

Agenda item 20: Report of the Secretary-General on incidents in the NORI-D contract area of the Clarion-Clipperton Zone

Statement of the Kingdom of the Netherlands

Mr. President,

1. Thank you for giving me the floor and for inviting the Council to address this important topic. With your indulgence, Mr. President, the Kingdom of the Netherlands would like to share with the Members of the Council the following comments and observations.
2. We have taken due note of the contents of the reports of the Secretary-General with respect to the subject-matter that we are discussing this afternoon as well as the Statement of the President and Vice-Presidents of the Council dated 15 December 2023.
3. We thank the Republic of Nauru for providing its comments on these events and welcome in particular its support for the right of individuals and groups to protest peacefully, including on the high seas.
4. We furthermore thank the Kingdom of Denmark, as the flag State of the MV Coco, for the information and video footage from the crew of the MV Coco that was provided through the Danish maritime authorities, as well as the constructive exchanges on the matter with the Dutch maritime authorities.
5. We will present to the Council our position on the right to protest at sea and we will share with you the treatment of the events that took place between 22 November and 4 December 2023 by the Kingdom of the Netherlands in the exercise of the responsibilities of the Kingdom of the Netherlands as the flag State of the MV Arctic Sunrise. We will clarify the Decision of the Amsterdam District Court of 30 November 2023 as well as the (findings of the) investigation carried out by the Human Environment and Transport Inspectorate of the Ministry of Infrastructure and Water Management of the Netherlands. I will conclude with the reasons why the Netherlands considers that the Council does not have to take any additional actions in relation to the Secretary-General's reports on the matter.

The right to protest at sea

6. The view of the Netherlands with respect to the right to protest at sea is well known.
7. The Netherlands attaches great importance to that right in accordance with international law.
8. Protest at sea is an internationally lawful use of the sea related to and exercised in conjunction with the freedom of navigation. It is a right that derives from the freedom of expression and the freedom of assembly, both of which are recognised in regional and universal international human rights instruments as well as resolutions of international organisations, including by the Maritime Safety Committee of the International Maritime Organisation.¹
9. The right to protest is not without limitations.
10. And when the right to protest is exercised at sea its limitations are defined, inter alia, by the law of the sea.²

¹ The Arctic Sunrise Arbitration (Netherlands v. Russia), Award on the Merits, para. 227.

² The Arctic Sunrise Arbitration (Netherlands v. Russia), Award on the Merits, para. 228.

11. The right to protest at sea must be exercised in a peaceful manner, without compromising safety at sea and, on the high seas, with due regard for the interests of other States in the exercise of the freedom of the high seas, and with due regard for the rights with respect to activities in the Area under the auspices of the International Seabed Authority in accordance with the United Nations Convention on the Law of the Sea.

12. At the same time, as confirmed by the Arbitral Tribunal in the Arctic Sunrise Arbitration of 2015 constituted under Annex VII of the United Nations Convention on the Law of the Sea, some level of nuisance through civilian protest should be tolerated as long as it does not amount to an interference with the exercise of rights of others in accordance with the United Nations Convention on the Law of the Sea and due regard must be given to the rights of other States, including the right to allow vessels flying their flag to protest.³

13. In the same arbitration it was confirmed that measures to protect the interests and rights involved must have a basis in international law and must fulfil the tests of reasonableness, necessity and proportionality.⁴

14. When it comes to these limitations, on the high seas, vessels shall be subject to the exclusive jurisdiction of the State under whose flag they fly, save in exceptional cases expressly provided for in international treaties or in the United Nations Convention on the Law of the Sea.⁵ There are no such express provisions applicable in this case. Therefore, only the Kingdom of the Netherlands as the flag State of the MV Arctic Sunrise was allowed to exercise jurisdiction over the vessel.

15. The Netherlands jurisdiction over the vessel includes the adjudicatory jurisdiction by its competent courts to determine the limits of the right to protest at sea, such as, in the case at hand, by reviewing the lawfulness of the protest actions undertaken from the MV Arctic Sunrise in the vicinity of and on board the Danish flagged MV Coco.

16. The aforementioned elements constitute the legal framework for the courts of the Netherlands to determine the limits of that right, now and in the future, and for the Dutch maritime authorities to supervise safety at sea.

