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

Betwee 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

Tuesday, 12 October 2021
The Hague, The Netherlands

AS CORRECTED BY THE PARTIES
APPEARANCES

THE ARBITRAL TRIBUNAL:

PROFESSOR DONALD MCRAE, President
Faculty of Law, University of Ottawa
57 Louis Pasteur Street
Ottawa, Ontario K1N 6N5
Canada

Email: donald.mcrae@uottawa.ca

JUDGE GUDMUNDUR EIRIKSSON*
Jindal Global Law School
Sinpat Narela Road
Sonipat 131001, Haryana
India

Email: Geiriksson@jgu.edu.in

JUDGE RÜDIGER WOLFRUM
Max Planck Institute for Comparative Public Law
and International Law
Im Neuenheimer Feld 535
69120 Heidelberg
Germany

Email: Wofrum@mpi1.de

JUDGE VLADIMIR VLADIMIROVICH GOLITSYN*
Lomonosov Moscow State University
Faculty of Law
Leninskie Gory 1 MSU, build. 4
119991 Moscow GSP-1
Russia

Email: vgolitsyn@gmail.com

SIR CHRISTOPHER GREENWOOD, GBE, CMG, QC*
Magdalene College
Cambridge CB3 0AG
United Kingdom

Email: c.j.greenwood123@gmail.com
ON BEHALF OF THE PERMANENT COURT OF ARBITRATION:

Mr Martin Doe Rodriguez, Senior Legal Counsel
Mr Levent Sabanogullari, Legal Counsel
Mr Henry Off, Assistant Legal Counsel
Ms Ekaterina Shkarbuta, Assistant Legal Counsel
Ms Jinyoung Seok, Assistant Legal Counsel
Ms Magdalena Legris, Case Manager

COURT REPORTER:

Ms Susan McIntyre, RPR, CRR, CRC, QRR

ON BEHALF OF CLAIMANT UKRAINE:

BY:   Ms Oksana Zolotaryova, Agent
      Director, International Law Department
      Ministry of Foreign Affairs of Ukraine
      1 Mykhailivska Square
      Kyiv 01018
      Ukraine
      Tel:  +380 97 901 92 85
      Email:  oksana.zolotaryova@mfa.gov.ua

BY:   Ms Marney L. Cheek
      Mr David M. Zionts

      Covington & Burling LLP
      One City Center
      850 Tenth Street, NW
      Washington, DC  20001-4956
      United States
      Tel:  +1 202 662 6000
      Email:  mcheek@cov.com
dzionts@cov.com
      ngore@cov.com

BY:   Professor Alfred H.A. Soons

      Emeritus Professor of Public International Law, Utrecht University
      Member, Institut de Droit International
      Email:  a.h.a.soons@uu.nl
BY: Professor Jean-Marc Thouvenin

Professor, Université Paris Nanterre
Associate Member, Institut de Droit International
Sygna Partners
4 rue du Colonel Driant
75001 Paris
France

Tel: +33 1 70 39 39 39
Email: jmthouvenin@sygna-avocats.com

as counsel and advocates

ALSO PRESENT:

Mr Andrii Pasichnyk, Deputy Director,
International Law Department, Ministry of
Foreign Affairs of Ukraine,

Ms Olga Bondarenko, First Secretary,
Embassy of Ukraine in the Kingdom of the
Netherlands,

Mr George M. Mackie, Covington & Burling LLP

Ms Amanda Tuninetti, Covington & Burling LLP

Mr Volodymyr Shkilevch, Covington & Burling LLP

Ms Jill Warnock, Covington & Burling LLP

Vice Admiral Andrii Tarsov, Chief of Staff,
Deputy Commander of the Navy of the Armed
Forces of Ukraine,

Colonel Leonid Zaliubovskyi, Assistant to the
Commander of the Navy of the Armed Forces
of Ukraine for Legal Affairs, Head of the
Legal Department,

Ms Maria Bezdieniezhna, Counsellor,
International Law Department, Ministry of
Foreign Affairs of Ukraine,

Ms Svitlana Romanenko, Counsellor,
International Law Department, Ministry of
Foreign Affairs of Ukraine,

Mr Oleg Nikolenko, Spokesperson, Ministry of
Foreign Affairs of Ukraine.
ON BEHALF OF RESPONDENT the Russian Federation:

BY: Professor Alain Pellet
Emeritus Professor, University Paris Nanterre
Member, Institut de Droit International
Email: courriel@alainpellet.eu

BY: Professor Tullio Treves
Emeritus Professor, University of Milan
Member, Institut de Droit International
Curtis, Mallet-Prevost, Colt & Mosle LLP

Tel: +39 027 623 2001
Email: ttreves@curtis.com
tulliorodolfo.treves3@gmail.com

BY: Mr Samuel Wordsworth QC
Ms Amy Sander
Essex Court Chambers
24 Lincoln’s Inn Fields
London
WC2A 3EG

