

PCA Case No. 2019-28

IN THE MATTER OF AN ARBITRATION

- before -

**AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII
TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA**

- between -

UKRAINE

- and -

THE RUSSIAN FEDERATION

- in respect of a -

**DISPUTE CONCERNING THE DETENTION OF UKRAINIAN NAVAL VESSELS AND
SERVICEMEN**

PROCEDURAL ORDER NO. 2

ARBITRAL TRIBUNAL:

**Professor Donald McRae (President)
Judge Gudmundur Eiriksson
Judge Rüdiger Wolfrum
Judge Vladimir Golitsyn
Sir Christopher Greenwood**

REGISTRY:

The Permanent Court of Arbitration

WHEREAS on 22 November 2019, the Arbitral Tribunal adopted Procedural Order No. 1, setting out the timetable and the Rules of Procedure for the present arbitration (“**Rules of Procedure**”);

WHEREAS pursuant to paragraph 3 of Procedural Order No. 1, on 22 May 2020, Ukraine submitted its Memorial;

WHEREAS Article 10, paragraph 1, of the Rules of Procedure provides that “[t]he Arbitral Tribunal shall have the power to rule on objections to its jurisdiction or to the admissibility of the Notification and Statement of Claim or of any other claim made in the proceedings”;

WHEREAS Article 11, paragraph 1, of the Rules of Procedure provides that “any objection on the ground of jurisdiction or admissibility the decision on which is requested before any further proceedings on the merits . . . shall be raised in writing by the date set by the Arbitral Tribunal”;

WHEREAS Article 11, paragraph 3, of the Rules of Procedure provides that “[t]he Arbitral Tribunal shall rule on any Preliminary Objection in a preliminary phase of the proceedings, unless the Arbitral Tribunal determines, after ascertaining the views of the Parties, that such Preliminary Objection does not possess an exclusively preliminary character and should be ruled upon in conjunction with the merits”;

WHEREAS pursuant to paragraph 5 of Procedural Order No. 1, on 22 August 2020, the Russian Federation submitted its Preliminary Objections (“**Preliminary Objections**”);

WHEREAS in its Preliminary Objections, the Russian Federation contended that the Arbitral Tribunal does not have jurisdiction:

- (i) because Ukraine’s claims relate to a “dispute concerning military activities” and are therefore excluded from the Tribunal’s jurisdiction by the operation of declarations made by both Ukraine and the Russian Federation to exclude such disputes pursuant to Article 298(1)(b) of the United Nations Convention on the Law of the Sea (the “**Convention**”) (the “**Article 298(1)(b) Objection**”);
- (ii) because Article 32 of the Convention does not provide for an applicable immunity of warships and other government vessels operated for non-commercial purposes in the territorial sea (the “**Article 32 Objection**”);
- (iii) because the Arbitral Tribunal lacks jurisdiction over the “main dispute” between the Parties, it also lacks jurisdiction on Ukraine’s claims based on the alleged non-compliance of the Russian Federation with the Order of the International Tribunal for the Law of the Sea of 25 May 2019 for the Prescription of Provisional Measures (the “**Article 290 and 296 Objection**”);
- (iv) because Article 279 of the Convention “contains no reference to the aggravation of disputes” and therefore does not provide a basis for the Arbitral Tribunal’s jurisdiction to adjudicate the Russian Federation’s alleged aggravation of the present dispute (the “**Article 279 Objection**”);
- (v) because Ukraine has not complied with the requirement set forth in Article 283 of the Convention that parties to a dispute under the Convention must “proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means” (the “**Article 283 Objection**”);

WHEREAS in its Preliminary Objections, the Russian Federation characterized each of its Preliminary Objections as “exclusively preliminary” and therefore apt to be decided in a preliminary phase of the proceedings in accordance with the “default position of a preliminary phase” set forth in Article 11, paragraph 3, of the Rules of Procedure;

WHEREAS pursuant to paragraph 5(a) of Procedural Order No. 1, on 7 September 2020, Ukraine submitted its Observations on the Question of Bifurcation (“**Observations**”);

