

**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 Daleq
Mr Jean-Christophe Pierret**

1 Tuesday, 11 June 2019

2 (10.00 am)

3 MR PRESIDENT: Good morning, everyone.

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

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

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

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

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

22 Opening submissions by UKRAINE

23 MS ZERKAL: Mr President, distinguished members of the
24 tribunal, it is an honour for me to appear before you
25 today as an agent of Ukraine.

1 Ukraine is here before you with a request to resolve
2 a dispute on interpretation and application of the
3 United Nations Convention on the Law of the Sea. This
4 dispute is over Russia's violations of Ukraine's rights
5 under the UNCLOS in the Black Sea, the Sea of Azov, and
6 the Kerch Strait. In violation of many provisions of
7 UNCLOS and without any legal ground, Russia built
8 an illegal bridge across an international strait. It
9 harasses ships of all countries as they navigate to and
10 from Ukrainian ports. It steals our energy resources
11 within our maritime areas. It excludes our fishermen
12 from the waters they have always fished.

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

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

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

24 Russia may not come to this tribunal and blow hot
25 and cold in order to defeat this tribunal's

1 jurisdiction. In any case, sovereignty is not what
2 Ukraine's case is about. Why would we bring such a case
3 when the sovereignty of Ukraine over Crimea is not at
4 all in question?

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

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

17 At this moment, let me make a positive note. I am
18 truly pleased that Russian Federation has decided to
19 participate in this arbitration. All of Ukraine hopes
20 that this means Russia is prepared to comply with the
21 decision of the tribunal, whatever it is, as is
22 envisaged in the Convention. In the same way, we hope
23 that Russia's acknowledgment of the ITLOS Provisional
24 Measures Order, which it repeated twice yesterday, means
25 that Russia is preparing to comply with this binding

1 order.

2 Mr President, members of the tribunal, yesterday
3 Russia tried so hard to change the subject of the case
4 in order to squeeze it into the scope of Russia's
5 objections. Today, you will hear about the real dispute
6 that is before you. As a result, it will become clear
7 why none of Russia's objections undermine your
8 jurisdiction.

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

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

21 Meanwhile, our government struggles to ensure energy
22 self-sufficiency by expanding domestic extraction of
23 natural gas. The demanded volume, 5-6 billion cubic
24 metres per year, could have been covered by our
25 resources in the Black Sea.

1 In a similar way, Russia violates articles 2, 21,
2 56, 58, and other articles of UNCLOS, and ruins the
3 traditional life of Ukrainian fishing communities. It
4 simply squeezes Ukrainian fishermen out of areas where
5 they operated for ages. As a result, Ukraine's annual
6 catch dramatically declined. Instead, Russia is
7 exploiting Ukraine's fish stocks in an unsustainable
8 way.

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

25 Mr President, Ukraine's memorial describes in great

1 details these and other violations of UNCLOS. Prof Koh
2 will further present the nature of Russia's violations
3 and how Russia violates articles after articles after
4 articles of UNCLOS.

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

13 In short, your jurisdiction over this dispute is
14 clear.

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

23 Mr Wordsworth was quite insistent yesterday that
24 Russia does not bring a claim of sovereignty before this
25 tribunal. He may not like this word, but that is

1 exactly what Russia does. Ukraine has suffered serious
2 UNCLOS violations, and we have a treaty right to bring
3 those violations to this tribunal.

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

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

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

1 sovereignty.

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

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

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

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

22 Ukraine has always had a different approach, and
23 moved away from this imperial past. Since the
24 dissolution of the Soviet Union, Ukraine, as
25 an independent state, considered that UNCLOS should be

1 the basis of our maritime relations, both with our
2 neighbour Russia, and the rest of the international
3 community. That is why, in 1992, we deposited with the
4 United Nations coordinates of the baseline for measuring
5 Ukraine's territorial sea and exclusive economic zone in
6 the Sea of Azov. Russia then used the idea of internal
7 waters status as a weapon against the international law
8 of the sea applying to the Sea of Azov and Kerch
9 Strait. Its goal is to exclude application of UNCLOS.

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

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

25 The text of the treaty illustrates that its primary

1 purpose was to serve as a framework to future agreement
2 on the proper treatment of the Sea of Azov.

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

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

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

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

25 Let me be clear. What you have heard in this case

1 before you is the official position of Ukraine.
2 Whatever documents Russia wishes to point to is nothing
3 compared to the blatant inconsistency between Russia's
4 words and actions. The international community objects
5 to these Russian actions and calls on Russia to respect
6 UNCLOS in the Sea of Azov and Kerch Strait.

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

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

21 Another example of how Russia twists the law is its
22 reference to the State Border Treaty of 2003. It says
23 that in this treaty, we agreed to resolve UNCLOS
24 disputes through some other procedure. But this treaty
25 was about Ukraine's land border. It decided nothing

1 about the sea. In fact, I am very surprised that Russia
2 chooses to rely on this treaty as if it supports its
3 objections.

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

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

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

20 Russia tries to take this right away from Ukraine by
21 introducing again unilaterally the topic of sovereignty.
22 Although Russia could not persuade Ukraine to reach
23 a final agreement on the Sea of Azov, it pretends that
24 the outcome it wanted is the law anyway. Again, Russia
25 acts unilaterally, and whatever Russia says, it is the

1 law, but it is not.

2 Mr President, members of the tribunal. Ukraine and
3 Russia have a dispute that concerns the law of the sea.
4 Ukraine has the right to have the dispute addressed by
5 a law of the sea tribunal. Today, you will see that
6 Russia can't avoid your jurisdiction.

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

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

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

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

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

1 issue in dispute in this case.

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

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

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

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

20 Finally, Prof Koh will provide a brief concluding
21 statement.

22 Mr President, members of the tribunal, Russia has
23 raised very considerable objections to this tribunal's
24 jurisdiction, but Russia can't avoid the most basic rule
25 established by articles 286 and 288 of the Convention:

