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

PCA Case No. 2017-06

Permanent Court of Arbitration
Peace Palace, The Hague
The Netherlands

B E T W E E N

UKRAINE

– and –

THE RUSSIAN FEDERATION

- before -

JUDGE JIN-HYUN PAIK (Presiding Arbitrator)
JUDGE BOUALEM BOUGUETAIA
JUDGE ALONSO GOMEZ-ROBLEDO
JUDGE VLADIMIR GOLITSYN
PROFESSOR VAUGHAN LOWE QC

Heard on:

Tuesday, 11 June 2019

MS O ZERKAL, Agent for Ukraine, and PROF H KOH, PROF
F SOONS, PROF J THOUVENIN, MS M CHEEK, MR J GIMBLETT,
MR D ZIONTS, MR N GORE, of Counsel, appeared on behalf of
Ukraine

MR D LOBACH, Agent for the Russian Federation, and MR
S WORDSWORTH QC, PROF A PELLET, PROF T TREVES, MR S USOSKIN,
MS A SANDER, of Counsel, appeared on behalf of the Russian
Federation

REGISTRY: DR DIRK PULKOWSKI, Senior Legal Counsel, appeared
for the Permanent Court of Arbitration
ALSO PRESENT:

FOR THE PERMANENT COURT OF ARBITRATION
Ms Ashwita Ambast, Legal Counsel
Mr Juan Ignacio Massun, Legal Counsel

INTERPRETERS (FRENCH-ENGLISH)

Ms Marie Dalcq
Mr Jean-Christophe Pierret

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MR PRESIDENT: Good morning, everyone.

The arbitral tribunal will continue today its hearing in PCA case number 2017-06, Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait.

Today, Ukraine is due to present its first round of oral pleadings. According to the schedule for this hearing, the hearing today will run from 1 pm, and then from 2.30 pm to 5.30 pm.

In accordance with paragraph 2 of the procedural order number 5, the opening statement of the agent for Ukraine will be webcast live on the internet. Members of the diplomatic corps and the general public are also following this public portion of the hearing in another room in the Peace Palace.

The remaining parts of the oral arguments presented today are confidential and will not be webcast.

I now invite the agent for Ukraine, Ms Olena Zerkal, to proceed with her opening statement.

Opening submissions by UKRAINE

MS ZERKAL: Mr President, distinguished members of the tribunal, it is an honour for me to appear before you today as an agent of Ukraine.
Ukraine is here before you with a request to resolve a dispute on interpretation and application of the United Nations Convention on the Law of the Sea. This dispute is over Russia's violations of Ukraine's rights under the UNCLOS in the Black Sea, the Sea of Azov, and the Kerch Strait. In violation of many provisions of UNCLOS and without any legal ground, Russia built an illegal bridge across an international strait. It harasses ships of all countries as they navigate to and from Ukrainian ports. It steals our energy resources within our maritime areas. It excludes our fishermen from the waters they have always fished.

Together, these violations show Russia's complete disrespect for the international law of the sea.

Not surprisingly, Russia has decided on its own that Ukraine's case is about something else. According to Russia, this case is about sovereignty over Crimea, but it is not.

For us, and in fact for the whole world, it is clear Crimea is Ukraine. It is enshrined in the Ukrainian Constitution and respected by the international community. Russia as well has recognised Ukrainian sovereignty over Crimea, including in binding treaties.

Russia may not come to this tribunal and blow hot and cold in order to defeat this tribunal's
jurisdiction. In any case, sovereignty is not what Ukraine's case is about. Why would we bring such a case when the sovereignty of Ukraine over Crimea is not at all in question?

It is Russia that has introduced this topic into the case. Russia does this because it simply can't justify its violations of the law of the sea. The only way to escape responsibility is to reconstruct the case that Ukraine has brought.

Russia is clearly very confident in its strategy. Yesterday, Russia's advocates repeated that they have all expectations that the tribunal will find it has no jurisdiction. Russia has expected whatever it likes. But let me recall that Russia was just as confident last month when it told the ITLOS it manifestly lacked jurisdiction.