Tel: +44 (0)20 7813 8000
Mail: swordsworth@essexcourt.net
asander@essexcourt.net

BY: Mr Sergey Usoskin
Member of the Saint Petersburg Bar

Email: sergey.usoskin@doublebridgelaw.com

BY: Mr Vasily Torkanovskiy
Member of the Saint Petersburg Bar
Ms Sofia Sarenkova
Ivanyan and Partners Law Firm

Tel: +7 495 647 00 46
Email: vasily_torkanovskiy@iplf.ru
sofia_sarenkova@iplf.ru
ON BEHALF OF RESPONDENT the Russian Federation
CONTINUED:

BY: Ms Tessa Barsac
Master, University Paris Nanterre
Email: t.barsac@gmail.com

BY: Mr Renato Raymundo Treves
Curtis, Mallet-Prevost, Colt & Mosle LLP
Email: rtreves@gmail.com

BY: Ms Ksenia Galkina
Third Secretary
Ministry of Foreign Affairs of the Russian Federation
Email: kagalkina@mid.ru

ALSO PRESENT:

H.E. Mr Dmitry Lobach, Agent
Ambassador-at-large
Ministry of Foreign Affairs of the Russian Federation
Smolenskaya-Sennaya Square 32/34
119200 Moscow
Tel: +7 499 241 7718
Email: dlobach@mid.ru
dp@mid.ru
Tuesday, 12 October 2021

Ukraine v the Russian Federation

PRESIDENT:  Good morning. The Arbitral Tribunal will continue today its hearing in PCA Case No. 2019-28, the dispute concerning the detention of Ukrainian naval vessels and servicemen. Today Ukraine is due to present its first round of oral submissions.

Again, as was the case yesterday, this portion of the hearing is being webcast live on the internet. After the statement made by the agent for Ukraine, the webcast will end. No other parts of today's proceedings will be webcast.

I give the floor to Ms Zolotaryova to make her statement.

OPENING STATEMENT ON BEHALF OF UKRAINE

MS ZOLOTARYOVA:  Mr President, members of the Arbitral Tribunal, I am honoured to appear before you as the Agent for Ukraine.

Ukraine believes in international law. When the rules of international law are broken, we seek justice and accountability by peaceful means. That is why Ukraine came to this Tribunal. The Russian Federation has violated a fundamental principle of the Law of the Sea, the
immunity of warships. The United Nations Convention on the Law of the Sea guarantees this immunity. It means that Ukrainian naval vessels, the Nikopol, the Berdyansk and the Yani Kapu, are an expression of our sovereignty and they must be respected as such. But Russia does not respect international law. It does not respect Ukraine's sovereignty. And in this case, it did not respect the immunity of Ukraine's warships, a well-established principle of international law.

We are here to defend not just Ukraine but the rule-based international order on the seas.

Ukraine also has another reason for this case. We pursue this case for 24 of our brave servicemen who suffered because of Russia's disrespect for international law. For 9.5 months Russia took away their liberty and kept them from their families. Russia treated them as criminals. Russia detained them in poor conditions in the notorious Lefortovo Prison, and Russia forced them to sit in cages in the courts. My entire country, and the whole world, watched this with horror.

This case is about these brave Ukrainian men.

As you listen to legal arguments
this week, I ask the Tribunal to keep in mind the
names of my countrymen. They are the ones who
Russia illegally arrested, detained and prosecuted
and who deserve justice, namely Denys Hrytsenko,
Roman Mokryak, Bohdan Nebylytsia, Oleh Melnychyky, Volodymyr Lisovyy, Serhiy Popov, Andriy Drach,
Vasyl Soroka, Andriy Artemenko, Viktor Bezpalchenko, Yuriy Bezyazychnyy, Andriy Oprysko,
Volodymyr Tereschenko, Mykhailo Vlasyuk, Volodymyr Varymez, Vyacheslav Zinchenko, Andriy Eider,
Bohdan Holovash, Yevheniy Semydetskyy, Serhiy Tsybizov, Yuriy Budzylo, Andriy Shevchenko,
Vladyslav Kostyshyn, Serhiy Chyliba.

Russia does not want this Tribunal
to hear Ukraine's case. It seeks to avoid dispute settlement under UNCLOS, even though Russia consented to it. Russia believes it can violate international law without consequences. Russia is mistaken. Many of its arguments have already been rejected by the International Tribunal for the Law of the Sea. The ITLOS issued an order requiring Russia to immediately release Ukrainian warships and servicemen. It was a commonsense order, adopted by 19 votes to one. The ITLOS found prima facie jurisdiction to issue that order.
This week all Ukraine asks from the Tribunal is to follow a similar path and recognise its jurisdiction over this dispute. We believe the record before you establishes your jurisdiction beyond doubt.

Ukraine will demonstrate that Russia's attempt to escape accountability must be rejected. These attempts are not based on sound principles of international law. In fact, they are inconsistent. When it suits Russia to call something a law enforcement activity, it does so, but when they believe it helps them they say instead it is a military activity. When Russia first arrested our vessels, it involved UNCLOS as justification. But now Russia insists that UNCLOS does not govern their actions. The only point on which Russia is consistent, is that it should not be accountable for its actions.

