UNCLOS, above n 4, art 111.

1 Violation of coastal State laws and immediacy of pursuit

The Tribunal appeared to be satisfied with the immediacy of pursuit. As soon as the *Ladoga* identified that the RHIBs were attempting to flee the safety zone, it commenced pursuit.[78] The Tribunal was also satisfied that the Russian authorities had good reason to believe that the *Arctic Sunrise*'s RHIBs breached the 500 metre safety zone.[79] The mere entering of a safety zone in which navigation has been prohibited is sufficient reason to commence pursuit in accordance with art 111.[80]

In determining whether hot pursuit had been lawfully undertaken, the relevant issues for the Tribunal were: the signal to stop; the location of the pursued vessel; and the continuity of pursuit. As will be seen, the Tribunal showed a willingness to take into account the realities of maritime enforcement in determining whether these requirements had been satisfied.

2 Signal to stop and location of foreign ship

Articles 111(1) and 111(4) of the Convention provide that pursuit may only be commenced after "a visual or auditory signal to stop has been given" while the foreign ship, or one of its boats, is still within the maritime zone where the offending took place. The doctrine of constructive presence allows a coastal State to pursue the mother ship in place of the smaller vessels that were acting for her.[81] The *Arctic Sunrise* itself was not within the 500 metre safety zone.[82] Thus the requisite signal to stop had to have been given while at least one of the RHIBs was.[83]

(a) Signal to stop

A signal to stop ensures that the offending vessel is aware that it has been detected and is being requested to stop and admit boarding.[84]

[78] *Arctic Sunrise*, above n 5, at [93].
[79] At [250].
[80] At [250].
[81] At [253]; William Gilmore "Hot Pursuit: The Case of R v Mills and Others" (1995) 44 ICLQ 949 at 954; Attard, above n 63, at 266.
[82] *Arctic Sunrise*, above n 5, at [83].
[83] At [253].
[84] Allen, above n 3, at 319.

The Tribunal determined that the "parameters of the right of hot pursuit must be interpreted in the light of their object and purpose, having regard to the modern use of technology".[85] It was held that a VHF radio message by the *Ladoga* ordering the *Arctic Sunrise* to stop was a valid "auditory signal" for the purposes of the Convention.[86] The Tribunal justified this on the basis that the principal object of the signal requirement is to make the foreign vessel aware of the pursuit, and in the modern maritime environment, radio messages are the standard form of communication.[87]

In criticising this interpretation of art 111(4), the Netherlands drew attention to the International Law Commission's (ILC) commentary to the 1958 Convention.[88] The commentary was very clear that wireless is an inadequate means of signaling the offending ship.[89] The ILC's reasoning was that radio signals could be given from great distance and allowing them could lead to abuse of the doctrine by coastal States.[90] However, at the time of the commentary there was no uniform recognition of the breadth of the territorial sea and no legal recognition of the EEZ.[91] The 1982 Convention delimited the territorial sea and extended aspects of coastal State jurisdiction in respect of the EEZ and the continental shelf, creating much larger areas to be policed.[92] Further, modern maritime operations make use of advanced technology that was not available at the time the requirements of hot pursuit were codified.[93] Given these factors, the Tribunal concluded that it made no sense to exclude radio as a means of communicating a valid auditory signal to stop.[94]

This finding is supported by academic commentary and State practice. In 1989, Allen proposed that there was no good reason for not allowing the signal to stop to be given by radio.[95] Allen went as far as saying that in the modern maritime environment, where crew

[85] *Arctic Sunrise*, above n 5, at [259].
[86] At [260].
[87] At [259].
[88] At [260].
[89] Report of the International Law Commission, above n 70, at 285.
[90] At 285.
[91] Sir Arthur Watts *The International Law Commission 1949 -1988 Volume I: The Treaties* (Oxford University Press, Oxford, 1999) at 32.
[92] *Arctic Sunrise*, above n 5, at [260]; Robert Beckman and Tara Davenport "The EEZ Regime: Reflections after 30 Years" (paper presented to Law of the Sea Institute, UC Berkeley–Korea Institute of Ocean Science and Technology Conference, Seoul, Korea, May 2012) at 3; Allen, above n 3, at 310.
[93] Allen, above n 3, at 310.
[94] *Arctic Sunrise*, above n 5, at [260].
[95] Allen, above n 3, at 323.

have become accustomed to communicating by radio and vessels routinely maintain full-time listening and scanning of radio frequencies, a radio signal may actually be *required* to order an offending vessel to stop.[96] Allen's commentary has been supported and referenced by academics since.[97]

State practice can be seen in a treaty between Australia and France concerning cooperative surveillance in the Southern Ocean.[98] The treaty contains a provision for the exercise of hot pursuit that merely requires a signal that is able to be seen or heard by the offending vessel.[99] The scope of this provision suggests that radio could be a valid means of signaling the order to stop.[100]

The use of radio has also been judicially considered. The English Court in *R v Mills* found that the use of a VHF radio signal to communicate the order to stop was valid for the purposes of art 111(4) when used in conjunction with a hovering helicopter.[101]

In the *M/V Saiga* case, Anderson J made reference to the possibility of recognising radio signals, stating:[102]

> Even if the Tribunal had been willing in principle to consider the possibility of accepting as an auditory signal a radio message sent over a distance of 40 miles or so, the alleged signal from P328 could still not have been deemed to constitute a valid signal in the absence of any evidence of… the receipt of the message by the *Saiga* and the latter's understanding of the message as an order to stop by officials of Guinea.