At this moment, let me make a positive note. I am truly pleased that Russian Federation has decided to participate in this arbitration. All of Ukraine hopes that this means Russia is prepared to comply with the decision of the tribunal, whatever it is, as is envisaged in the Convention. In the same way, we hope that Russia's acknowledgment of the ITLOS Provisional Measures Order, which it repeated twice yesterday, means that Russia is preparing to comply with this binding
Mr President, members of the tribunal, yesterday Russia tried so hard to change the subject of the case in order to squeeze it into the scope of Russia's objections. Today, you will hear about the real dispute that is before you. As a result, it will become clear why none of Russia's objections undermine your jurisdiction.

Russia, in violation of articles 2, 56 and 77 of UNCLOS, steals our resources in the Black Sea. It excludes us from accessing the oil and gas that is beneath our waters. Since spring 2014, Russia has already stolen more than 9 billion cubic metres of natural gas. It has purported to cancel licences duly issued by the Ukrainian government for energy production and it has issued its own licences to Russian companies.

Russia has even taken from us valuable and modern mobile drilling rigs which it moves around our entitlements in the Black Sea to drill for more of our natural gas.

Meanwhile, our government struggles to ensure energy self-sufficiency by expanding domestic extraction of natural gas. The demanded volume, 5-6 billion cubic metres per year, could have been covered by our resources in the Black Sea.
In a similar way, Russia violates articles 2, 21, 56, 58, and other articles of UNCLOS, and ruins the traditional life of Ukrainian fishing communities. It simply squeezes Ukrainian fishermen out of areas where they operated for ages. As a result, Ukraine's annual catch dramatically declined. Instead, Russia is exploiting Ukraine's fish stocks in an unsustainable way.

Russia also disrupts international navigation and commerce on the seas. It builds bridges, pipelines and cables without even consulting us. Russia decided on its own to build a low-clearance bridge across the Kerch Strait. Because of that bridge, large ships can no longer reach the important Ukrainian ports of Mariupol and Berdyansk. Since April 2018, Russia has stopped and harassed ships in the Black Sea, Sea of Azov, and Kerch Strait. It has even stopped vessels just a few miles from Ukraine's ports. These actions are serious aggravations of the dispute before the tribunal, and we notified the tribunal of these aggravations of the dispute in the letter of 27 November 2018. That letter recounts how Russia has illegally stopped and harassed at least 150 vessels, majority with the flags of third states on their way to Ukrainian ports.

Mr President, Ukraine's memorial describes in great
details these and other violations of UNCLOS. Prof Koh will further present the nature of Russia's violations and how Russia violates articles after articles after articles of UNCLOS.

The important point is this. Ukraine has brought to the tribunal a significant dispute concerning the interpretation and application of UNCLOS. Resolution of such disputes is an essential part of UNCLOS. This tribunal has jurisdiction over any dispute that concerns interpretation or application of the Convention. The only exceptions to your jurisdiction over such a dispute are narrow, and they don't apply here.

In short, your jurisdiction over this dispute is clear.

Russia's preliminary objections are not a good-faith assessment of the jurisdiction of the tribunal. Instead of responding to the law of the sea violations presented by Ukraine, Russia tries to unilaterally redefine the dispute. Russia treats preliminary objection like the Olympic sport of curling, using its claim of sovereignty as a rock and attempting to take out the real dispute over the law of the sea.

Mr Wordsworth was quite insistent yesterday that Russia does not bring a claim of sovereignty before this tribunal. He may not like this word, but that is
exactly what Russia does. Ukraine has suffered serious
UNCLOS violations, and we have a treaty right to bring
those violations to this tribunal.

Russia tries to introduce a separate topic, its idea
that the status of Crimea is in doubt. Whether
Mr Wordsworth likes it or not, the question is whether
this claim introduced by Russia is capable of defeating
our rights under the treaty to seek resolution of
disputes. The answer is no.

