

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

and

THE RUSSIAN FEDERATION

in respect of a

**DISPUTE CONCERNING COASTAL STATE RIGHTS
IN THE BLACK SEA, SEA OF AZOV, AND KERCH STRAIT**

Volume I - PRELIMINARY OBJECTIONS OF THE RUSSIAN FEDERATION

ARBITRAL TRIBUNAL:

**Judge Jin-Hyun Paik, President
Judge Boualem Bouguetaia
Judge Alonso Gómez-Robledo
Judge Vladimir Golitsyn
Professor Vaughan Lowe, QC**

REGISTRY:

The Permanent Court of Arbitration

19 May 2018

INDEX OF MATERIALS

Volume I Preliminary Objections of the Russian Federation

Volume II Exhibits

Volume III Legal Authorities (in electronic form only)

page intentionally left blank

TABLE OF CONTENTS

CHAPTER 1 INTRODUCTION	1
I. Three preliminary observations	1
II. Organisation of Russia’s Preliminary Objections	5
CHAPTER 2 THE TRIBUNAL HAS NO JURISDICTION OVER UKRAINE’S SOVEREIGNTY CLAIM.....	9
I. Characterisation of the dispute: Ukraine’s claim to sovereignty over Crimea.....	9
A. Ukraine’s Statement of Claim.....	11
B. Contemporaneous statements of Ukraine	12
C. Ukraine’s Memorial	14
II. Application of Article 288(1)	18
A. Scope of Article 288(1).....	19
B. Article 288(1) and Ukraine’s claim	21
CHAPTER 3 THE TRIBUNAL HAS NO JURISDICTION OVER CLAIMS CONCERNING ACTIVITIES IN THE SEA OF AZOV AND IN THE KERCH STRAIT ..	
.....	25
I. The Sea of Azov and the Kerch Strait are internal waters.....	25
A. The Sea of Azov and the Kerch Strait before the dissolution of the USSR: uncontested internal waters.....	26
B. The status of internal waters remained unchanged after the dissolution of the USSR and the independence of Ukraine.....	29
1. Ukraine’s position in the Memorial	29
2. The position of Ukraine must be rejected: after 1991 the Sea of Azov and the Kerch Strait remained internal waters	30
3. International case law and practice confirm that there can be bays with more than one coastal State consisting of internal waters	31
4. The practice of Russia and Ukraine is consistent with the internal waters status of the Sea of Azov and the Kerch Strait	33

5. Russia and Ukraine have also acquired historic title to the Sea of Azov and the Kerch Strait.....	34
C. Ukraine’s unilateral practice consistently supports the internal waters status of the Sea of Azov and the Kerch Strait.....	35
II. The Tribunal lacks jurisdiction because the waters of the Sea of Azov and the Kerch Strait are not regulated by UNCLOS	39
A. UNCLOS does not regulate internal waters.....	39
B. The Kerch Strait is not a strait regulated by UNCLOS	42
C. Disputes concerning internal waters are not covered by the Tribunal’s jurisdiction	43
 CHAPTER 4 THE TRIBUNAL HAS NO JURISDICTION IN LIGHT OF THE PARTIES’ DECLARATIONS UNDER ARTICLE 298(1) OF UNCLOS.....	
I. The Tribunal has no jurisdiction over military activities and law enforcement activities	46
A. The Tribunal has no jurisdiction since the dispute concerns military activities	46
B. The Tribunal has no jurisdiction over claims concerning law enforcement activities	50
II. The Tribunal has no jurisdiction over delimitation related claims.....	52
A. Scope of the optional exception to binding settlement in Article 298(1)(a)(i) of UNCLOS.....	52
B. Ukraine’s alleged rights cannot be determined without prior delimitation of the maritime areas concerned	55
III. The Tribunal has no jurisdiction over historic bays or titles	59
 CHAPTER 5 THE TRIBUNAL HAS NO JURISDICTION OVER FISHERIES CLAIMS IN LIGHT OF ARTICLE 297(3)(A) OF UNCLOS	
I. Scope of the automatic limitation to a binding settlement in Article 297(3)(a) of UNCLOS	61
II. Article 297(3)(a) and Ukraine’s claims relating to fisheries	63