17. The Netherlands further recalls that the Arbitral Tribunal in the Arctic Sunrise Arbitration confirmed that States have the right to allow vessels flying their flags to protest.⁶ This right is thus enjoyed by all members present, and all States Parties indeed have an interest in ensuring full respect for that right.

18. The Netherlands feels compelled to make these observations which are relevant for the Council to consider in relation to the exercise of the internationally recognised right to protest at sea, but which are not mentioned in the reports of the Secretary-General.

Legal proceedings in the flag State of the MV Arctic Sunrise

19. Let me now turn to the treatment of the events by the Kingdom of the Netherlands in the exercise of its responsibilities as the flag State of the MV Arctic Sunrise.

20. Legal proceedings were initiated by NORI against Greenpeace before the Amsterdam District Court on 27 November 2023.

³ The Arctic Sunrise Arbitration (Netherlands v. Russia), Award on the Merits, para. 328.

⁴ The Arctic Sunrise Arbitration (Netherlands v. Russia), Award on the Merits, para. 222.

⁵ Article 92(1) UNCLOS.

⁶ The Arctic Sunrise Arbitration (Netherlands v. Russia), Award on the Merits, para. 328.

21. A hearing was held on 28 November 2023 before a senior judge, with more than 20 years of experience. A judgment was rendered swiftly, already on 30 November 2023.

22. In the exercise of its adjudicatory jurisdiction the Amsterdam District Court applied the legal framework with respect to the right to protest at sea. On the basis of the information submitted and the arguments advanced by the parties, the Court balanced the rights and interests involved and applied the tests of reasonableness, necessity and proportionality.

23. The Court decided that safety hazards and the delaying of operations on board the MV Coco outweighed the continued presence of Greenpeace activists on board the vessel and therefore instructed them to leave the vessel with immediate effect.

24. However, the Court dismissed, given the facts and the circumstances brought to its attention by the parties, wider limitations on the right to protest. This included, as argued by NORI, the Immediate Measures of a temporary nature issued by the Secretary-General pursuant to Regulation 33 of the Regulations on Prospecting and Exploration for Polymetallic Nodules to maintain a safety distance from the MV Coco of at least 500 metres.

25. The Court reasoned that by ordering Greenpeace International to withdraw the activists from the vessel, the nuisance caused by the protest actions will decrease, but – in line with the findings in the Arctic Sunrise Arbitration – the Court also held that some level of nuisance caused by protest actions is inevitable and that without a concrete substantiation of what the nuisance consists of, protest actions cannot be prohibited beforehand.

26. This reasoning also applied to the claim to obtain an injunction to prohibit Greenpeace International from being within a radius of 500 meters around the MV Coco for a period of six months and from undertaking or facilitating unlawful or nuisance actions for as long as the MV Coco is in the Clarion-Clipperton Zone.

27. In the absence of concrete indications of the necessity of such measures, the Court considered that such measures would constitute a disproportionate infringement of Greenpeace's right to protest. Such a prohibition would relate to future actions by Greenpeace International, which cannot be assumed in advance to be unlawful, because the circumstances under which those possible future actions take place are not known.

28. The Greenpeace activists complied with the Decision of the District Court and disembarked from the MV Coco and continued their protest actions around the vessel until 4 December 2023.

29. In this respect, the Netherlands recalls that legal remedies, have always been available and continue to be available to the interested parties in accordance with the laws of the Netherlands, including the possibility for NORI to institute further proceedings on the merits, as it has done.

30. In short, the competent Dutch courts are the appropriate forum to have the final say in making determinations on the right to protest at sea and the limitations thereof. The Netherlands also considers that its courts provide effective access to justice and notes that local remedies have not yet been exhausted.

Investigation by the Dutch maritime authorities

31. I will now turn to the treatment of the events by the Human Environment and Transport Inspectorate, the competent Dutch maritime authority and the Dutch experts concerning matters relating to safety at sea.

32. Following requests thereto and in particular in response to the letter from His Excellency the President of the Republic of Nauru, Honourable David W.R. Adeang, addressed to the Prime Minister of the Netherlands, Mark Rutte, dated 18 December 2023, which contained the notification pursuant to Article 94, paragraph 6 of the United Nations Convention on the Law of the Sea, the Human Environment and Transport Inspectorate investigated the protest actions by Greenpeace International.

