

PCA Case No. 2017-06

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
(APPLICANT)

- and -

THE RUSSIAN FEDERATION
(RESPONDENT)

- in respect of -

Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait

PROCEDURAL ORDER No. 3
Regarding Bifurcation of the Proceedings

ARBITRAL TRIBUNAL:

Judge Jin-Hyun Paik (President)
Judge Boualem Bouguetaia
Judge Alonso Gómez-Robledo
Judge Vladimir Golitsyn
Professor Vaughan Lowe

REGISTRY:

The Permanent Court of Arbitration

WHEREAS on 18 May 2017, the Arbitral Tribunal adopted Rules of Procedure for the present arbitration (“Rules of Procedure”);

WHEREAS in accordance with Article 13 of the Rules of Procedure, on 19 February 2018, Ukraine submitted its Memorial;

WHEREAS Article 10, paragraph 2, of the Rules of Procedure requires that “[a] plea that the Arbitral Tribunal does not have jurisdiction ... shall be raised, in writing, as soon as possible but not later than three (3) months after the date of the delivery of the Memorial ... if the Russian Federation requests that the objection/s be addressed as a preliminary matter”;

WHEREAS Article 10, paragraph 1, of the Rules of Procedure provides that “[p]ursuant to Article 288, paragraph 4, of the Convention, the Arbitral Tribunal shall have the power to rule on objections to its jurisdiction”;

WHEREAS Article 10, paragraph 4, 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 Objection does not possess an exclusively preliminary character and should be ruled upon in conjunction with the merits”;

WHEREAS in accordance with Article 10, paragraph 2, of the Rules of Procedure, on 21 May 2018, the Russian Federation submitted to the Arbitral Tribunal its Preliminary Objections dated 19 May 2018 (“Preliminary Objections”), requesting the Arbitral Tribunal “to adjudge and declare that it is without jurisdiction in respect of the dispute submitted to this Tribunal by Ukraine”;

WHEREAS the first objection of the Russian Federation is that the Arbitral Tribunal lacks jurisdiction because the Parties’ dispute in reality concerns Ukraine’s “claim to sovereignty over Crimea” and is therefore not a “dispute concerning the interpretation or application of the Convention” as required by Article 288, paragraph 1, of the Convention; and whereas, without prejudice to the first objection, the Russian Federation contends that the Arbitral Tribunal does not have jurisdiction

(i) insofar as Ukraine’s claims pertain to the Sea of Azov and the Kerch Strait, because they constitute internal waters, UNCLOS does not regulate internal waters, and the Kerch Strait is not a strait regulated by UNCLOS,

(ii) because Ukraine’s claims relate to categories listed in Article 298(1)(a)(i) and (b) of the Convention, which are excluded from the Arbitral Tribunal’s jurisdiction as a result of the Parties’ declarations made under Article 298(1),

(iii) because the dispute concerns living resources within the exclusive economic zone, excluded from the Arbitral Tribunal’s jurisdiction by the “automatic limitation” in Article 297(3)(a) of the Convention,

(iv) because both Parties made declarations choosing “an Annex VIII tribunal for the consideration of matters relating to fisheries, the protection and preservation of the marine environment, marine scientific research, and navigation”, thus excluding the jurisdiction of the present Tribunal over Ukraine’s claims relating to fisheries, protection and preservation of the marine environment, and navigation, and

(v) because the provisions on dispute settlement contained in the State Border Treaty and the Azov/Kerch Cooperation Treaty, by virtue of Article 281 of the Convention, exclude the jurisdiction of the Tribunal over Ukraine’s claims relating to the Sea of Azov, the Kerch Strait and other adjacent sea areas;

WHEREAS in its Preliminary Objections, the Russian Federation noted that “all the objections fall to be determined in a preliminary phase of the proceedings in accordance with the general principle established by Article 10(4) of the Rules of Procedure”;

WHEREAS on 28 May 2018, the Arbitral Tribunal invited Ukraine to comment on the Russian Federation’s request to deal with all objections raised by it in a preliminary phase of the proceedings by 18 June 2018;

WHEREAS on 18 June 2018, Ukraine provided comments on the Russian Federation’s request to deal with the Preliminary Objections in a preliminary phase (“Ukraine’s Comments”);

WHEREAS in its Comments, Ukraine noted that “Russia’s principal jurisdictional objection rests on the remarkable premise that it has a legal claim to sovereignty over the Crimean Peninsula” and submitted:

Russia has no plausible legal claim to sovereignty over Crimea. The Tribunal therefore cannot recognize such a claim as a basis to defeat its jurisdiction (or otherwise). Accordingly, Russia’s principal jurisdictional objection is manifestly not plausible and cannot justify the delay and risk of prejudice to Ukraine associated with a separate jurisdictional phase.

WHEREAS in its Comments, Ukraine noted that “bifurcation is also a potential source of unwarranted delay and expense” and argued:

[T]he risk of delay is especially salient in this case, where a separate jurisdictional phase would likely result in more than a year of additional legal process, and where Russia has demonstrated its intention to continue infringing Ukraine’s UNCLOS rights during the pendency of the dispute.

