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RUSSIAN PERSPECTIVES ON INTERNATIONAL LAW SYMPOSIUM

## Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov

### Part III: The Jurisdiction of the Arbitral Tribunal

DMYTRO KOVAL — VALENTIN J. SCHATZ — 15 January, 2018



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In our [first](#) and [second](#) post, we have considered the status of the Sea of Azov and Kerch Strait and, on that basis, identified passage rights of Ukraine that could potentially feature in the proceedings before the arbitral tribunal established under Annex VII of UNCLOS. In our present and last post, we inquire if (or to what extent) these potential Ukrainian claims could fall within the jurisdiction of the arbitral tribunal. These were: Under Scenario 1 (Sea of Azov as shared bay regime of internal waters), customary rights of coastal State sovereignty in Crimea's internal waters, customary passage rights, and rights of navigation under the Cooperation Agreement. Under Scenario 2 (Sea of Azov as a normal bay with territorial seas of both States), passage rights under the Cooperation Agreement, coastal State rights in the territorial Sea of Crimea (Part II of UNCLOS) and rights of transit passage or non-suspendable innocent passage through Kerch Strait under Articles 38(1) or 45(1)(b) UNCLOS.

Based on this assessment of potential claims, there are at least four potential obstacles to the arbitral tribunal's jurisdiction which we will address in turn. Again, it is beyond the scope of this blog post to offer a final conclusion of all issues raised in the course of the analysis.

#### *The Arbitral Tribunal's Jurisdiction under Article 288 UNCLOS*

Under Article 288(1) UNCLOS, the arbitral tribunal has jurisdiction "over any dispute concerning the interpretation or application of [UNCLOS]". This restricts the arbitral tribunal's jurisdiction *ratione materiae* to claims which are based on provisions of UNCLOS. While sources of relevant law other than UNCLOS do form part of the applicable law under Article 293 UNCLOS, they cannot by themselves form the basis of a claim that is not connected to a provision of UNCLOS. Jurisdiction over disputes concerning the interpretation or application of other agreements related to the purposes of UNCLOS, such as the Cooperation Agreement, would only exist if these agreements contained compromissory clauses referring such disputes to dispute settlement under UNCLOS (see Article 288(2)). This, however, is not the case for any of the bilateral agreements cited above, which means that Ukraine's claims under the Cooperation Agreement, the Safety and Navigation Agreement, and the FCN-Treaty do not fall within the arbitral tribunal's jurisdiction *ratione materiae*. Equally, claims based solely on customary international law are excluded from the scope of Part XV. Unless the arbitral tribunal finds a way to link such claims to provisions of UNCLOS, this arguably removes potential claims of Ukraine based on its customary coastal State rights in its internal waters as well as potential passage rights under customary international law (in both Scenarios for the status of the Sea of Azov and Kerch Strait explained in our second post).

#### *Russia's Declaration under Article 298(1)(a) UNCLOS*

Russia has, by way of declaration under Article 298(1)(a) UNCLOS, excluded any disputes "involving historic bays or titles" from the applicability of the compulsory dispute settlement mechanism of Part XV. On that basis, Russia might argue that any claims concerning Kerch Strait and the Sea of Azov involve such questions which, if true, would deprive the arbitral tribunal of jurisdiction in that respect. While we

will refrain from discussing whether this argument would be successful, it should be noted that claims concerning historic bays have not been extinguished by UNCLOS *per se*. In any case, classifying the Sea of Azov as a historic bay would arguably mean to limit Ukraine's potential claims to those based on customary international law, which in turn would probably not fall within the limited scope of Article 288(1) UNCLOS.

### *The Problem of Incidental Sovereignty Questions*

Any question concerning Russia's alleged usurpation of coastal State rights in the waters off Crimea in Kerch Strait and the Sea of Azov (irrespective of their classification as internal waters or territorial sea) would necessarily require the arbitral tribunal to address, as an incidental question based on the principle that "the land dominates the sea", whether territorial sovereignty over Crimea belongs to Ukraine or Russia. However, according to prevailing opinion among scholars and Annex VII tribunals (here and here), territorial sovereignty disputes are (at least in most cases) excluded from jurisdiction *ratione materiae* under Part XV of UNCLOS as they do not constitute disputes concerning the interpretation and application of UNCLOS. If one follows that view in the case of *Ukraine vs. Russia*, the arbitral tribunal would only have jurisdiction over issues which do not require an incidental decision on sovereignty over Crimea. This would exclude the question of Ukraine's coastal State rights in the Crimean territorial sea, which otherwise would have been included by Article 288(1) UNCLOS. In light of the previously settled nature of the sovereignty question concerning Crimea and the Russian annexation after the entry into force of UNCLOS (this "issue of timing" might potentially reduce the "weight" of the sovereignty dispute compared to considerations of effectiveness), it is debatable whether it should not be distinguished from previous cases. While further in-depth consideration (which we are unable to provide here) is necessary to look into the validity of each of these considerations, the question of an interpretation of Part XV which gives preference to the effectiveness of the dispute settlement mechanism and which is less vulnerable to abuse can at least be raised.

### *Overriding Dispute Settlement Mechanisms in Relevant Agreements*

Finally, as has been pointed out by Tzeng, relevant agreements may potentially contain dispute settlement clauses which constitute agreements of Russia and Ukraine “to seek settlement of the dispute by a peaceful means of their own choice” which “exclude any further procedure”, thus posing an obstacle to jurisdiction under Article 281(1) UNCLOS. It is beyond the scope of this post to provide an exhaustive analysis of the dispute settlement clauses in these bilateral agreements (Article 4 Cooperation Agreement, Article 7 Safety of Navigation Agreement, Article 37 FCN-Treaty). Suffice to say that they all refer to consultations and negotiations rather than binding forms of dispute settlement and that, at first sight, none of them seems to satisfy the requirements of Article 281(1) UNCLOS.

### *Conclusion*

Given all these obstacles, arguably only one of potential Ukraine’s potential passage rights falls within the jurisdiction of the arbitral tribunal. This would be a claim to transit passage or innocent passage under Article 37 or 45(1)(b) UNCLOS. Such a passage right would both arise directly from UNCLOS and would not depend on an incidental question of territorial sovereignty over Crimea. This claim can, however, only be successful under Scenario 2 and, in addition, if Kerch Strait is also a strait “used for international navigation” in the functional sense.

As we have shown, *Ukraine v. Russia* is a treasure trove of intricate legal questions both with regard to substantive law and the arbitral tribunal’s jurisdiction. We have argued that while Ukraine can potentially claim violations by Russia of passage rights arising from several sources, it is uncertain whether any of these claims might actually fall within the jurisdiction *ratione materiae* of the Annex VII tribunal. Many legal issues revolve around the key question of whether Kerch Strait and the Sea of Azov constitute internal waters or not. It remains to be seen whether the arbitral tribunal will cease the chance to clarify the applicable regime and to resolve – if not the sovereignty dispute over Crimea – the question of Ukraine’s passage rights under the *status quo*.

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