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[96] At 323 (emphasis added).
[97] RR Churchill and AV Lowe *The law of the sea* (3rd ed, Manchester University Press, Manchester, 1999) at 216; Baird, above n 73, at 11.
[98] Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands, Australia-France (adopted 8 January 2007, not yet in force).
[99] Article 2.4.b.
[100] Baird, above n 73, at 11.
[101] Gilmore, above n 81, at 957.
[102] *The M/V "Saiga" (No. 2) (Saint Vincent and The Grenadines v Guinea*) ITLOS 1 July 1999 Separate Opinion of Judge Anderson at 6.

This suggests an openness to recognising radio signals as valid means of communicating an order to stop. It also reiterates that the focus should be on achieving the purpose of the requirement, that is, notifying the pursued vessel they have been detected and are required to heave to and allow boarding.[103]

State practice since the codification of hot pursuit appears to reaffirm and support the Tribunal's interpretation. In this regard, the Tribunal's interpretation is consistent with the principles of interpretation laid out in the Vienna Convention on the Law of Treaties.[104]

However, it should be noted that the Tribunal took into account that the *Arctic Sunrise* and the *Ladoga* were within three nautical miles of each other when the radio signal was given, preventing the possibility of abuse.[105] This creates uncertainty as to whether future tribunals will universally accept a radio message as a valid signal to stop for the purposes of commencing pursuit, irrespective of the distance the signal was given at. Nevertheless, based on the commentary and State practice discussed, confirmation by an international tribunal that radio messages can constitute a valid signal to stop is likely to be well received.

(b) Location of foreign ship

At the time the signal to stop was given, at least one of the RHIBs must have been within the 500 metre safety zone. This was a factual determination to be made on the evidence presented. The Tribunal determined that the last RHIB left the safety zone at approximately 06.12.[106] The timing of the first signal to stop was less certain.

Taking the various reports into account, the Tribunal determined that the first order to stop was given at sometime between 06.13 and 06.24.[107] Therefore, the Tribunal concluded that the first order to stop was likely given after the last RHIB had exited the safety zone.[108] Nevertheless, the Tribunal held that this was sufficient to satisfy the location requirement to

[103] Allen, above n 3, at 319.
[104] Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31(3).
[105] *Arctic Sunrise*, above n 5, at [260].
[106] At [262].
[107] At [266].
[108] At [266].

validly commence hot pursuit.[109] The Tribunal's justification was based on the wording of art 111(4). While art 111(1) provides that the foreign ship "must be" in the relevant maritime zone at the commencement of pursuit, art 111(4) merely requires that the "pursuing ship has satisfied itself by such practicable means as may be available" that the pursued ship is still in the relevant maritime zone.[110] The Tribunal interpreted this as providing leeway to the pursuing ship in determining the location of the pursued ship. The Tribunal suggested that the location of the pursued ship at the time of the first order should be examined from the perspective of the pursuing ship at the time pursuit was commenced, not with the benefit of hindsight.[111]

The Tribunal's interpretation has previously been raised by counsel for the Australian Government in the case of the *Volga*.[112] During the proceedings, the flag State of the *Volga* submitted that the seizure of its vessel on the high seas was unlawful as the order to stop had been given after the *Volga* had exited the Australian EEZ.[113] In response, Australia submitted that the right of hot pursuit would be undermined if a mistaken, although reasonable, determination that the offending vessel was still within the relevant maritime zone rendered the pursuit unlawful.[114] Counsel for Australia relied on Hall's writings on the rationale of hot pursuit, which implied that if immediate escape of the offending vessel prevented the commencement of pursuit while the vessel was still within the relevant maritime zone, this should not bar the coastal State from relying on hot pursuit.[115]

The Tribunal also took into account the specific facts of the case in concluding that the precondition had been satisfied. It noted that the maritime zone in which there had been a violation of Russia's laws, and therefore the zone in which the foreign ship must have been located for the pursuit to have been validly commenced, was the 500 metre safety zone.[116] As such, it may have only taken a few minutes for the foreign ship to leave the zone.[117] The Tribunal held that given the short period of time between the first stop order and the last

[109] At [267].
[110] At [267].
[111] At [267].
[112] The *Volga* Case (*Russian Federation v Australia*) No. 11, ITLOS 23 December 2002.
[113] The *Volga* Case (Oral proceedings, 12 December 2002) at 13.
[114] At 13; Baird, above n 73, at 12.
[115] Ian Brownlie *Principles of Public International Law* (5th ed, Oxford University Press, Oxford, 1998) at 242.
[116] *Arctic Sunrise*, above n 5, at [267].
[117] At [267].

Arctic Sunrise RHIB leaving the safety zone, and the *Ladoga*'s apparent radioing of the order as soon as the RHIBs began their retreat, the *Ladoga* should be seen as having "satisfied itself by such practicable means as were available that the *Arctic Sunrise* RHIBs were in the relevant zone".[118]

The Tribunal's interpretation may be disputed. Allen and Poulantzas were of the opinion that the wording of art 111(4) gives the enforcing vessel scope to use whatever means may be available to it to determine the position of the pursued vessel, whether this be radar, surveillance aircraft, satellite or other.[119] It is arguable that "such practicable means" was intended to allow coastal States discretion in this regard, not to allow coastal States to commence pursuit on a reasonable belief that the offending vessel is still in the maritime zone. This is supported by the use of the words "must be" within the relevant maritime zone in art 111(1).