Russia also has trouble with facts. Throughout yesterday's presentations you were told that there is no real dispute about the facts. So I was very surprised to hear a number of statements that are not based on reality. I know the record of this case and the testimony of our servicemen; they tell a very different story.
were also presented yesterday with the false
picture of what the dispute is about and an
incorrect approach to UNCLOS. Today we will show
you what the dispute actually concerns.

I should pause here to acknowledge what the whole world knows. The disputes between
Ukraine and Russia are complex and multi-faceted; many of them serious in nature. Ukraine is
witnessing blatant violations of international law by Russia on a daily basis but, even for us,
Russia's arrest of our warships was a shocking event. While our disputes are many, we are before
you to solve a narrow issue under UNCLOS regarding Russia's affront to Ukraine's sovereignty when it
arrested and detained our warships and men.

The Tribunal has jurisdiction to hear this dispute. Today we will show you why
every one of Russia's objections should be rejected. First, you will hear from Ms Marney
Cheek. She will demonstrate that this dispute does not concern military activities and,
therefore, this case is not subject to the exception from the jurisdiction under Article 298(1)(b) of the Convention. Ukraine
claims that Russia has violated the immunity of
its naval vessels. When Russia arrested those
vessels and their crew in order to prosecute them
for supposedly violating Russian law, that
immunity was violated. Russia continued to assert
criminal jurisdiction by prosecuting Ukraine's
servicemen. It detained our warships on the basis
that they were evidence in a criminal case. Such
actions are gross violations of the Law of the
Sea. Ukraine brings a claim that concerns an
unlawful attempt to invoke criminal jurisdictions
against vessels that are immune from such
jurisdiction. This is not a dispute that falls
within the Convention's military activities
exception.

Following Ms Cheek, Professor Alfred
Soons will demonstrate that Ukraine's claims of
immunity violation fall within the UNCLOS.
Specifically, he will explain that since the
immunity violations committed by Russia occurred
in the Exclusive Economic Zone in the Black Sea
they are governed by Articles 95 and 96 of the
Convention. Russia wishes to dispute the precise
location of its unlawful arrest of Ukrainian
vessels and servicemen, but this is improper at
this stage of proceeding. The proper legal
analysis is to accept the facts as brought by
Ukraine in assessing Russia's objection. In
addition to its improper factual argument, Russia
makes an untenable legal argument. Russia claims
that it was engaged in hot pursuit of warships and
that Russia has the right to chase our ships from
the territorial sea into the Exclusive Economic
Zone to arrest them. That is not what UNCLOS says
about warship immunity. Russia is wrong at every
step. The idea of hot pursuit against the warship
makes just no sense. Russia's argument is also
wrong because it would deny the immunity to
warships in the territorial sea. Although this
question is not properly before the Tribunal at
this stage, Professor Soons will show that
Article 32 of the Convention provides for such
immunity in the territorial sea.

After Professor Soons speaks,
Professor Jean-Marc Thouvenin will demonstrate
that the Tribunal also has jurisdiction over the
dispute between the parties concerning Russia's
violation of the provisional measures order and
its aggravation of the dispute.

First, he will address Russia's
failure to promptly comply with the provisional
measures under the order issued by the International Tribunal of the Law of the Sea. The order of the ITLOS in May 2019 was binding and clear. Russia was required to immediately release Ukraine's naval vessels and servicemen. But Russia continued detaining them for months after that order. This was a serious breach of Article 290 of the Convention which imposes a legal obligation to comply promptly with the provisional measures order. The Tribunal has jurisdiction over these serious violations of UNCLOS.

Professor Thouvenin will also explain how Russia has violated Article 279 of the Convention by aggravating the dispute between the parties.

Finally, Mr David Zionts will demonstrate that Ukraine satisfied its obligation to proceed to an exchange of views about the resolution of this dispute. As required by Article 283 of the Convention, Ukraine asked the Russian Federation to exchange views on resolving this dispute, but Russia delayed and would not proceed quickly to an exchange of views. Meanwhile, our servicemen remained in detention.
and faced this new violation of their immunity in Russia's courts.

Ukraine was fully justified in commencing arbitration and bringing its application for provisional measures.

Mr President, members of the Tribunal, you will see that Ukraine's grounds for invoking the Tribunal's jurisdiction are well-supported by the facts and by international law. Russia's objections are not. Russia committed serious violations of international law by violating the immunity of Ukraine's warships. The Tribunal has jurisdiction under UNCLOS to provide a remedy for this serious violation and to hold Russia to account.

The Berdyansk, Nikopol and Yani Kapu and the 24 servicemen on board were illegally arrested almost three years ago. Ukraine asks the Tribunal to promptly move to the merits of the case.

On behalf of my country, I thank you for your attention to this important case. We seek your relief so that Ukraine can finally obtain justice, accountability and compensation for our brave servicemen and defend the
well-recognised principle of absolute immunity of naval vessels.

Mr President, thank you. I now request that you invite Ms Marney Cheek to the podium.

PRESIDENT: I thank you, Ms Zolotaryova. The live transmission of today's hearing now concludes. I don't know if there is a photographer present, but we'll ask the photographer to leave. Thank you.