

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 a -

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

**PROCEDURAL ORDER No. 2
Regarding Confidentiality**

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 12 May 2017, a first procedural meeting with the Parties was held at the premises of the Permanent Court of Arbitration (“PCA”) at the Peace Palace in The Hague; and whereas, at that meeting, issues relating to confidentiality were considered;

WHEREAS on 18 May 2017, the Arbitral Tribunal adopted the Rules of Procedure; and whereas Article 27, paragraph 7, of the Rules of Procedure provides that “[t]he Arbitral Tribunal, after ascertaining the views of the Parties, shall adopt procedures for the protection of confidential information in the present proceedings, including through appropriate arrangements at hearings and through redactions to the Parties’ pleadings and documentary evidence, the Arbitral Tribunal’s procedural orders and awards, and any hearings transcripts”;

WHEREAS by letter dated 27 November 2017, the Arbitral Tribunal invited comments from both Parties on a draft of this Procedural Order;

WHEREAS by letters dated 8 December 2017, the Agents for Ukraine and the Russian Federation submitted their views with regard to the draft Order;

WHEREAS by letters dated 18 December 2017, the Agents for Ukraine and the Russian Federation provided comments on the correspondence received from the other Party;

NOW, THEREFORE, the Arbitral Tribunal, having ascertained the views of the Parties, adopts the Procedural Order on Confidentiality.

A. CONFIDENTIAL INFORMATION

1. Definition of Confidential Information

Confidential Information shall be any information not in the public domain that is designated as such by a Party on one of the following grounds:

- a. commercial or technical confidentiality;
- b. special political or institutional sensitivity (including information that has been classified as secret by a government or a public international institution);
- c. information in relation to which a Party owes an obligation of confidence to a third party;
- d. personal data.

2. Treatment of Confidential Information in the Parties’ Written Pleadings

Confidential Information contained in the Parties’ written pleadings shall be treated as follows:

- a. A Party may designate documents containing Confidential Information by marking them with the phrase “Contains Confidential Information”. Any Confidential Information within the document shall be identified clearly by placing it in square brackets (“[...]”) or highlighting it by other appropriate means.
- b. Any document containing Confidential Information shall be submitted in accordance with the procedural calendar. A redacted version of the document shall be submitted within 21 days thereafter.

- c. If a Party objects in writing to the other Party's designation of information as Confidential Information within 21 days after the submission of that information, or if a Party wishes to designate as Confidential Information any document or any part of a document submitted by the other Party within the same time period, the following procedures shall apply:
 - i. If the Parties do not reach agreement, either Party may make an application to the Tribunal within 14 days after the objection or request for designation is received.
 - ii. The submitting Party shall have 14 days to respond to the other Party's application.
 - iii. The Arbitral Tribunal shall decide whether the information was properly designated, or should be designated as Confidential Information. Until such decision, the information shall be treated as Confidential Information.
- d. If the Arbitral Tribunal decides that the information was not properly designated, or should be designated as Confidential Information, the submitting Party shall have the opportunity either to remove or make the designation (as the case may be), or to withdraw the information from the record within 7 days.

3. Treatment of Confidential Information in Hearings and Transcripts

Confidential Information used or discussed at hearings shall be treated as follows:

- a. Where Confidential Information is used or discussed at any hearing, the Arbitral Tribunal shall restrict access to that portion of the hearing to members of the Arbitral Tribunal and officials of the Registry; experts retained by the Arbitral Tribunal; the Parties and their counsel; independent experts or consultants retained by the Parties; court reporters and other hearing staff.
- b. Transcripts of those portions of the hearing in which Confidential Information is used or discussed shall be redacted to remove such Confidential Information prior to being made public. Full unredacted transcripts will be retained in the case file.
- c. Prior to the publication of hearing transcripts pursuant to Article 27, paragraph 4, of the Rules of Procedure, each Party shall have the opportunity to redact Confidential Information within 14 days after the last day of the hearing to which they relate. To the extent that the other Party objects to any of the proposed designations within 14 days after such designation, the procedure set out in Section A.2.c.i-iii shall apply *mutatis mutandis*,

4. Treatment of Confidential Information in the Arbitral Tribunal's Awards and Orders

Confidential Information contained in the Arbitral Tribunal's awards and orders shall be treated as follows:

- a. Each Party may propose within 21 days after the receipt of any award or within 7 days after the receipt of any order from the Arbitral Tribunal the designation of any parts of such documents as Confidential Information. To the extent that the other Party objects to any of

the proposed designations within 14 days (for awards) or 7 days (for orders), the procedure set out in Section A.2.c.i-iii shall apply *mutatis mutandis*.

- b. The Arbitral Tribunal shall remain constituted for the purpose of making any order under this Section in relation to its final award or other final decision.

5. Non-Disclosure or Use of Confidential Information

No information or material designated as Confidential by a Party shall be used by any person who obtains access to such information or material as a consequence of its submission in this arbitration for purposes other than this arbitration, *inter alia*, in any other judicial proceedings, whether domestic or international.

B. RESTRICTED INFORMATION

1. Definition of Restricted Information

Restricted Information shall be any Confidential Information the disclosure of which to the other Party would seriously affect a Party's national interests. The designation of Restricted Information shall only be used in exceptional circumstances where wider disclosure of information would give rise to a real risk of material prejudice to a Party's national interests.

2. Treatment of Restricted Information

A Party may rely on information designated as Restricted Information in its written pleadings. The Party shall indicate in the pleadings which specific contentions of fact it intends to prove by reference to documents containing Restricted Information by placing the alleged reference to Restricted Information in double square brackets ("[[...]]"). The Party shall also prepare a "Log of Restricted Information", in which it shall describe the nature of the information so designated and the grounds on which the designation is based, including an explanation as to how disclosure would give rise to a real risk of material prejudice to its national interest.

Where a pleading contains information that is designated as Restricted Information, the Party shall, at the time of filing, provide the Registry with twenty (20) paper copies and twenty (20) USB flash drives of the redacted version of the pleading and the Log of Restricted Information, as well as one (1) paper copy and one (1) USB flash drive of the unredacted original version. The Registry shall safely store the unredacted original version, and transmit to the Arbitral Tribunal and the other Party copies of only the redacted version and the Log of Restricted Information.

Following receipt of a pleading containing information that is designated as Restricted Information, the Arbitral Tribunal, after ascertaining the views of the Parties, shall decide the modalities of treating such Restricted Information, including the extent to which it shall be made available to the Arbitral Tribunal or the other Party.

In the event that either Party intends to rely on Restricted Information at the hearing, that Party shall notify the Arbitral Tribunal and the other Party at least 30 days prior to the hearing. The Arbitral Tribunal, after ascertaining the views of the Parties, shall decide the modalities for the use and protection of such Restricted Information at the hearing.

C. GENERAL PROVISIONS

1. The time periods set out in this Procedural Order may be amended by agreement of the Parties, or by an order of the Arbitral Tribunal after ascertaining the views of the Parties and taking into account all relevant circumstances.
2. This Procedural Order supplements the provisions on transparency and confidentiality contained in the Rules of Procedure, and shall apply in conjunction with such provisions.
3. The provisions of this Procedural Order shall remain in effect after the conclusion of this arbitration, unless the Tribunal determines otherwise in the final award or by a further procedural order, or unless the Parties agree otherwise.

Dated: 18 January 2018

For the Arbitral Tribunal:



Judge Jin-Hyun Paik
President