However, the Tribunal's reasoning should be embraced. A strict interpretation of the location requirement would render the right of hot pursuit of little to no practical use when the violation occurs within a safety zone. This is because it may not be possible to communicate an order to stop before the offending vessel has left the zone.[120]

Due to the Tribunal's focus on the practical difficulties with commencing hot pursuit out of a safety zone, such a generous interpretation may not be given to art 111(4) in the context of any other maritime zone. However, if the offending vessel was within the relevant maritime zone and the coastal State has a reasonable belief that the vessel is still within that zone, provided the coastal State takes all practical steps to commence the pursuit immediately, there appears to be no good reason for denying the coastal State the right of hot pursuit, regardless of the zone. This is consistent with the policy reason for the location requirement, that is, to ensure the offending vessel was subject to the enforcement jurisdiction of the coastal State before pursuit was commenced.[121]

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[118] At [267].

[119] Allen, above n 3, at 322; Poulantzas, above n 4, at 202.

[120] Sebastian tho Pesch "Coastal State Jurisdiction around Installations: Safety Zones in the Law of the Sea" (2015) 30 IJMCL 512 at 529.

[121] O'Connell, above n 64, at 1077; Attard, above n 63, at 263; Brownlie, above n 115, at 242.

3 Continuity of pursuit

Article 111(1) states that the pursuit must be commenced when the foreign ship is within the relevant zone and may only be continued outside of that zone "if the pursuit has not been interrupted". The requirement that pursuit must be continuous is essential in maintaining the jurisdictional link that allows the coastal State to interfere with the offending vessel on the high seas.[122] It also serves to ensure that enforcement action is not taken against an incorrectly identified vessel.[123]

The ILC were clear that once pursuit was interrupted, it could not be resumed.[124] However, there is no definition of interruption in the Convention. It is generally accepted that the interruption must be significant.[125] Short gaps in pursuit will not constitute an interruption provided the pursuing vessel remains in pursuit and can positively identify the offending vessel.[126] Further, the mere passage of time will not amount to an interruption.[127] This is illustrated by the *Viarsa* case, where the pursuit continued for 21 days.[128]

For the boarding, seizure and detention of the *Arctic Sunrise* to have been justified by hot pursuit, the pursuit must have been uninterrupted from the first signal to stop at approximately 06.13 on the 18 September 2013 until the *Arctic Sunrise* was boarded at approximately 18.30 on the 19 September 2013.[129] For the few hours immediately after the first order to stop, the Tribunal considered the *Ladoga*'s behaviour to be consistent with that of a pursuing vessel.[130] During this time, the *Ladoga* was repeating orders to stop and allow boarding.[131] The *Ladoga* made threats and launched a RHIB to board the *Arctic Sunrise*.[132] These were unsuccessful.

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[122] Attard, above n 63, at 263; Poulantzas, above n 4, at 210.
[123] Allen, above n 3, at 319.
[124] Report of the International Law Commission, above n 70, at 285.
[125] Poulantzas, above n 4, at 213; Reuland, above n 68, at 584.
[126] Allen, above n 3, at 320; Poulantzas, above n 4, at 213; Baird, above n 73, at 12; O'Connell, above n 64, at 1091.
[127] Oude Elferink, above n 34, at 153n.
[128] EJ Molanaar "Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa 1 and the South Tomi" (2004) 19(1) IJMCL 19 at 19.
[129] *Arctic Sunrise*, above n 5, at [269].
[130] At [270].
[131] At [270].
[132] At [270].

However, the *Ladoga*'s behaviour changed from approximately 9.30 on the 18 September 2013. It ceased making orders and for the next 33 hours it merely shadowed the *Arctic Sunrise*, positioning itself between the *Arctic Sunrise* and the platform.[133] When the *Arctic Sunrise* retreated 20 nautical miles from the platform, the *Ladoga* followed. There was limited communication between the two vessels. During this time, an *Arctic Sunrise* RHIB was permitted to make a delivery of necessities to the *Ladoga* for Ms Saarela and Mr Weber, the two activists who had been detained by Russian officials.[134] It was the behaviour of the two vessels during this 33-hour period that the Tribunal considered to constitute an interruption in pursuit. The Tribunal held that the final objective of a continuous pursuit would be to board the pursued ship as soon as possible, and this was clearly not the *Ladoga*'s objective.[135]

Arrest at sea is not an easy undertaking. The Tribunal did consider the possibility that the *Ladoga* had not abandoned pursuit, rather that it was waiting for assistance to help carry out boarding.[136] However, the Tribunal concluded that this was not a plausible explanation for what was going on during the 33 hour period prior to boarding and arrest, on the basis of the evidence available. According to the Tribunal, the *Ladoga* was merely ensuring that the *Arctic Sunrise* did not undertake further action at the platform. Its actions were therefore not part of a continuous pursuit.[137]

Given the Tribunal's interpretation of the other conditions required to lawfully undertake hot pursuit, it is interesting that it chose to interpret the actions of the *Ladoga* as an interruption to pursuit.[138] The *Ladoga* remained in close visual and physical contact with the *Arctic Sunrise* during the 33 hour period and it appears the change in behaviour and the retreating of the *Arctic Sunrise* was an attempt to "cool down" what had become an aggressive situation.[139] In other words, the *Ladoga* arguably had limited options in maintaining the pursuit in the way it had been in the first few hours and thought its only

[133] At [271].
[134] At [271].
[135] At [271].
[136] At [272].
[137] At [272].
[138] James Harrison "Current Legal Developments: The *Arctic Sunrise* Arbitration (Netherlands v Russia)" (2016) 31 IJMCL 145 at 153.
[139] *Arctic Sunrise*, above n 5, at [95].

option was to refrain from actively trying to board until it could get assistance. Had Russia participated in the proceedings, it may have brought evidence confirming this theory.