WHEREAS in its Comments, Ukraine further expressed its view that:

Russia’s Objections are, moreover, deeply intertwined with the merits of this case and lack an exclusively preliminary character. . . . Russia’s Objections call on the Tribunal to consider evidence relevant to the merits of Ukraine’s claims as part of a fact-bound analysis as to where the relative weight of the Parties’ disputes lies. In addition, the Tribunal would inevitably touch upon the merits were it to consider Russia’s claim that it treats the Sea of Azov and Kerch Strait as shared internal waters of the two States, in light of Ukraine’s contentions on the merits that Russia does not in fact treat those maritime areas as such. By way of further example, the Tribunal would necessarily reach facts relevant to the merits if it were to consider in detail the nature of Russia’s activities in the Black Sea and the Sea of Azov in order to determine whether they are military activities, law enforcement activities, or neither. In sum, Ukraine submits that each of Russia’s objections should be considered together with the merits.

WHEREAS Ukraine accordingly requested that, in light of “[t]he risks and harms associated with bifurcation, the *prima facie* implausibility of Russia’s principal jurisdictional objection, and the extent to which each of Russia’s objections is intertwined with the merits”, the Tribunal decline the Russian Federation’s request for bifurcation of these proceedings into a separate jurisdictional phase and instead join the Preliminary Objections to the merits;

WHEREAS on 20 June 2018, the Arbitral Tribunal invited the Russian Federation to reply to Ukraine's Comments on its request to deal with the Preliminary Objections in a preliminary phase by 4 July 2018;

WHEREAS on 4 July 2018, the Russian Federation submitted its reply to Ukraine's Comments ("Russian Federation's Reply");

WHEREAS in its Reply, the Russian Federation noted:

Article 10(4) of the Rules of Procedure ('RoP') establishes the basic rule that this Tribunal "shall rule on any Preliminary Objection in a preliminary phase of the proceedings"; it is only if the objection(s) "does not possess an exclusively preliminary character" that it could be deferred for consideration at the merits phase. This basic rule is consistent with the well-established principle that "a party should not have to give an account of itself on issues of merits before a tribunal which lacks a jurisdiction in the matter, or whose jurisdiction has not yet been established".

WHEREAS in its Reply, the Russian Federation further noted that "Ukraine appears to misunderstand the role that the plausibility standard plays and how it fits alongside the basic rule that jurisdiction in international law cases is dependent upon consent" and that "an important purpose of determination of jurisdictional objections in a preliminary phase is to ensure procedural economy and the sound administration of justice";

WHEREAS in its Reply, the Russian Federation contended that its sovereignty objection "does not raise any issues of fact at all," nor does it require "in-depth engagement with the merits"; whereas according to the Russian Federation, "[i]t is common ground" that each of the Parties considers that it is sovereign over Crimea and thus the coastal State, "and hence [...] the two States are engaged in a dispute over this critical issue of sovereignty over Crimea"; and whereas, accordingly, the Russian Federation argued that "[t]he sole question for the Tribunal is then a legal one," and this "requires no more than characterization of the dispute, which is an entirely usual exercise for an international tribunal at a jurisdictional phase";

WHEREAS in responding to Ukraine's claim that each of the Preliminary Objections is intertwined with the merits, the Russian Federation clarified that determination of its objections would involve only an assessment of Ukraine's claims as set out in its Memorial, and would not require the Arbitral Tribunal to prejudge "the dispute or some elements of the dispute on the merits";

WHEREAS in its Reply, the Russian Federation submitted that "[a]ll of Russia's Preliminary Objections turn on the scope of consent to compulsory dispute settlement within Part XV of UNCLOS and are of an exclusively preliminary character", and accordingly requested the Arbitral Tribunal to determine its Preliminary Objections in a preliminary phase of the proceedings;

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; 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 UNANIMOUSLY ISSUES THE FOLLOWING PROCEDURAL ORDER:

1. The Arbitral Tribunal considers that the Preliminary Objections of the Russian Federation appear at this stage to be of a character that requires them to be examined in a preliminary phase, and accordingly decides that the Preliminary Objections of the Russian Federation shall be addressed in a preliminary phase of these proceedings.
2. If the Arbitral Tribunal determines after the closure of the preliminary phase of the proceedings that there are Preliminary Objections that do not possess an exclusively preliminary character, then, in accordance with Article 10, paragraph 8, of the Rules of Procedure, such matters shall be reserved for consideration and decision in the context of the proceedings on the merits.
3. The proceedings on the merits are hereby suspended, and the President of the Arbitral Tribunal, after ascertaining the views of the Parties, will fix time-limits for further pleadings in accordance with Article 10, paragraph 5, of the Rules of Procedure.

Dated: 20 August 2018

For the Arbitral Tribunal:



Judge Jin-Hyun Paik
President