The sovereignty claim that Russia tries to place in
front of you is frivolous. First of all, it is
inadmissible. Ukraine's sovereignty in Crimea is beyond
any doubt. Non-recognition of the annexation is
the cornerstone of the international community's policy
on Crimea, and it's based on the fundamental principle
of international law: illegal acts can't produce legal
effects.

Russia's claim is also not plausible. It depends on
the ridiculous idea that Crimea became independent and
then immediately was absorbed by Russia. Russia did not
name any state that recognised this new state of Crimea
over the few hours it was supposedly independent.
I don't think I need to tell you why Russia said nothing
about this. Russia's advocates also seemed somewhat
embarrassed to explain how Russia could plausibly claim
sovereignty.

Mr Wordsworth referred to the circumstances of 1954 in the most vague terms possible, but said nothing about how this could be relevant. Again, I don't need to tell you why you heard so little.

It seems that Russia fights so hard against the plausibility test because it understands how implausible its claim is.

The legal defects of Russia's objections of sovereignty are clear. They only highlight that the object of Ukraine's case is to vindicate our rights in the sea; nothing more.

Russia also tries to avoid the tribunal's jurisdiction by contesting the status of the Sea of Azov and Kerch Strait. Russia's approach is based on the imperial historical narrative pushed by its leaders. In the version of reality presented yesterday by Russia, nothing has changed since the Russian Empire. This explains why Russia believes that it alone can make the rules. But again, Russia's objections miss the actual reality.

Ukraine has always had a different approach, and moved away from this imperial past. Since the dissolution of the Soviet Union, Ukraine, as an independent state, considered that UNCLOS should be
the basis of our maritime relations, both with our
neighbour Russia, and the rest of the international
community. That is why, in 1992, we deposited with the
United Nations coordinates of the baseline for measuring
Ukraine's territorial sea and exclusive economic zone in
the Sea of Azov. Russia then used the idea of internal
waters status as a weapon against the international law
of the sea applying to the Sea of Azov and Kerch
Strait. Its goal is to exclude application of UNCLOS.

I should mention that Ukraine does not accept the
general position of Russia, that the internal waters
regime is outside the scope of UNCLOS. But that
question is not relevant here.

It may be helpful for the tribunal to have some
context behind the story you heard yesterday. I freely
admit that in the face of never-ending Russian pressure,
we were willing to enter into these discussions on the
internal waters regime with Russia. In 2003, for
example, Russia took provocative actions, constructing
a dam linking Russia's Taman Peninsula and Ukraine's
Tuzla Island, in the Kerch Strait. To ease the
tensions, which could have led to a military clash, we
concluded the Sea of Azov Treaty after abnormally quick
negotiations.

The text of the treaty illustrates that its primary
purpose was to serve as a framework to future agreement
on the proper treatment of the Sea of Azov.

Discussions on the status of the Sea of Azov
continued, as well as on the topic of delimitation,
which Ukraine considered essential. Nevertheless, no
such agreement was ever reached. There was never any
delimitation. And Russia's core demand -- a regime of
common internal waters -- had never turned into
practice.

Russian unilateralism culminated since 2014 in
Russia's treatment of navigation in Kerch Strait. While
transit passage through the strait is guaranteed under
article 38 and 44 of UNCLOS, Russia's leadership
declares that it may alone limit navigation there.

Without any consistency, before this tribunal,
Russia refers to the status of the Kerch Strait as
"common internal waters of Russia and Ukraine". But
outside this arbitration, it calls the Kerch Strait
"Russia's strait", which can be closed unilaterally.

Russia believes it has proved some points by finding
press statements or notes verbales where it thinks
Ukraine used incorrect language. Russia further thinks
it is entitled to interpret Ukrainian laws and decrees
and tell us what they mean.

Let me be clear. What you have heard in this case
before you is the official position of Ukraine.

Whatever documents Russia wishes to point to is nothing compared to the blatant inconsistency between Russia's words and actions. The international community objects to these Russian actions and calls on Russia to respect UNCLOS in the Sea of Azov and Kerch Strait.

This is not political, as Prof Treves said. It is about the law. The Kerch Strait is an international strait, and references to internal waters status of Sea of Azov and Kerch Strait are incorrect, as will be explained further by Prof Soons.