In considering the findings of the Tribunal in relation to the exercise of hot pursuit, Harrison noted:[140]

> It is doubtful whether the mere pause in an attempt to actively arrest a vessel can alone be classified as an interruption of the pursuit. Such an interpretation would not fit easily with the operational reality of maritime enforcement, where it may be necessary for a State to take time to consider its tactics and call in appropriate support.

However, Harrison acknowledged that without evidence of Russia's intention, the *Ladoga*'s actions were difficult to reconcile with an active maritime enforcement operation, specifically noting the delivery of necessities for the activists on board the *Ladoga*.[141] This is also supported by Oude Elferink who noted that the communication between the vessels, and the request from the *Ladoga* to the *Arctic Sunrise* to retreat from the platform, was inconsistent with continuous pursuit.[142] Further, there was no evidence that the *Ladoga* was actively seeking back up to carry out an arrest.

The Tribunal was likely correct in its opinion that the actions of the *Ladoga* could not be interpreted as continuous pursuit. This provides guidance to States in the future: the exercise of hot pursuit must be active. That is, merely shadowing the offending vessel will not suffice.

4 Clearly marked and identifiable

The Tribunal did not discuss the requirement that the pursuing vessel or aircraft must be a warship or military aircraft, or must be clearly marked and identifiable.[143] It is likely this was due to the finding that there had been an interruption in pursuit. However, it appears the Tribunal would have taken a lenient approach to satisfying this precondition. The actual boarding of the *Arctic Sunrise* was carried out by helicopter. This helicopter was unmarked, apart from a red star on its bottom side, and from it descended men in unmarked uniforms.[144]

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[140] Harrison, above n 138, at 153.
[141] At 154.
[142] Oude Elferink, above n 34, at 24.
[143] UNCLOS, above n 4, art 111(5).
[144] *Arctic Sunrise*, above n 5, at [100].

Those on board the *Arctic Sunrise* gave evidence that these men did not identify themselves.[145] Nevertheless, the Tribunal held that it was obvious that they were Russian officials.[146]

This indicates that had it been necessary, the Tribunal would have found that the requirement contained in art 111(5) had been satisfied from "the context". The context referred to by the Tribunal included the actions of the officials after the arrests had been made.[147] This demonstrates the Tribunal's willingness to take into account the realities of maritime enforcement in finding the requirements of hot pursuit satisfied.

5 Support for a pragmatic interpretation

Hot pursuit is an exception to exclusive flag State jurisdiction on the high seas and therefore needs to be conducted carefully.[148] The Tribunal's pragmatic interpretation has not undermined the doctrine's exceptional nature; a State must still ensure that each of the preconditions is fulfilled before it commences hot pursuit. Yet, the Tribunal appears to be of the opinion that it is permissible to focus on whether the underlying policy reason for each of the preconditions has been meet, rather than whether the situation falls within the strict black letter law. In this way, the Tribunal's interpretation of hot pursuit reflects the overall object and purpose of the doctrine, as discussed earlier. This is consistent with the principles of treaty interpretation.[149]

As has been seen, over the years there has been much support for a pragmatic interpretation of the procedural requirements of hot pursuit in academic commentary and State practice.[150] This has largely come about as a result of technological advancements, such as radio, satellite and radar, and the expanding maritime areas in which coastal States have rights.[151] Allen contended that a strict interpretation undermines the doctrine and essentially renders

[145] At [101].
[146] At [101].
[147] At [101].
[148] Poulantzas, above n 4, at 39; Attard, above n 63, at 263; Reuland, above n 68, at 581; Allen, above n 3, at 312.
[149] Vienna Convention on the Law of Treaties, above n 104, art 31.
[150] Allen, above n 3, at 325; Baird, above n 73, at 16; Churchill and Lowe, above n 97, at 216; Gilmore, above n 81, at 957.
[151] Allen, above n 3, at 310.

it useless in today's maritime environment.[152] As above, it would have been practically impossible for Russia to commence hot pursuit from the safety zone before the offending vessel had left.[153] The Tribunal's interpretation meant that Russia had every opportunity to lawfully commence hot pursuit and was not prevented from protecting its rights by procedural issues.[154]

It should be noted that some commentators are dubious of a pragmatic reading of the doctrine of hot pursuit, recalling the exceptional nature of the right.[155] Gilmore stated that such an approach cannot be taken "at the expense of other central and long established values of the international legal order".[156]

However, in light of the Tribunal's conservative recognition of a coastal State's enforcement powers in response to interference with its sovereign rights in the EEZ and continental shelf, it is submitted that a pragmatic interpretation of hot pursuit should be embraced. This is the only way the doctrine will provide any real assistance to coastal States, especially when the violation occurs within a safety zone. However, as will be discussed below, the doctrine may still not provide much use to States who are unaware of an impending interference with their offshore platform.

III Was the Tribunal's Recognition of Coastal States' Enforcement Rights Too Restrictive?

Russia was lawfully exercising its rights as a coastal State in establishing a platform for the purposes of oil drilling.[157] The *Arctic Sunrise* was actively interfering with these lawful rights by scaling the platform and shutting down operations. Yet, the Tribunal did not recognise any lawful basis, bar hot pursuit, for Russia's arrest of the *Arctic Sunrise* in the

[152] At 325.
[153] tho Pesch, above n 120, at 529.
[154] Oude Elferink, above n 34, at 288.
[155] C John Colombus *International Law of the Sea* (6th ed, Longmans Green & Co Ltd, London, 1967) at 170; Gilmore, above n 81, at 957.
[156] At 957.
[157] UNCLOS, above n 4, arts 56 and 77.

