

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

B e t w e e n :

UKRAINE

Claimant

and

The Russian Federation

Respondent

in respect of a

DISPUTE CONCERNING THE DETENTION OF
UKRAINIAN NAVAL VESSELS AND SERVICEMEN

THE ARBITRAL TRIBUNAL

PROFESSOR DONALD MCRAE	- PRESIDENT
JUDGE GUDMUNDUR EIRIKSSON	- CO-ARBITRATOR
JUDGE RÜDIGER WOLFRUM	- CO-ARBITRATOR
JUDGE VLADIMIR GOLITSYN	- CO-ARBITRATOR
SIR CHRISTOPHER GREENWOOD	- CO-ARBITRATOR

Monday, 11 October 2021
The Hague, The Netherlands

AS CORRECTED BY THE PARTIES

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1 PCA Case No. 2019-28

2 Ukraine v The Russian Federation

3 PRESIDENT: Good afternoon, ladies
4 and gentlemen. I have to ask the normal question:

5 can you hear me? Is my microphone working? In 01:11:34
6 the absence of people saying no, I will continue.

7 It is my pleasure to declare open
8 the hearing in PCA Case No. 2019-28, the case of
9 the dispute concerning the detention of Ukrainian
10 naval vessels and servicemen instituted by Ukraine 01:11:56
11 against The Russian Federation under Annex VII to
12 the 1982 United Nations Convention on the Law of
13 the Sea, which will be variously referred to as
14 "the Convention" or UNCLOS.

15 The present hearing concerns the 01:12:12
16 parties' arguments in relation to the Preliminary
17 Objections raised by The Russian Federation.

18 The hearing will take place in
19 hybrid format with some members of the Arbitral
20 Tribunal and some members of the parties' 01:12:25
21 delegations joining in person and others by
22 videoconference.

23 My named is Donald McRae and I'm the
24 presiding Arbitrator in these proceedings. I am
25 joined by my colleagues and fellow members of the 01:12:37

1 Arbitral Tribunal. To my left is Judge Rüdiger
2 Wolfrum. The other three Arbitrators, whom
3 I assume you can see and I believe are behind me,
4 Judge Gudmundur Eiriksson, Judge Vladimir Golitsyn
5 and Christopher Greenwood, joining us by 01:12:54
6 videoconference.

7 The Arbitral Tribunal is assisted by
8 the Registrar, Mr Martin Doe, and his colleagues
9 at the International Bureau at the Permanent Court
10 of Arbitration. 01:13:09

11 On behalf of the Arbitral Tribunal
12 I welcome the agents and co-agents and counsels
13 and advisers, assistants and observers of the
14 Ukraine and The Russian Federation to this hearing
15 and express our gratitude to the parties for their 01:13:21
16 cooperation in the conduct of these hybrid
17 proceedings.

18 I would now like to ask the agent
19 for each party to introduce their delegations.

20 First, let me turn to the agent for 01:13:33
21 the Russian Federation, Mr Dmitry Lobach to
22 introduce the delegation of the Russian
23 Federation.

24 H.E. MR LOBACH: Thank you,
25 Mr President. 01:13:59

1 Mr President, distinguished Members
2 of the Tribunal, it's my honour and privilege to
3 appear before you as agent of the Russian
4 Federation in these proceedings.

5 Allow me first to introduce myself, 01:14:12
6 I am Dmitry Lobach, ambassador-at-large, Ministry
7 of Foreign Affairs of The Russian Federation.

8 I also have the honour to introduce
9 our renowned counsel who will take the floor in
10 this hearing. They are, in order of appearance: 01:14:24

11 Mr Sam Wordsworth QC, member of the English and
12 Paris bars. Professor Alain Pellet, emeritus
13 professor, University Paris Nanterre, President of
14 the Institute of International Law, former
15 Chairperson of the International Law Commission 01:14:43
16 who will be with us through video link.

17 Professor Tullio Treves, senior consultant, Curtis
18 Mallet-Prevost, Colt & Mosle, emeritus professor,
19 University of Milan; member of the Institute of
20 International Law. Mr Sergey Usoskin, member of 01:14:58
21 the St Petersburg bar.

22 Mr President, this concludes my
23 introduction of the team of The Russian
24 Federation. Thank you.

25 PRESIDENT: Thank you, Mr Lobach. 01:15:13

1 I turn to the agent for Ukraine,
2 Ms Oksana Zolotaryova to introduce the delegation
3 of Ukraine.

4 MS ZOLOTARYOVA: Thank you,
5 Mr President, distinguished Members of the 01:15:26
6 Tribunal. It's an honour for me to appear before
7 this Tribunal as the agent of Ukraine.

8 My name is Oksana Zolotaryova and
9 I am the head of the department of the
10 International Law of the Ministry of Foreign 01:15:37
11 Affairs of Ukraine.

12 Before I introduce the rest of the
13 delegation, I would like to take this opportunity
14 and to thank you, the Members of the Tribunal for
15 your continued attention to this very important 01:15:49
16 case. I would like to thank the Registrar for the
17 work that has been done in the preparation for
18 today's hearings.

19 I am joined today here by Ukraine's
20 counsel and advocates, Ms Marney Cheek of 01:16:03
21 Covington & Burling, Professor Alfred Soons, and
22 Professor Jean-Marc Thouvenin and Mr David Zions,
23 as well of Covington & Burling.

24 Also present are counsel for
25 Ukraine, Mr Andrii Pasichnyk, Deputy Director of 01:16:17

1 the International Law Department of the Ministry
2 of Foreign Affairs of Ukraine. As well, the
3 representatives of Ukrainian Navy, Vice Admiral
4 Andrii Tarasov and Colonel Leonid Zaliubovskyi as
5 observers. 01:16:36

6 Due to COVID restrictions on the
7 number of participants in the hearing room, we
8 also have several members of our team in the
9 breakout room. This includes counsel Ms Olga
10 Bondarenko, the First Secretary, Embassy of 01:16:47
11 Ukraine in the kingdom of The Netherlands;
12 Mr George Mackie and Amanda Tuninetti of Covington
13 & Burling. Counsel from Covington & Burling
14 participating remotely are Mr Volodymyr Shkilevych
15 and Ms Jill Warnock. Observers in the breakout 01:17:07
16 room are Ms Mariia Bezdieniezhna and Ms Svitlana
17 Romanenko, counsel from International Law
18 Department, and Mr Oleg Nikolenko, spokesperson of
19 the Ministry of Foreign Affairs.

20 Finally, the delegation includes two 01:17:20
21 assistants, Ms Anastasiia Chorna and Ms Ambria
22 Davis-Alexander. Our delegation is formed by the
23 President of Ukraine, Volodymyr Zelensky, and our
24 work is guided by the Minister of Foreign Affairs
25 of Ukraine, Mr Dmytro Kuleba. 01:17:35

1 Mr President, this concludes my
2 introduction of the Ukrainian team. Thank you.

3 PRESIDENT: I now call on the
4 Registrar to summarise the procedure to date and
5 to read out the submissions of the parties as 01:17:58
6 formulated in their written submissions in respect
7 of the jurisdictions of this Arbitral Tribunal.

8 MR DOE: Thank you, Mr President.

9 This arbitration was instituted by
10 Ukraine on 1 April 2019 when it served on The 01:18:13
11 Russian Federation a notification under
12 Article 287, Annex VII Article 1 of UNCLOS, in a
13 statement of the claim and the grounds on which it
14 is based dated 31 March 2019 in respect of "a
15 dispute concerning the immunity of three Ukrainian 01:18:35
16 naval vessels and the 24 servicemen on board."

17 On 16 April 2019, Ukraine filed with
18 the International Tribunal for the Law of the Sea
19 a request for provisional measures to be
20 prescribed under Article 290, paragraph 5 of the 01:18:52
21 Convention. By note verbale, dated 30 April 2019
22 a memorandum dated 7 May 2019, The Russian
23 Federation set out its position that ITLOS lacked
24 prima facie jurisdiction and that the requirements
25 for provisional measures had not been met. 01:19:12

1 Following a hearing on 19 May 2019
2 ITLOS adopted an order with respect to Ukraine's
3 request prescribing measures listed in
4 paragraph 124 of that Order.

5 On 21 November 2019, the Arbitral 01:19:26
6 Tribunal held the first procedural meeting with
7 the parties at the Peace Palace in The Hague. At
8 that meeting, the procedure and timetable to be
9 adopted for this arbitration were discussed.

10 On 22 November 2019, having regard 01:19:39
11 to the consultations with the parties at the first
12 procedural meeting, the Arbitral Tribunal adopted
13 Procedural Order No. 1 in which it established a
14 timetable for written submissions and adopted
15 rules of procedure setting out the process for 01:19:52
16 addressing any Preliminary Objections.

17 On 22 May 2020, Ukraine submitted
18 its memorial.

19 On 22 August 2020, The Russian
20 Federation submitted its Preliminary Objections. 01:20:06
21 The Russian Federation requested that its
22 Preliminary Objections be heard in a preliminary
23 phase of the proceedings as set forth in the rules
24 of procedure and Procedural Order No. 1.

25 On 7 September, Ukraine submitted 01:20:19

1 its observations on the question of bifurcation.

2 On 21 September 2020, The Russian
3 Federation submitted its response to the
4 observations of Ukraine on the question of
5 bifurcation.

01:20:33

6 On 28 September 2020, Ukraine
7 submitted its reply to the response of The Russian
8 Federation on the question of bifurcation.

9 On 27 October 2020, the Arbitral
10 Tribunal issued Procedural Order No. 2, in which 01:20:46

11 it "decided that the Preliminary Objections of The
12 Russian Federation shall be addressed in a
13 preliminary phase of these proceedings", and it
14 fixed the time limit of Ukraine to file its
15 observations on the Preliminary Objections of the
16 Russian Federation. At the same time the
17 proceedings on the merits were suspended.

01:21:02

18 On 27 January 2021, Ukraine
19 submitted its written observations on the
20 Preliminary Objections of the Russian Federation. 01:21:18

21 On 5 February 2021, after having
22 considered the views of the parties on the need
23 for further written submissions, the Arbitral
24 Tribunal decided that the further proceedings in
25 respect of the Preliminary Objections of the 01:21:29

1 Russian Federation would be oral.

2 On 6 March 2021, after having
3 considered the views of the parties on the length
4 and scheduling of a hearing on the Preliminary
5 Objections of the Russian Federation, the Arbitral 01:21:42
6 Tribunal fixed the hearing for the week of
7 11 October, up to and including Saturday,
8 16 October, if necessary, with the hearing to take
9 place in person, if possible, and, otherwise, by
10 videoconference. 01:21:56

11 On 20 August 2021, after having
12 considered the views of the parties on the format
13 of the hearing in the light of continuing global
14 travel and public health restrictions, the
15 Arbitral Tribunal decided that the hearing would 01:22:10
16 take place in a hybrid format with some of the
17 members of the parties' delegations and some of
18 the members of the Arbitral Tribunal joining in
19 person and others by videoconference.

20 On 17 September 2021, after having 01:22:22
21 considered the views of the parties in respect of
22 the procedural and administrative aspects of the
23 hearing on the Preliminary Objections of the
24 Russian Federation, the Arbitral Tribunal issued
25 Procedural Order No. 3, establishing the schedule 01:22:36

1 and modalities for the hearing on the Preliminary
2 Objections of the Russian Federation.

3 In its Preliminary Objections, the
4 Russian Federation requests as follows:

5 "For the reasons set forth in the 01:22:50
6 Preliminary Objections, The Russian Federation
7 requests the Tribunal to adjudge and declare that
8 it is without jurisdiction in respect of the
9 dispute submitted to this Tribunal by Ukraine."

10 In its written observations Ukraine 01:23:04
11 requests as follows:

12 "For the reasons set forth in these
13 written observations, Ukraine respectfully
14 requests that the Tribunal:

15 (a) dismiss the Preliminary 01:23:19
16 Objections submitted by The Russian Federation;

17 (b) adjudge and declare that it has
18 jurisdiction to hear and decide the claims and
19 submissions filed by Ukraine in this case; and

20 (c) award Ukraine its costs for the 01:23:31
21 preliminary phase of these proceedings pursuant to
22 Article 26 of the rules of procedure."

23 Mr President.

24 PRESIDENT: Thank you, Registrar.

25 Pursuant to Articles 286 and 287 of 01:23:47

1 the Convention, Article 11 of the rules of
2 procedure of this arbitration and Procedural Order
3 No. 3, the Arbitral Tribunal shall sit today,
4 11 October 2021, tomorrow, 12 October 2021, on 14
5 and 15 October 2021, and, if necessary, on 01:24:05
6 16 October 2021.

7 The Russian Federation, which has
8 raised the Preliminary Objections in this case
9 will be heard first today.

10 Article 28, paragraph 3 of the rules 01:24:20
11 of procedure states that the presentation of the
12 parties' opening statements at any hearing shall
13 be open to the public.

14 Paragraph 2 of Procedural Order
15 No. 3 notes the parties' agreement that the 01:24:31
16 opening statements of each party's agent in the
17 first round of oral submissions will be made
18 accessible to the public through an online stream
19 available on the Permanent Court of Arbitration
20 website. Accordingly, I note that this portion of 01:24:47
21 the hearing is being webcast live on the Internet.

22 After the statement made by the agent for The
23 Russian Federation this afternoon, the webcast
24 will end for today and no other parts of today's
25 pleadings will be webcast. 01:25:03

1 I think, before we continue,
2 I probably have to ask the photographer to leave
3 and the staff of the PCA can guide you back to the
4 waiting area. Thank you.

5 (Photographer withdrew) 01:25:42

6 I now request the agent for The
7 Russian Federation to proceed with his statement.
8 Mr Lobach.

9 OPENING STATEMENT ON BEHALF OF THE RUSSIAN FEDERATION

10 H.E. MR LOBACH: Mr President, 01:26:03
11 distinguished Members of the Tribunal, this
12 hearing concerns the Preliminary Objections to the
13 jurisdiction of this Tribunal lodged by The
14 Russian Federation. I will introduce the
15 objections that will then be developed by counsel. 01:26:31

16 Let me acknowledge at the outset of
17 the hearing that it is taking place during the
18 difficult times of the COVID-19 pandemic. We are
19 very grateful for the Members of the Tribunal and
20 to the team of the Permanent Court of Arbitration 01:26:47
21 for the effective handling of this case, despite
22 the various constraints resulting from the
23 pandemic. Thank you.

24 I wish to recall that, from the
25 commencement of this arbitration by Ukraine, The 01:27:00

1 Russian Federation has made clear its significant
2 objections to the jurisdiction of the Tribunal.
3 In accordance with the Rules of Procedure, The
4 Russian Federation then submitted its Preliminary
5 Objections in writing. The Tribunal has decided 01:27:15
6 to hear those Objections in a separate preliminary
7 phase. Indeed, if Russia's Objections, or one of
8 them, are upheld, the Tribunal will have no
9 jurisdiction and it cannot proceed to address the
10 merits in the present case. 01:27:30

11 This brings me to the broader
12 context in which these proceedings are taking
13 place. The military engagement between the naval
14 vessels of the Ukraine and the Russian Federation
15 occurred against a backdrop of the Ukraine's 01:27:45
16 provocative actions and military build-up in the
17 area in an attempt to challenge Russia's
18 sovereignty over Crimea and the status of the
19 Kerch Strait as Russia's internal waters.

20 The incident that is central to the 01:28:00
21 present proceedings, namely the attempt by
22 Ukrainian warships to covertly cross the Russian
23 territorial sea, forms part of this unfortunate
24 campaign.

25 ///

1 Of course the existing broader
2 differences between Russia and Ukraine must be
3 settled through political means.

4 Mr President, Members of the
5 Tribunal, allow me to touch briefly on the basic 01:28:23
6 facts which our counsel will shortly develop.

7 The dispute submitted by Ukraine
8 concerns an armed confrontation between the
9 military forces of Ukraine and The Russian
10 Federation on 25 November 2018. The Berdyansk, 01:28:36

11 the Nikopol, and the Yani Kapu are Ukrainian naval
12 vessels that at the relevant time had on board 24
13 servicemen of the Ukrainian navy and security
14 services and were armed with artillery and machine
15 guns. According to the checklist found on board 01:28:55

16 one of the vessels, they were on a mission to
17 covertly pass the Kerch Strait. When they were
18 discovered by the Russian forces and informed that
19 they were prohibited from entering the Russian
20 territorial sea, the Ukrainian forces nevertheless 01:29:12

21 continued to move forward. As a result of the
22 ensuing confrontation, the Berdyansk, the Nikopol
23 and the Yani Kapu were detained by the Russian
24 forces. In sum, this was a military incident
25 involving the military forces of Russia and 01:29:29

1 Ukraine.

2 The military incident resulted in
3 domestic criminal proceedings instituted in
4 Russia. However, the three Ukrainian naval
5 vessels and all the servicemen returned to Ukraine 01:29:40
6 back in 2019.

7 Mr President, the claims submitted
8 by Ukraine in these proceedings fall outside the
9 jurisdiction of this Tribunal. While UNCLOS is
10 indeed the constitution of the sea that has 01:29:56
11 created a comprehensive dispute settlement system,
12 the Convention does not govern all law of the sea
13 issues and there are important exceptions to the
14 scope of jurisdiction of tribunals constituted
15 under the Convention. These limits have been and 01:30:11
16 continue to be important in achieving acceptance
17 of UNCLOS by the majority of States and must, of
18 course, be respected.

19 Ukraine's claims fall outside of
20 these limits for the following reasons. First, 01:30:26
21 the dispute concerns military activities and
22 therefore it falls outside of the Tribunal's
23 jurisdiction pursuant to a declaration made by the
24 Russian Federation under Article 298(1)(b).

25 I note in passing that Ukraine has made a very 01:30:44

1 similar declaration.

2 Second, Ukraine's case is based on a
3 claim of immunity of warships in the territorial
4 sea, an issue that UNCLOS doesn't govern. This
5 regime extends to the Exclusive Economic Zone and 01:31:00
6 the high seas since all the conditions for hot
7 pursuit are met.

8 Third, the claims concerning alleged
9 breach of the order of ITLOS on provisional
10 measures and the alleged aggravation of the 01:31:15
11 dispute are premised on the existence of a primary
12 dispute falling within the scope of the Tribunal's
13 jurisdiction, and since that is not the case the
14 Tribunal has no jurisdiction over them.

15 Finally, Ukraine commenced this 01:31:31
16 arbitration without complying with the obligation
17 imposed by Article 283 UNCLOS regarding an
18 exchange of views as to the means of settlement of
19 the dispute. The dispute submitted by Ukraine
20 concerns military activities and therefore falls 01:31:47
21 outside of the Tribunal's jurisdiction under
22 Article 298(1)(b) UNCLOS.

23 Mr Sam Wordsworth will address this
24 objection in detail and I will make only three
25 preliminary observations. 01:32:02

1 First, the Members of the Tribunal
2 are well aware that UNCLOS was a package deal
3 that, among other things, created a comprehensive
4 compulsory dispute settlement system. However,
5 acceptance of such system would have been 01:32:17
6 impossible without a set of exceptions from its
7 scope that either exclude or allow States to opt
8 out of compulsory dispute settlement with respect
9 to certain categories of disputes.

10 Second, disputes concerning military 01:32:34
11 activities are one category of disputes that
12 States are entitled to exclude from the scope of
13 compulsory dispute settlement. This is not
14 surprising given the political sensitivity of such
15 disputes as well as the difficulties that may be 01:32:50
16 associated with respect to disclosing sensitive
17 military information.

18 Third, Ukraine attempts to overcome
19 the fact that the dispute concerns military
20 activities by recharacterising it as one 01:33:09
21 concerning law enforcement activities focusing its
22 submissions on the detention and prosecution of
23 the vessels and servicemen. That attempted
24 recharacterisation is misconceived as
25 Mr Wordsworth will explain. It is also 01:33:27

1 inappropriate and unhelpful, as Professor Tullio
2 Treves will further explain, too.

3 Mr President, Members of the
4 Tribunal, in addition, the Tribunal does not have
5 jurisdiction over Ukraine's claim since the claim 01:33:38
6 is based on alleged breach of immunity of naval
7 vessels in the territorial sea that UNCLOS does
8 not provide for.

9 Professor Alain Pellet will explain
10 how Article 32 of UNCLOS, that Ukraine primarily 01:33:52
11 relies on, grants no immunity to military vessels.
12 Rather it represents a deliberate choice of State
13 Parties to refrain from defining the existence and
14 scope of immunities of military vessels in the
15 territorial sea. 01:34:11

16 Professor Tullio Treves will address
17 Russia's Preliminary Objections concerning
18 Ukraine's claims, alleging breach of the ITLOS
19 order on provisional measures on 25 May 2019, and
20 aggravation of the dispute. He will demonstrate 01:34:26
21 that if the Tribunal finds that it has no
22 jurisdiction over Ukraine's primary claim, there
23 will be no jurisdiction over these additional
24 claims.

25 Finally, Mr Sergey Usoskin will 01:34:40

1 address Russia's Preliminary Objection concerning
2 the Ukraine's failure to exchange views as to the
3 means of settlement of the dispute before
4 commencing the present proceedings as required by
5 Article 283 UNCLOS.

01:34:53

6 Mr President, Members of the
7 Tribunal, this concludes my opening statement and
8 I thank you for your kind attention.

9 Mr President, may I ask you to
10 invite Mr Sam Wordsworth to the podium. Thank you
11 again.

01:35:05

12 PRESIDENT: I thank, Mr Lobach. The
13 live transmission of today's hearing will now
14 conclude.