Winter is Coming:
The Arctic Sunrise Arbitration
OVERVIEW

- Facts of the dispute
- UNCLOS dispute settlement
- International procedural law
I. Facts of the Dispute
China’s New Shipping Frontier
How the new Northern Sea route compares to the traditional Suez Canal route

**NORTHERN SEA ROUTE**
- **Travel time**: 35 days
- **Dangers**: Icebergs
- **Travel window**: July to November
- **Container-carrying vessels**: One this year

**SUEZ CANAL ROUTE**
- **Travel time**: 48 days
- **Dangers**: Access to Suez Canal under question with upheaval in Egypt
- **Travel window**: Year-round
- **Container-carrying vessels**: 17,000 last year

Sources: Northern Sea Route Information Office; National Snow and Ice Data Center; Cosco; Lloyd’s List
Energy Resources in the Arctic

22% of the World’s undiscovered petroleum resources are believed to be found in the Arctic.

**Arctic**

- South Kara Sea
- North Kara Sea
- Laptev Sea
- East Siberian Sea
- Chukchi Sea
- Alaska North Slope
- East Greenland
- Barents Sea

**Rest of the World**

**North Africa, Middle East, Caspian Sea**
“Well, *one* of us is in the wrong cartoon.”
Prirazlomnaya

- First Arctic-class ice-resistant oil platform in the world
- Pechora Sea (Russian EEZ)
- Gazprom
PIRATES
OF THE ARCTIC?
“These 30 people are in prison in Russia for staging a peaceful protest in the Arctic! Let your voice be heard. Let's bring these people home!”

Madonna

#FreeTheArctic30
BLACK ICE

When preventing a crime makes you the criminal

giving up is not an option

A documentary about the Arctic 30

blackicemovie.net
II. UNCLOS Dispute Settlement
UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982 (UNCLOS)

- Constitution for the Oceans
- Entry into force: 1994
- Parties: 168 (States + European Union)
UNCLOS Dispute Settlement System

- Diplomatic means
- Legal means
  - Compulsory
  - Choice of procedure: International Court of Justice; International Tribunal for the Law of the Sea; special arbitration; arbitration
- Limitations and exceptions
**Arctic Sunrise Arbitration**

- International Tribunal for the Law of the Sea (ITLOS)
  - Provisional measures (Order of 22 November 2013)

- UNCLOS Arbitral Tribunal
  - Registry: Permanent Court of Arbitration
  - Jurisdiction (Award of 26 November 2014)
  - Merits (Award of 14 August 2015)
  - Compensation (pending)
III. INTERNATIONAL PROCEDURAL LAW
NON-PARTICIPATION IN INTERNATIONAL LITIGATION

- Partial: e.g. Albania in *Corfu Channel* (compensation phase); Guatemala in *Nottebohm* (preliminary objections); USA in *Military and Paramilitary Activities* (merits)

- Total: e.g. Iran in *Tehran Hostages*; France in the *Nuclear Tests Cases*

- Usually limited forms of participation e.g. informal correspondence

- Virtual disappearance of the phenomenon until very recently:
  - *Arctic Sunrise* Arbitration
  - *South China Sea Arbitration (Philippines v. China)*
  - Crimea-related investment arbitration (Ukraine-Russia BIT)
RUSSIA AND INTERNATIONAL LITIGATION

- Czar Nicolas II of Russia and the First Hague Peace Conference (1899)

- Arbitration: Whaling and Sealing Claims Arbitration (USA/Russia) (1902); Russian Claim for Indemnities (Russia/Turkey) (1912); Yukos shareholders (2014)


RUSSIA’S NON-PARTICIPATION IN THE ARCTIC SUNRISE ARBITRATION

- Extent of non-participation: party representatives; appointment of arbitrators; deposit of costs; written pleadings; oral hearings
  - Exception: legal memo published 9 days before the award

- ITLOS: minor criticism in the order; substantial criticism by individual judges

- Arbitral Tribunal: adapted rules of procedure; “neutral” venue of arbitration; measures to safeguard Russia’s procedural rights; heightened scrutiny of the Netherlands’ arguments
  - Criticism: “Russia’s non-participation in the proceedings has made the Tribunal’s task more challenging than usual. In particular, it has deprived the Tribunal of the benefit of Russia’s views on the factual issues before it and on the legal arguments advanced by the Netherlands.”
**APPLICABLE LAW**

- Art. 293(1) UNCLOS: “[The Arbitral Tribunal] shall apply this Convention and other rules of international law not incompatible with this Convention.”

- The Netherlands: initial request to find that Russia violated the ICCPR (right to liberty and security; right to leave a country)

- Arbitral Tribunal
  - Lack of jurisdiction to determine that another treaty has been violated
  - Restrictive approach to applicable law: general international law (e.g. law of treaties, state responsibility), broadly worded provisions, *renvoi*
  - Human rights as the “relevant context” for interpreting UNCLOS in relation to the arrest or detention of a vessel and persons
**AMICUS CURIAE**

- Greenpeace sought permission to file *amicus curiae* on issues relating to international human rights law

- The Netherlands: no objection

- Russia: late objection (ITLOS) or no comment (Arbitral Tribunal)

- ITLOS + Arbitral Tribunal
  - Rejection of request
  - No reasons provided
  - Possible considerations: equality of parties; Greenpeace directly affected; nature of the case (contentious ↔ advisory jurisdiction)

- Greenpeace’s reaction: online publication of the *amicus curiae*
“The Russian Federation and the People’s Republic of China reaffirm the principle of peaceful settlement of disputes and express their firm conviction that States shall resolve their disputes through dispute settlement means and mechanisms that they have agreed upon [...]. This applies equally to all types and stages of dispute settlement, including political and diplomatic means when they serve a pre-requisite to the use of other mechanisms of dispute settlement. It is crucial for the maintenance of international legal order that all dispute settlement means and mechanisms are based on consent and used in good faith and in the spirit of cooperation, and their purposes shall not be undermined by abusive practices.”
Thank you for your attention!

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