EEZ.[158] The Tribunal's finding may therefore place a significant limitation on a coastal State's ability to respond to interference with its sovereign rights in the non-living resources in its continental shelf.[159]

An inability to take action in response to intentional interference with offshore platforms will certainly result in harm to coastal States. The offshore oil and natural gas industry is of great importance to coastal States, providing a substantial source of energy and income.[160] Unsurprisingly, platforms used for such activities are an appealing target for protest action.[161] A limited recognition of enforcement rights means that States and private companies may be reluctant to engage in expensive exploration and exploitation operations over the continental shelf, causing significant financial harm to the coastal State. Further, interference with offshore installations brings a risk of extensive and irreparable damage to the environment, and can cause costly delays.[162]

The interests of a coastal State must be balanced with the interests of foreign vessels in the EEZ.[163] The right to protest is of significant social importance and is tied up with important human rights considerations, such as freedom of expression and freedom of assembly.[164] Further, protest action drawing attention to the risks of Arctic drilling and the importance of having an adequate oil spill response plan is of environmental significance.[165] Striking an appropriate balance between these competing interests in the EEZ is an essential yet difficult task.

It should be noted that the Tribunal appeared to centre its discussion around Russia's rights in its EEZ, when arguably the Tribunal should have focused on Russia's rights over its

[158] *Arctic Sunrise*, above n 5, at [333].
[159] Ted McDorman "The Continental Shelf" in Donald R Rothwell and others (eds) *The Oxford Handbook of the Law of the Sea* (Oxford University Press, Oxford, 2015) 181 at 188.
[160] Assaf Harel "Preventing Terrorist Attacks on Offshore Platforms: Do States Have Sufficient Legal Tools?" (2012) 4 NSJ 131 at 134.
[161] R Caddell "Platforms, Protestors and Provisional Measures: The *Arctic Sunrise* Dispute and Environmental Activism at Sea" in M Ambrus and RA Wessel (eds) *Netherlands Yearbook of International Law 2014* (T.M.C Asser Press, The Hague, 2015) 359 at 375.
[162] *The Ministry of Foreign Affairs of the Russian Federation*, above n 12 [1.2] and [14.5].
[163] Barbara Kwiatkowska *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Martinus Nijhoff, Leiden, 1989) at 6.
[164] *Arctic Sunrise*, above n 5, at [227]; Caddell, above n 161, at 379; Oude Elferink, above n 34, at 260.
[165] Oude Elferink, above n 34, at 273.

continental shelf.[166] These two regimes are linked and for the most part the exercise and enforcement of coastal States' rights over the continental shelf will be carried out in the EEZ. However, the Tribunal's EEZ focused discussion of enforcement rights may pose difficulties in situations where interference is occurring on the outer continental shelf, where the superjacent waters are the high seas.[167]

A A Right to Take Preventative Action

The Tribunal did consider that a coastal State may be able to take enforcement action to *prevent* interference with a coastal State's sovereign rights for the exploration and exploitation of non-living resources in its EEZ.[168] Acknowledging that there needs to be deference given to civilian protest, the Tribunal was of the opinion that if such a protest amounted to interference with a coastal State's sovereign rights, the coastal State could take measures to prevent it.[169] The Tribunal found:[170]

> The protection of a coastal State's sovereign rights is a legitimate aim that allows it to take appropriate measures for that purpose. Such measures must fulfill the tests of reasonableness, necessity, and proportionality.

However, the Tribunal held that this did not provide justification for Russia's actions. This was because at the time of the arrest, the *Arctic Sunrise* was no longer involved in protest action that could have interfered with Russia's sovereign rights.[171] As a result, the Tribunal stated the arrest was an unjustifiable interference with navigation.[172] This finding appears to limit a coastal State's right to take action to when the interfering activity is underway or imminent.[173]

Arguably, the measures taken by Russia could have been to prevent the resumption of protest action at the oil rig. However, the Tribunal did not examine this further as Russia had not

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[166] Mossop, above n 60, at 75.
[167] At 75.
[168] *Arctic Sunrise*, above n 5, at [324] (emphasis added).
[169] At [327]–[328].
[170] At [326].
[171] At [329].
[172] At [331].
[173] Mossop, above n 60, at 73.

given this as a reason for boarding.[174] This is interesting given that the Tribunal concluded there had been an interruption in pursuit on the basis that the *Ladoga* had remained shadowing the *Arctic Sunrise*, not as part of continuous pursuit, but to ensure that the *Arctic Sunrise* did not resume action at the oil rig.[175] Had Russia participated, it may have submitted evidence that it had conducted the arrest to prevent a resumption of the protest action. It seems that Russia would have been able to put forward a compelling argument: this was not the first time Greenpeace had interfered with the *Prirazlomnaya*[176] and the *Arctic Sunrise* was still in the vicinity of the oil rig despite multiple requests to leave.[177] As such, it is unfortunate that Russia did not participate in the proceedings.

B A Limited Right to Respond to Intentional Interference

The Tribunal's discussion of justified preventative action does provide some leeway for coastal States to take enforcement measures against protest action in the future. What is arguably missing is the ability for a coastal State to take action against a vessel that intentionally interferes with its offshore platform and leaves the zone before enforcement action can be taken or hot pursuit commenced, with no intention of resuming the action. The potential problem with the Tribunal's restrictive finding is explained well in Russia's position paper:[178]

> The coastal state cannot be reasonably expected to be always able to stop, detain or arrest those who perform an attack on the installation, within 500 meters safety zone. As it happened in the situation under consideration, modern equipment, including high speed boats and effective means of communication, careful preparation of attack and presence of the mother vessel beyond the safety zone but still in the immediate vicinity, facilitate prompt escape of the attackers from the installation and narrow safety zone around it, making their interception by law-enforcement authorities within the range of 500 meters hardly possible.

Had Russia been unaware of the *Arctic Sunrise* approaching and its intention to interfere with the *Prirazlomnaya*, it is unlikely there would have been a Russian coast guard vessel

[174] *Arctic Sunrise*, above n 5, at [329].
[175] At [272].
[176] *The Ministry of Foreign Affairs of the Russian Federation*, above n 12, at [4.1]–[4.4].
[177] *Arctic Sunrise*, above n 5, at [100].
[178] *The Ministry of Foreign Affairs of the Russian Federation*, above n 12, at [12.9].

in the vicinity, ready to take action.[179] Therefore, it is highly likely that there would have been no opportunity to take enforcement measures while the *Arctic Sunrise* was still within the safety zone, or to successfully commence hot pursuit before the *Arctic Sunrise* left the zone.[180] On the Tribunal's findings, this means that Russia would have been powerless to take any action in response to a flagrant disregard for its rights as the coastal State.

A pragmatic interpretation of the requirements of hot pursuit goes some way towards combating the practical issues with commencing hot pursuit from a safety zone. However, the right of hot pursuit alone is arguably insufficient to protect a coastal State's rights in the non-living resources in the EEZ and continental shelf, as laid out in the Convention. Deference to protest and facilitating free speech are important, yet there are surely compelling arguments for allowing a coastal State to respond to such a blatant interference with its sovereign rights while the offending vessel is still within the EEZ and over the continental shelf. This would appear to be consistent with other enforcement powers recognised in the UNCLOS.[181]

As mentioned, such an enforcement right was contended for by Russia in its position paper.[182] Russia's position was supported by the dissenting opinion of Judge Golitsyn to the ITLOS's order for provisional measures.[183] Judge Golitsyn appeared to be of the opinion that a coastal State could take enforcement action beyond the safety zone in response to violations by foreign vessels within the safety zone, noting:[184]

> 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.

[179] *Arctic Sunrise*, above n 5, at [82].
[180] tho Pesch, above n 152, at 529.
[181] UNCLOS, above n 4, arts 25, 33 and 73.
[182] *Ministry of Foreign Affairs of the Russian Federation*, above n 12, at [11.1].
[183] *The Arctic Sunrise (The Kingdom of the Netherlands v The Russian Federation) (Request for Provisional Measures)* ITLOS 22 November 2013 Dissenting Opinion of Judge Golitsyn.
[184] At [23].

The Tribunal did not support Judge Golitsyn's view.[185] However, the Tribunal did confirm that a coastal State's sovereign rights over non-living resources in its EEZ include the right to take enforcement measures.[186] This finding is significant given that the UNCLOS contains no explicit provision recognising the enforcement rights of coastal States over non-living resources in the EEZ and continental shelf.[187] The finding was based on the ILC's commentary to the 1958 Convention on the Continental Shelf. The ILC said that "[sovereign] rights include jurisdiction in connexion with the prevention and punishment of violations of the law".[188] The idea that enforcement powers are inherent in a coastal State's sovereign rights to explore and exploit non-living resources in the continental shelf is supported by academic commentary.[189]

The Tribunal did not expand on this right further as the *Arctic Sunrise* had not violated any laws Russia had for the exploration and exploitation of non-living resources, except entry into the safety zone.[190] However, the Tribunal did appear to limit these enforcement rights later in its judgment.[191] As above, the Tribunal stated that a coastal State may be able to take action in response to interference with its sovereign rights, provided the action was underway or imminent.

Such a limitation may be necessary to give adequate protection to freedom of navigation in the EEZ. However, this appears difficult to defend in light of art 73 of the Convention, which provides enforcement rights to prevent and punish interference with the exploration and exploitation of *living* resources in the EEZ.[192] Article 73 does not limit a coastal State's enforcement rights to when the interference is underway or imminent.

The Tribunal's more restrictive recognition of rights may be explained by the fact that it had to read in the ability to take enforcement measures in response to interference with non-

[185] *Arctic Sunrise*, above n 5, at [244].
[186] At [284].
[187] Mossop, above n 60, at 71.
[188] *Arctic Sunrise*, above n 5, at [283]; Report of the International Law Commission, above n 70, at 297.
[189] S Oda "Proposals for Revising the Convention on the Continental Shelf" (1968) 7(1) Colum.J.Transnat'l L. 1 at 20; Joanna Mossop "Regulating Uses of Marine Biodiversity on the Outer continental Shelf" in D Vidas (ed) *Law, Technology and Science for Oceans in Globalisation* (Martinus Nijhoff, Leiden, 2010) 319 at 334.
[190] *Arctic Sunrise*, above n 5, at [285].
[191] At [330].
[192] UNCLOS, above n 4, art 73(1) (emphasis added).

living resources. As a result, questions arise as to whether the requirement of prompt release applies to vessels arrested in response to interference with non-living resources.[193] The provision for prompt release requires the coastal State to release the arrested vessel and crew upon the posting of a reasonable bond.[194] This reconciles the rights and interests of the flag State and the coastal State and prevents abuse of enforcement measures by coastal States.[195] Therefore, the Tribunal's more restrictive recognition of enforcement rights over non-living resources may be necessary to balance the competing rights of coastal States and flag States in the absence of an explicit prompt release provision.