CHAPTER 6 THE TRIBUNAL HAS NO JURISDICTION OVER FISHERIES, PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT, AND NAVIGATION IN LIGHT OF ANNEX VIII.....	67
I. The choice of means for dispute settlement made by the Parties.....	67
II. Article 287 and the principle of <i>lex specialis</i>	69
III. Ukraine’s claims relating to fisheries, protection and preservation of the marine environment, and navigation are covered by Annex VIII.....	72
CHAPTER 7 THE TRIBUNAL HAS NO JURISDICTION PURSUANT TO ARTICLE 281 OF UNCLOS	73
I. Agreement reflected in the bilateral treaties between Russia and Ukraine requires recourse to negotiations, and Ukraine failed to satisfy this condition	74
A. Pursuant to Article 281 of UNCLOS States may exclude or condition jurisdiction of an Annex VII tribunal.....	74
B. In the State Border Treaty and the Azov/Kerch Cooperation Treaty the Parties agreed to settle their disputes by negotiations	74
1. The agreement covers all disputes relating to the Sea of Azov and the Kerch Strait and adjacent sea areas in the Black Sea	75
2. The obligation to have “settlement of questions ... effected by agreement of the Parties” includes an obligation to engage in negotiations to settle disputes.....	76
C. Ukraine failed to engage in good faith negotiations to settle the disputes.....	77
II. The agreement reflected in the State Border Treaty and the Azov/Kerch Cooperation Treaty excludes recourse to Part XV procedures.....	81
III. The State Border Treaty and the Azov/Kerch Cooperation Treaty provisions on dispute settlement exclude jurisdiction of this Tribunal over claims relating to the Sea of Azov, the Kerch Strait and other adjacent sea areas	84
CHAPTER 8 SUBMISSION.....	87

page intentionally left blank

CHAPTER 1 INTRODUCTION

1. In accordance with Article 10 of the Rules of Procedure adopted by the Tribunal on 18 May 2017, the Russian Federation (“Russia”) submits these Preliminary Objections in which it requests the Tribunal to find that it is without jurisdiction in respect of the dispute submitted to the Tribunal by Ukraine.

2. In **Section I** of this Introduction, Russia makes certain important preliminary observations, including on the correct approach to the characterisation of the purported dispute on the law of the sea that Ukraine has sought to put before the Tribunal. In **Section II**, Russia outlines the objections that it makes, it being 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.¹

I. Three preliminary observations

3. Ukraine has put before the Tribunal a dispute that purports to merely concern law of the sea issues. According to Ukraine, the dispute concerns its “coastal State rights in the Black Sea, Sea of Azov and Kerch Strait”.² Russia makes three preliminary observations as to the issue of jurisdiction over this dispute.

4. First, whether or not Ukraine has “coastal State rights” depends entirely on whether or not Ukraine is sovereign over the land territory of Crimea. Ukraine maintains that its case focuses upon “violations of Ukraine’s sovereignty and sovereign rights within Ukraine’s maritime zones in the Black Sea, Sea of Azov, and Kerch Strait”.³ However, this merely

¹ Pursuant to Article 10(4) of the Rules of Procedure: “The 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.”

² Notification under Article 287 and Annex VII, Article 1 of UNCLOS and Statement of the Claim and Grounds on which it is Based (“Statement of Claim”), title and also paras. 1 and 2. See also Memorial of Ukraine (“UM”), para. 1.

³ UM, para. 8.

reinforces the basic point that Ukraine’s claim necessitates a prior determination of which State is in fact sovereign in the identified maritime zones.

5. The Tribunal has to determine whether it has jurisdiction to decide such a claim. In making that determination it is for this Tribunal to characterise the dispute and it is well-established that an international court or tribunal is not bound by the characterisation of a claimant State. For example, as stated by the International Court of Justice (“ICJ”) in *Fisheries Jurisdiction (Spain v. Canada)*:

“It is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties:

‘[I]t is the Court’s duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions.’ (*Nuclear Tests (New Zealand v. France)*, *Judgment*, *I.C.J. Reports 1974*, p. 466, para. 30; see also *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, *Order of 22 September 1995*, *I.C.J. Reports 1995*, p. 304, para. 55.)

...