33. The final report containing the findings and conclusions of that investigation was published on 27 February 2024 and has been shared with the Republic of Nauru, the Danish maritime authority as the flag State of the MV Coco, and with the International Seabed Authority.

34. We thank the Secretariat for making this document available to this Council meeting on the website of the International Seabed Authority.⁷

35. The investigation of the Inspectorate is based on a statement of facts and video footage provided by the crew of the MV Coco through the Danish maritime authority on 29 November 2023. Additional information from or channeled through the Secretary-General of the International Seabed Authority, including from NORI and Tonga Offshore Mining Limited (TOML) and Greenpeace International has also been taken into account.

36. In its report, as an introductory remark, the Inspectorate noted that it had not been made aware of any dangers to the marine environment originating from the protest actions by Greenpeace International or the likelihood that an event could have unfolded as a result of these actions that would have had the severity or magnitude to cause a serious impact on the marine environment.⁸

37. Please allow me to highlight the three main findings of the report of the Inspectorate.

38. Firstly, the Inspectorate found no legal basis, whether under the (provisions of the) 1972 Convention on the International Regulations for Preventing Collisions at Sea (COLREGS) or otherwise, for prescribing and maintaining a safety or operating zone of 500 metres around the MV Coco.⁹

39. Secondly, the Inspectorate found that the safety of navigation was not compromised and that the maneuvers of the MV Arctic Sunrise towards the MV Coco would not qualify as dangerous or unlawful.¹⁰

40. And thirdly, the Inspectorate concluded that the presence of Greenpeace activists in kayaks at the stern of the MV Coco, resulting in the capsizing of one them, created safety hazards towards these persons.¹¹

41. On the basis of the findings of the Inspectorate, the Dutch authorities deemed it appropriate to continue to discuss with Greenpeace International matters relating to safety during demonstrations at sea and the necessity to observe relevant international standards in that respect, in particular on the high seas, now and in the future, in accordance with the resolution of the International Maritime Organization of 17 May 2010 on assuring safety during demonstrations, protests or confrontations on the high seas.¹² The Dutch maritime authorities have indeed already done so.

⁷ Available at: <https://www.isa.org.im/sessions/29th-session-2024/>, under 'Statements', 'Written Statements on Agenda Item 20'.

⁸ See Investigation Report of the Human Environment and Transport Inspectorate, para. 11.

⁹ See Investigation Report of the Human Environment and Transport Inspectorate, para. 17.

¹⁰ See Investigation Report of the Human Environment and Transport Inspectorate, para. 13.

¹¹ See Investigation Report of the Human Environment and Transport Inspectorate, para. 16.

¹² International Maritime Organisation, Resolution MSC.303(87).

Immediate Measures issued by the Secretary-General

42. At this point the Netherlands wishes to express its views regarding the Immediate Measures of a temporary nature taken by the Secretary-General pursuant to Regulation 33 of the Regulations on Prospecting and Exploration for Polymetallic Nodules.

43. Regulation 33, paragraph 2, prescribes that the Secretary-General has to act if he becomes aware “of an *incident, resulting from or caused by a contractor’s activities in the Area that has caused, is causing or poses a threat of serious harm to the marine environment.*”

44. However, as the Inspectorate’s report confirms, the protest actions posed no danger to the marine environment and thus did not qualify as a situation envisaged under that provision. This is further corroborated by the reports from the crew of the MV Coco, which essentially only related to safety concerns of Greenpeace activists in the immediate vicinity or on board of the MV Coco. The Netherlands, therefore, maintains its view that the Immediate Measures promulgated by the Secretary-General are not in conformity with Regulation 33.

45. Similarly, the Netherlands observes that – in line with the findings in the Arctic Sunrise Arbitration - it was *not* reasonable to consider that the concerned protest actions by Greenpeace International with kayaks or RHIBs could have resulted in major harmful consequences for the marine environment.¹³

46. Regulation 33, paragraph 3 also states that the Secretary-General can only take such Immediate Measures of a temporary nature “to prevent, contain and minimize serious harm or the threat of serious harm to the marine environment”. The same conclusion must be drawn here: no such harm to the marine environment occurred or was reasonably expected to occur. The Netherlands also observes that the Secretary-General issued the measures in consideration of “the safety of life at sea”. However, Regulation 33 does not refer to safety of life at sea and therefore it does not provide any basis for Immediate Measures issued on those grounds.