WHEREAS in its Observations, Ukraine submitted that Russia’s Preliminary Objections “do not possess an exclusively preliminary character” for the following reasons:

- (i) in order to decide whether Ukraine’s claims raise a “dispute concerning military activities” rather than law enforcement activities (as Ukraine contends), the Arbitral Tribunal would have to consider “the same facts and evidence” upon which the merits of Ukraine’s claims turn;
- (ii) the Parties’ disagreement about whether Article 32 of the Convention establishes or incorporates an applicable immunity is a legal dispute concerning the interpretation or application of the Convention, over which the Arbitral Tribunal has jurisdiction, while the Parties’ disagreement over the locations of the vessels’ arrests is a factual question that should be taken up on the merits with the benefit of a full evidentiary record;
- (iii) the Arbitral Tribunal has jurisdiction over the ITLOS Provisional Measures Order if it has jurisdiction over the “main dispute”; the conditional Article 290 and 296 Objection “cannot be decided at a preliminary stage” because the Russian Federation’s other jurisdictional objections lack an “exclusively preliminary character” and “cannot be decided at a preliminary stage of the proceedings”;
- (iv) the Parties’ contrasting positions on whether Article 279 of the Convention includes an obligation not to aggravate a dispute raises a “straightforward dispute concerning the interpretation or application of the Convention” that the Arbitral Tribunal has jurisdiction to decide on the merits; and
- (v) whether Ukraine satisfied or exhausted the requirement to “expeditiously” exchange views under Article 283 of the Convention turns on the “urgency of the situation” and the Arbitral Tribunal in deciding thereon would risk “prejudging facts interwoven with the merits”;

WHEREAS in its Observations, Ukraine contended that bifurcation would frustrate the interests of efficiency and justice by “risk[ing] delay, increased cost, fragmented consideration of the evidence, and duplicative briefing” and by forcing the Ukrainian servicemen to “wait an inordinate time for accountability, compensation, and cessation of the ongoing harm of being the subject of unlawful criminal prosecutions”;

WHEREAS Ukraine has therefore requested that Russia’s Preliminary Objections be joined to the merits instead of being addressed in a preliminary phase;

WHEREAS pursuant to paragraph 5(c) of Procedural Order No. 1, on 21 September 2020, the Russian Federation submitted its Response to the Observations of Ukraine on the Question of Bifurcation (“**Response**”);

WHEREAS in its Response, the Russian Federation submitted that in order to overcome the alleged “default position” in favour of bifurcation established by Article 11, paragraph 3, of the Rules of Procedure, Ukraine would have to show either that the Arbitral Tribunal does not have all of the facts necessary to decide each Preliminary Objection raised or that, in deciding Russia’s Preliminary Objections, the Arbitral Tribunal would be required to prejudge some element of the dispute on the merits;

WHEREAS the Russian Federation also contended in its Response that notwithstanding an overlap in the relevant facts, the Arbitral Tribunal had before it the “limited and necessary facts” required to decide the Article 298(1)(b) Objection and the Article 32 Objection without the risk of “determin[ing] the dispute, or some elements thereof, on the merits”;

WHEREAS in its Response, the Russian Federation characterized the Article 279 Objection as a “pure question of law [over whether Article 279 of the Convention refers to the aggravation of disputes] having no reference to facts”;

WHEREAS the Russian Federation invoked the “established practice of international courts and tribunals” consistently addressing “objections based on failure to satisfy procedural preconditions to the exercise of jurisdiction” in general and objections premised on Article 283 of the Convention in particular in a preliminary phase;

WHEREAS in its Response, the Russian Federation objected that considerations of efficiency and justice do not give the Arbitral Tribunal leave to bypass the threshold requirement under Article 11, paragraph 3, of the Rules of Procedure that a Preliminary Objection should “not possess an exclusively preliminary character” for it to be joined to the merits;