The Court will itself determine the real dispute that has been submitted to it (see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1995*, pp. 24-25). It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence (see *Nuclear Tests (Australia v. France)*, *Judgment*, *I.C.J. Reports 1974*, pp. 262-263).⁴

6. So far as concerns the current case, the exercise of characterisation is of importance because the jurisdiction of the Tribunal is defined and limited by the relevant provisions of the United Nations Convention on the Law of the Sea (“UNCLOS”), in particular Article 288(1),

⁴ *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment*, *I.C.J. Reports 1998*, p. 448, paras. 30-31 (**RUL-22**). Cited with approval in *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award on Jurisdiction and Admissibility, 29 October 2015, para. 150 (**UAL-3**) and *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, para. 208 (**UAL-18**) (respectively referred to hereinafter as *Philippines v. China* and *Mauritius v. UK*).

which is the sole provision on which Ukraine relies to found jurisdiction.⁵ Article 288(1) provides:

“A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the *interpretation or application of this Convention* which is submitted to it in accordance with this Part.”⁶

7. Accordingly, a key question for the Tribunal in the present case is whether or not the real dispute concerns the “interpretation or application of the Convention”. It does not, and the Tribunal lacks jurisdiction accordingly. In this respect, the core of Ukraine’s claim turns on, and is rooted in, a pre-supposition of unlawful conduct by Russia in Crimea in 2014. In Ukraine’s Statement of Claim and Memorial, there are repeated references to an alleged “annexation”⁷ and an “unlawful invasion”.⁸ Russia vigorously challenges and denies those accusations.⁹ In any event, however, these are plainly not matters for the present Annex VII Tribunal. The key – indeed defining – issue of disputed land sovereignty cannot somehow be bypassed by asserting that Russia is an aggressor and, as developed in Chapter 2 below and as has already been confirmed in other Annex VII arbitral proceedings, such an issue falls outside the scope of Article 288(1).¹⁰

8. Secondly, it is important to identify, albeit as an entirely separate matter, that both Parties have made extensive declarations pursuant to Article 298 of UNCLOS, limiting the potential scope of compulsory jurisdiction under Part XV. The respective texts of the Parties’ declarations made on ratification are as follows:

Russia: “The Russian Federation declares that, in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by

⁵ Statement of Claim, para. 47: “Ukraine therefore submits this dispute with the Russian Federation concerning the interpretation or the application of the Convention to an arbitral tribunal constituted in accordance with Annex VII, which has jurisdiction over the dispute under Article 288(1)”. See also UM, paras. 15-16.

⁶ Emphasis added.

⁷ Statement of Claim, paras. 2, 4, and 42; UM, paras. 83 and 169.

⁸ UM, paras. 8 and 102.

⁹ See further below para. 10 and Chapter 2 at para. 61.

¹⁰ See further Chapter 2.

government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.”

Ukraine: “Ukraine declares, in accordance with article 298 of the Convention, that it does not accept, unless otherwise provided by specific international treaties of Ukraine with relevant States, the compulsory procedures entailing binding decisions for the consideration of disputes relating to sea boundary delimitations, disputes involving historic bays or titles, and disputes concerning military activities.”

Ukraine’s Memorial fails to take any proper account of the extensive declarations.¹¹

9. Thirdly, it is emphasized that in the present Preliminary Objections Russia does not respond to issues related to the substance of Ukraine’s claims. This pleading is confined to objections on jurisdiction only. Insofar as certain matters of a factual nature are referred to herein, this is done solely for the purpose of Russia’s contentions on jurisdiction.

10. As a matter of record, however, Russia categorically denies the allegations that it “invaded and occupied the Crimean Peninsula, and then purported to annex it”.¹² The *coup d’état* in Kiev in February 2014 provoked deep division in the Ukrainian society. A large portion of the population, especially in those regions of Ukraine that historically have close ties with Russia, did not support the nationalist takeover with ensuing violence and political chaos. Yet, their dissent was brutally repressed by right-wing radicals.¹³

11. Following the *coup d’état* in Kiev in February 2014, the authorities of Crimea decided to hold a referendum on the future of the peninsula. The choice of the Crimeans, as expressed on 16 March 2014, was clear: the majority of voters (96,77 % with a turnout of 83,1 %) ¹⁴ opted

¹¹ See UM, para. 17 and fn. 30.

¹² UM, para. 102.

¹³ “Right-Wing Thugs Are Hijacking Ukraine’s Liberal Uprising”, *Time.com*, 28 January 2014, available at <http://world.time.com/2014/01/28/ukraine-kiev-protests-thugs> (RU-27); “Exclusive: Leader of Far-Right Ukrainian Militant Group Talks Revolution with Time”, *Time.com*, 4 February 2014, available at <http://time.com/4493/ukraine-dmitri-yarosh-kiev> (RU-26); “Far-Right party jeopardises Ukraine’s path to democracy”, *The Conversation*, 7 March 2014, available at <http://theconversation.com/far-right-party-jeopardises-ukraines-path-to-democracy-23999> (RU-29); “Ukraine protests are no longer just about Europe”, *The Guardian*, 22 January 2014, available at <https://www.theguardian.com/commentisfree/2014/jan/22/ukraine-protests-europe-far-right-violence> (RU-25).