Russia's additional objections are just meritless. For example, Russia says that everything it does in the Black Sea, the Sea of Azov and Kerch Strait, is military activities. Can Russia really believe that stealing Ukraine's natural gas is a military activity? Is building a bridge a military activity? Keeping fishermen out of their traditional fishing grounds? Removing priceless cultural objects from the seabed? The answer to these questions is obvious.

Another example of how Russia twists the law is its reference to the State Border Treaty of 2003. It says that in this treaty, we agreed to resolve UNCLOS disputes through some other procedure. But this treaty was about Ukraine's land border. It decided nothing.
about the sea. In fact, I am very surprised that Russia chooses to rely on this treaty as if it supports its objections.

According to the Russian President just a few years ago, the State Border Treaty reflects Russia's formal recognition of Crimea as part of Ukraine. So this treaty does nothing to help Russia, but it does add even more confirmation that Russia can't assert its baseless sovereignty claim in order to avoid this tribunal's jurisdiction.

This is just another example of how Russia's arguments lack principle.

Mr President, Russia has presented a long list of objections, but they share a theme and they reveal Russia's attitude towards international law. When Russia wants our natural resources, it takes them unilaterally. When a state's rights under the Convention are violated in this way, it has a right under UNCLOS to seek dispute resolution.

Russia tries to take this right away from Ukraine by introducing again unilaterally the topic of sovereignty. Although Russia could not persuade Ukraine to reach a final agreement on the Sea of Azov, it pretends that the outcome it wanted is the law anyway. Again, Russia acts unilaterally, and whatever Russia says, it is the
Mr President, members of the tribunal. Ukraine and Russia have a dispute that concerns the law of the sea. Ukraine has the right to have the dispute addressed by a law of the sea tribunal. Today, you will see that Russia can't avoid your jurisdiction.

I am confident that after hearing from us, you will agree that Ukraine has every right to come before you and seek justice under UNCLOS.

Ukraine's counsel will show that Russia's objections to the jurisdiction of this tribunal are without legal support and only distract from the true issues in dispute.

Prof Harold Hongju Koh will elaborate on the nature of Ukraine's claim and why they give rise to a dispute concerning the interpretation or application of the Convention.

Prof Koh will then explain why Russia's claim that the status of Crimea has been altered is inadmissible before this tribunal.

Prof Jean-Marc Thouvenin will next explain that Russia's claim related to Crimea is implausible and therefore is not capable of affecting this tribunal's jurisdiction. He will also explain that even if Russia's claim were considered, it is not the primary
issue in dispute in this case.

Prof Alfred Soons will next respond to Russia's attempt to claim the entire 38,000 square kilometre Sea of Azov, and the busy Kerch Strait, as internal waters where Russia is free to operate as it wishes. He will demonstrate that UNCLOS applies to these important bodies of water.

All of Russia's other objections similarly fail. Ms Marney Cheek will speak to Russia's incorrect and extreme reading of the military activities exceptions under article 298(1) (b) of UNCLOS.

Mr Nikhil Gore will explain that Russia's fisheries, law enforcement, and delimitation objections under UNCLOS articles 297 and 298 add nothing to its other baseless objections.

Mr Jonathan Gimblett will show why this tribunal should reject Russia's attempt to break this case into multiple parts by invoking procedures under article 281 and Annex VIII of UNCLOS.

Finally, Prof Koh will provide a brief concluding statement.

Mr President, members of the tribunal, Russia has raised very considerable objections to this tribunal's jurisdiction, but Russia can't avoid the most basic rule established by articles 286 and 288 of the Convention:
that this tribunal has jurisdiction to hear and decide any dispute concerning the interpretation or application of the Convention. This case concerns the wholesale violations of Ukraine's rights under UNCLOS. The Ukrainian people respectfully put our faith in this tribunal to protect the rule of law on the sea.

May I now request that you invite Prof Harold Koh to the podium.

MR PRESIDENT: Thank you, Ms Zerkal.

The live transmission of today's hearing will conclude with this opening statement.