Alternatively, the time restriction the Tribunal placed on the right to take enforcement measures in this case may come down to the activity the *Arctic Sunrise* was involved in. The *Arctic Sunrise* was engaged in protest action, which is related to the freedom of navigation. Therefore, the interference occurred as a result of the foreign vessel carrying out its rights in the EEZ.[196] This can be contrasted with when a foreign vessel interferes with a coastal State's sovereign rights by carrying out those rights itself. For example, had the *Arctic Sunrise* been attempting to explore and exploit the non-living resources in Russia's EEZ, there may not have been a time restriction placed on the Russia's ability to take enforcement action in response. Such a distinction appears to be consistent with a coastal State's duty to give due regard to the rights of foreign vessels in its EEZ.[197] Therefore, the Tribunal's restrictive recognition of enforcement rights may be an appropriate way to balance the competing rights of vessels within the EEZ.

Nevertheless, the *Arctic Sunrise*'s actions were not in accordance with international law; it repeatedly and intentionally interfered with Russia's exercise of its sovereign rights. Further, Russia responded to the interference in a graduated manner.[198] These factors suggest that the Tribunal's recognition of coastal States' enforcement rights over non-living resources in the EEZ and continental shelf may produce harsh outcomes for coastal States. This is reinforced by the ineffectiveness of flag State enforcement in this case.[199]

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[193] UNCLOS, above n 4, arts 73 and 292.
[194] Article 73(2).
[195] Donald Rothwell and Tim Stephens "Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests" (2004) 53(1) ICLQ 171 at 176.
[196] UNCLOS, above n 4, art 58.
[197] Article 56.
[198] Oude Elferink, above n 34, at 274.
[199] *The Ministry of Foreign Affairs of the Russian Federation*, above n 12, at [13.6]-[13.7].

IV Conclusion

The case of the *Arctic Sunrise* highlighted the difficulties inherent in balancing the rights of coastal States and flag States in the EEZ and continental shelf. The tension between the principle of sovereignty and the principle of freedom is always going to require a careful balancing act.

The Tribunal did a thorough job canvassing the area of law and discussing any potential arguments a coastal State may have made, in the absence of Russia's participation. It should be commended for its pragmatic interpretation of the doctrine of hot pursuit. However, it seems clear that this alone will not prove particularly beneficial to coastal States in protecting their rights over the continental shelf. Further, the Tribunal's findings have the practical effect of requiring the coastal State to have an enforcement vessel in the vicinity of the offshore platform when the interference occurs.[200] Therefore, the Tribunal's findings are likely to be of little use to coastal States who do not have the benefit of knowing an interference is about to take place.

While the limited recognition of enforcement rights by the Tribunal may have been necessary to give adequate protection to freedom of navigation, it is difficult to escape the conclusion that the Tribunal's findings are likely to produce harsh outcomes for coastal States wishing to enforce their sovereign rights in non-living resources.

Word Count:

The text of this paper (excluding footnotes and bibliography) comprises approximately 7992 words.

[200] Mossop, above n 60, at 68.

Bibliography

A Cases

1 International Arbitral Decisions

The Arctic Sunrise (The Kingdom of the Netherlands v The Russian Federation) (Merits) PCA 14 August 2015.

The Arctic Sunrise (The Kingdom of the Netherlands v The Russian Federation) (Request for Provisional Measures) ITLOS 22 November 2013.

The Arctic Sunrise (The Kingdom of the Netherlands v The Russian Federation) (Request for Provisional Measures) ITLOS 22 November 2013 Dissenting Opinion of Judge Golitsyn.

The Arctic Sunrise (The Kingdom of the Netherlands v The Russian Federation) (Request for Provisional Measures) ITLOS 22 November 2013 Separate Opinion of Judge Wolfrum and Judge Kelly.

The M/V "Saiga" (No. 2) (Saint Vincent and The Grenadines v Guinea) ITLOS 1 July 1999.

The M/V "Saiga" (No. 2) (Saint Vincent and The Grenadines v Guinea) ITLOS 1 July 1999 Separate Opinion of Judge Anderson.

The "Volga" Case (Russian Federation v Australia) (Application for prompt release) ITLOS 23 December 2002.

The "Volga" Case (Russian Federation v Australia) (Application for prompt release) (Oral proceedings, ITLOS/PV.02/02 12 December 2002 pm).

2 Canada

The Ship "North" v The King (1906) 37 SCR 385.

C Treaties

1 Mulitlateral Treaties

Convention on the Continental Shelf 499 UNTS 311 (opened for signature 29 April 1958, entered into force 10 June 1964).

Convention on the High Seas 450 UNTS 11 (opened for signature 29 April 1958, entered into force 30 September 1962).

United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994).

Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980).

2 Bilateral Treaties

Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands, Australia-France (adopted 8 January 2007, not yet in force).

D Books and Chapters in Books

D Anderson *Modern Law of the Sea* (Martinus Nijhoff, Leiden, 2008).

Gemma Andreone "The Exclusive Economic Zone" in Donald R Rothwell and others (eds) *The Oxford Handbook of the Law of the Sea* (Oxford University Press, Oxford, 2015) 159.

David Attard and Patricia Mallia "The High Seas" in David Attard (ed) *The IMLI Manual on International Maritime Law Volume I Law of the Sea* (Oxford University Press, Oxford, 2014) 239.

R Caddell "Platforms, Protestors and Provisional Measures: The *Arctic Sunrise* Dispute and Environmental Activism at Sea" in M Ambrus and RA Wessel (eds) *Netherlands Yearbook of International Law 2014* (T.M.C Asser Press, The Hague, 2015) 359.

H Caminos, 'Hot Pursuit' in R Wolfrum (ed) *Max Planck Encyclopaedia of Public International Law* (Oxford University press, Oxford, 2012) 1000.