WHEREAS the Russian Federation further objected that Ukraine’s concerns about efficiency and justice were mitigated by “reasonable time limits” and the release of the detained Ukrainian servicemen, while the possibility that the Preliminary Objections might be decided in Russia’s favour would “ensur[e] a swifter determination of this dispute, and avoid[] unnecessary time and expense”, better serving the “interests of efficiency and justice”;

WHEREAS pursuant to paragraph 5(d) of Procedural Order No. 1, on 28 September 2020, Ukraine submitted its Reply to the Response of the Russian Federation on the Question of Bifurcation (“**Reply**”);

WHEREAS in its Reply, Ukraine disagreed with the Russian Federation’s contention that Article 11, paragraph 3, of the Rules of Procedure creates a “default position” in favour of bifurcation but submitted that, at any rate, the Arbitral Tribunal had cause to abandon the “default position” because of the existence of disputed facts that overlap in their significance both to Russia’s Preliminary Objections and to the merits of Ukraine’s claims;

WHEREAS Ukraine objected in its Reply that the “undeniable overlap” in facts relevant to the Tribunal’s jurisdictional determination of whether the instant dispute concerns “military activities” and the merits question of whether Russia’s actions violated provisions of the Convention is sufficient grounds to conclude that the Article 298(1)(b) Objection lacks an exclusively preliminary character;

WHEREAS in its Reply, Ukraine argued that “bifurcation is never warranted for objections that . . . present a disagreement over the interpretation or application of the Convention” and emphasized that the Parties’ differing interpretations of Article 32 and Article 279 of the Convention raise merits questions concerning the interpretation or application of the Convention rather than jurisdictional questions;

WHEREAS Ukraine submitted in its Reply that in order to adjudicate Russia's differing interpretation of the Convention's requirement that the parties "expeditiously" exchange views, the Arbitral Tribunal would necessarily have to address facts giving rise to what Ukraine characterizes as "urgency of the situation" thereby "prejudging facts interwoven with the merits";

WHEREAS Ukraine therefore contended that bifurcation would undermine efficiency and justice by "causing delay and duplicative work for both the Tribunal and the parties, compounded by the potential for prejudicial factual findings on a limited record in the first phase";

WHEREAS the Arbitral Tribunal considers that it has sufficiently sought the views of the Parties and given them a full opportunity to be heard and present their cases on the question of bifurcation of these proceedings;

WHEREAS the Arbitral Tribunal has duly considered the views of the Parties; and

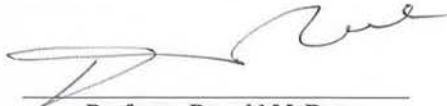
WHEREAS the Arbitral Tribunal is conscious of its duty to ensure the fair and efficient administration of justice and to avoid unnecessary delay and expense;

THE ARBITRAL TRIBUNAL HEREBY ORDERS:

1. The Arbitral Tribunal considers that the Preliminary Objections of the Russian Federation appear at this stage to be of a character that justifies having them examined in a preliminary phase, and in accordance with Article 11, paragraph 3, of the Rules of Procedure, decides that the Preliminary Objections of the Russian Federation shall be addressed in a preliminary phase of these proceedings.
2. The proceedings on the merits are hereby suspended.
3. In accordance with paragraph 5(f) of Procedural Order No. 1, Ukraine shall file any observations on the Preliminary Objections of the Russian Federation within three months of the date of this Order. Following receipt of these observations, the Arbitral Tribunal will decide whether any further written submissions are needed and, after consultation with the Parties, the time limits for such submissions.
4. If the Arbitral Tribunal, in delivering its award in the preliminary phase of the proceedings in accordance with Article 11, paragraph 7, of the Rules of Procedure, declares that a Preliminary Objection does not possess an exclusively preliminary character, then, in accordance with Article 11, paragraph 3, of the Rules of Procedure, that Objection shall be ruled upon in conjunction with the merits.

Dated: 27 October 2020

ON BEHALF OF THE ARBITRAL TRIBUNAL



Professor Donald McRae
President