47. Moreover, contrary to the Secretary-General’s Second Report, the Netherlands observes that Article 153, paragraph 4 of the United Nations Convention on the Law of the Sea concerns the “control over activities *in the Area.*” It does not provide the International Seabed Authority with any competence to determine the boundaries of the right to protest on the high seas.

48. In the given circumstances, the Secretary-General thus had no competence to issue measures. The Netherlands considers that any measures intended to be of a binding nature and intended to direct the MV Arctic Sunrise, encroach on the Netherlands’ exclusive flag State jurisdiction over the vessel. As such, the Netherlands concludes that the Secretary-General’s issuance of Immediate Measures constitutes an excess of jurisdiction or a misuse of power.

49. On a final note allow me to refer to the Secretary-General’s reports prepared for the topic of our discussion. In particular, I refer to the parts of those reports that, firstly, suggest that it would be outside the jurisdiction of the Courts of the Netherlands to decide on protests interfering with activities in the Area, including with respect to making any pronouncements as to whether the Secretary-General’s Immediate Measures had legal basis or carried legal effects; and secondly that the Courts of the Netherlands purported to condone protest actions on board or in the immediate vicinity of the MV Coco by sanctioning or authorising conduct that interferes with the rights and interests of the International Seabed Authority.

¹³ The Arctic Sunrise Arbitration (Netherlands v. Russia), Award on the Merits, para. 311.

50. As to the first point, as already explained, in the view of the Netherlands the legal framework with respect to the right to protest at sea equally applies to activities carried out under the auspices of the International Seabed Authority and, as the flag State of the MV Arctic Sunrise, it falls within the adjudicatory jurisdiction of the Courts of the Netherlands to review the lawfulness of the protest actions, including in respect of activities carried out in the Area. In that respect, the Netherlands notes that in the Dutch legal order, it is common practice for its Courts to interpret and apply applicable international law in order to settle disputes brought before them. Rather, we submit the opposite that it is outside the jurisdiction of the Secretary-General to limit the right to protest at sea.

51. As to the second point, the Netherlands rejects any suggestion that its Courts “condoned” protest actions and as a Member State of the International Seabed Authority the Netherlands respectfully asks to observe the independence of its judiciary. The Court acknowledged that Greenpeace indeed had a right to protest on the high seas, and continue certain other acts of peaceful protest on the high seas. However, it also confirmed that the right is not without its limitations, as the Amsterdam District Court ordered the Greenpeace activists to disembark from the MV Coco with immediate effect, in particular, according to the Court, because Greenpeace had already been able to make its point by generating publicity and continuation of protests on board hindered NORI in carrying out its activities and navigation of the vessel, thereby causing damage.

52. The Netherlands understands that there may be instances in which the Secretary-General considers acting in the interest of the International Seabed Authority, the Enterprise or rights granted under contracts by the Authority. The Netherlands confirms that it stands ready to act constructively and in good faith. Yet, the Netherlands cautions that if any legal measures are adopted, there has to be a legal basis to do so.

Conclusion

55. I come to a close.

56. The Netherlands attaches great importance to the right of protest at sea and to the right of all States to allow vessels flying their flag to protest. As the flag State of the MV Arctic Sunrise the Netherlands is also committed to upholding its international responsibilities in that regard, in particular in ensuring safety at sea is not endangered and relevant international collision avoidance regulations are observed. The Netherlands takes its exclusive jurisdiction over vessels flying its flag seriously and is wary of any encroachment on that right.

57. Bearing in mind that the relevant protests have now come to an end, the Amsterdam District Court’s decision of 30 November 2023, the Inspectorate’s report of February 2024 and its follow-up with Greenpeace International and the fact that legal remedies continue to be available to the interested parties in accordance with the laws of the Netherlands, the Netherlands considers that the Council does not have to take any additional actions in relation to the Secretary-General’s reports on the matter.

I thank you Mr. President