RR Churchill and AV Lowe *The law of the sea* (3rd ed, Manchester University Press, Manchester, 1999).

C John Colombus *International Law of the Sea* (6th ed, Longmans Green & Co Ltd, London, 1967).

Ian Brownlie *Principles of Public International Law* (5th ed, Oxford University Press, Oxford, 1998).

GB Knecht *Hooked: Pirates, Poaching, and the Perfect Fish* (Rodale Inc., USA, 2006).
Barbara Kwiatkowska *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Martinus Nijhoff, Leiden, 1989).

Ted McDorman "The Continental Shelf" in Donald R Rothwell and others (eds) *The Oxford Handbook of the Law of the Sea* (Oxford University Press, Oxford, 2015) 181.

MS McDougal and WT Burke *The Public Order of the Oceans* (New Haven Press, New Haven, 1987).

Joanna Mossop "Regulating Uses of Marine Biodiversity on the Outer continental Shelf" in D Vidas (ed) *Law, Technology and Science for Oceans in Globalisation* (Martinus Nijhoff, Leiden, 2010) 319.

DP O'Connell *The International Law of the Sea: Volume I* (Claredon Press, Oxford, 1984).

DP O'Connell *The International Law of the Sea: Volume II* (Claredon Press, Oxford, 1984).

NM Poulantzas *The Right of Hot Pursuit in International Law* (AW Sijthoff, Leiden,1969).

Donald R Rothwell and Tim Stephens *The International Law of the Sea* (Hart Publishing, Portland, 2010).

Yoshifumi Tanaka *The International Law of the Sea* (2nd ed, Cambridge University Press, Cambridge, 2015).

Sir Arthur Watts *The International Law Commission 1949 -1988 Volume I: The Treaties* (Oxford University Press, Oxford, 1999).

F Journal Articles

Craig H Allen "Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices" (1989) 20(4) Ocean Dev. & Int'l L. 309-341.

RJ Baird "Arrests in a Cold Climate (Part 2) – Shaping hot pursuit through State practice" (2009) 13 Antarctic and Southern Ocean Law and Policy Occasional Papers 1-21.

Anne Bardin "Coastal State's Jurisdiction over Foreign Vessels" (2002) 14(1) Pace Int'l L.Rev. 27-76.

Alex G Oude Elferink "The *Arctic Sunrise* Incident: A Multifaceted law of the sea case with a human rights dimension" (2014) 29(2) IJMCL 244-289.

GG Fitzmaurice "The Case of the *I'm Alone*" (1936) 17 BYIL 82-111.

William Gilmore "Hot Pursuit and Constructive Presence in Canadian Law Enforcement: A Case Note" (1988) 12 Marine Policy 105-11.

William Gilmore "Hot Pursuit: The Case of R v Mills and Others" (1995) 44 ICLQ 949-958.

Douglas Guilfoyle and Cameron A Miles "Current Developments Provisional Measures and the MV *Arctic Sunrise*" (2014) 108 AJIL 271-287.

Assaf Harel "Preventing Terrorist Attacks on Offshore Platforms: Do States Have Sufficient Legal Tools?" (2012) 4 NSJ 131-184.

James Harrison "Current Legal Developments: The Arctic Sunrise Arbitration (Netherlands v. Russia)" (2016) 31 IJMCL 145-159.

Stuart Kaye "Threats from the Global Commons: Problems of Jurisdiction and Enforcement" (2007) 8(1) MJIL 185-197.

Susan Maidment "Historical Aspects of the Doctrine of Hot Pursuit" (1972-1973) 46 BYIL 365-381.

EJ Molanaar "Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa 1 and the South Tomi" (2004) 19(1) IJMCL 19-42.

Joanna Mossop "Protests against Oil Exploration at Sea: Lessons from the *Arctic Sunrise* Arbitration" (2016) 31 IJMCL 60-87.

S Oda "Proposals for Revising the Convention on the Continental Shelf" (1968) 7(1) Colum.J.Transnat'l L. 1-31.

Eva Rieter "Introductory Note to the "*Arctic Sunrise*" Case (Netherlands/Russia) (ITLOS)" (2014) 53 ILM 603-619.

Robert Reuland "The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention" (1993) 33 VJIL 557-589.

Donald Rothwell and Tim Stephens "Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests" (2004) 53(1) ICLQ 171-187.

Sebastian tho Pesch "Coastal State Jurisdiction around Installations: Safety Zones in the Law of the Sea" (2015) 30 IJMCL 512-532.

Michaela Young "Then and Now: Reappraising Freedom of the Seas in Modern Law of the Sea" (2016) 47(2) Ocean Dev. & Int'l L. 165-185.

E United Nations Materials

International Maritime Organisation "Assuring Safety During Demonstrations, Protests or Confrontations on the High Seas" Res MSC303(87) 17 May 2010.

Report of the International Law Commission on the Work of its Eighth Session (23-4 July 1956) [1956] II *Yearbook of the International Law Commission* 253.

G Government Materials

The Ministry of Foreign Affairs of the Russian Federation on certain legal issues highlighted by the action of the Arctic Sunrise against Prirazlomnaya platform (Ministry of Foreign Affairs, 5 August 2015).

H Other

Hossein Esmaeili "The Legal Regime of Offshore Oil Rigs in International Law" (PhD Thesis, University of New South Wales, 1999).

Robert Beckman and Tara Davenport "The EEZ Regime: Reflections after 30 Years" (paper presented to Law of the Sea Institute, UC Berkeley–Korea Institute of Ocean Science and Technology Conference, Seoul, Korea, May 2012).