¹⁴ “All-Russia People’s Front: High voter turnout points to legitimacy of Crimea referendum”, *Tass Russian News Agency*, 17 March 2014, available at <http://tass.com/russia/723961> (RU-32).

for reunification with Russia.¹⁵ In accordance with the will of people, Crimea declared its independence on 17 March 2014¹⁶ and on 18 March it concluded an international treaty on accession to Russia.¹⁷

12. Following Crimea's accession, Russia assumed all the rights and duties of the coastal State in relation to the waters adjacent to the peninsula. Internationally, Russia unconditionally affirmed its status as a coastal State in relation to waters surrounding Crimea, taking full responsibility for the implementation therein of the relevant rules of international law, including, where applicable, UNCLOS.¹⁸

II. Organisation of Russia's Preliminary Objections

13. **Chapter 2** explains that the real issue in this case concerns sovereignty over land territory (i.e., sovereignty over Crimea). The dispute regarding territorial sovereignty, however framed, is not a "dispute concerning the interpretation or application" pursuant to Article 288(1) of UNCLOS. The Tribunal does not have jurisdiction with respect to that dispute and, accordingly, the current claim.

14. The further objections made by Russia in Chapters 3 – 7 are without prejudice to this first objection, which Russia considers of fundamental and systemic importance.

15. **Chapter 3** explains why disputes concerning activities in the Sea of Azov and in the Kerch Strait are outside the scope of the Tribunal's jurisdiction. This is because, despite Ukraine's submission to the contrary,¹⁹ the Sea of Azov and the Kerch Strait are internal waters, and a dispute concerning activities in internal waters is not a "dispute concerning the

¹⁵ Crimea first became part of Russia in 1783.

¹⁶ Resolution "On the Independence of the Crimea" taken at an extraordinary plenary session of the Supreme Soviet of the Autonomous Republic of Crimea on 17 March 2014, available at <http://crimea.gov.ru/act/11748> (RU-33).

¹⁷ "Agreement on the accession of the Republic of Crimea to the Russian Federation signed", 18 March 2014, available at <http://en.kremlin.ru/d/20604> (RU-34).

¹⁸ Communication from the Government of the Russian Federation as per IMO Circular Letter No.3471, 7 July 2014 (RU-36). See also Notices to Mariners No.43/2014, 25 October 2014, available at https://structure.mil.ru/files/morf/military/files/NM_1443%281%29.PDF (RU-37).

¹⁹ Ukraine holds that, since its independence, the waters of the Sea of Azov are not internal, but include a Ukrainian territorial sea, EEZ and continental shelf (UM, para. 26).

interpretation or application” of UNCLOS. For the avoidance of doubt, all other preliminary objections submitted by Russia are without prejudice to its position that the Sea of Azov and the Kerch Strait are internal waters.

16. **Chapter 4** addresses the impact of the Parties’ declarations pursuant to Article 298 of UNCLOS. It explains that even if there were a “dispute concerning the interpretation or application” of UNCLOS (there is not), the Parties’ declarations pursuant to Article 298 exclude any compulsory procedures over disputes concerning military activities or law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297(3) (**Section I**), sea boundary delimitations (**Section II**) and disputes involving historic bays or titles (**Section III**).

17. **Chapter 5** addresses those aspects of Ukraine’s claim that fall under the automatic limitation provided for in Article 297(3)(a) of UNCLOS, which excludes the settlement of any dispute relating to Russia’s sovereign rights or their exercise with respect to the living resources in the exclusive economic zone (“EEZ”).

18. **Chapter 6** sets out why, as a further and separate matter, the Tribunal does not have jurisdiction over fisheries, protection and preservation of the marine environment, and navigation. This is because both Russia and Ukraine have, pursuant to Article 287(1) of UNCLOS, opted for a special arbitral tribunal constituted in accordance with Annex VIII for the consideration of those matters.

19. **Chapter 7** explains that, in any event (and without prejudice to the aforementioned preliminary objections), the Tribunal’s jurisdiction is restricted pursuant to Article 281 of UNCLOS. This is because, pursuant to two bilateral treaties, there is a previously agreed procedure for the settlement of disputes relating to the Sea of Azov, the Kerch Strait and adjacent sea areas in the Black Sea, and recourse to any other procedure is excluded. The two bilateral treaties relied upon are the Treaty between Ukraine and Russia on the Russian-Ukrainian Border (the “State Border Treaty”)²⁰ and the Treaty on Cooperation in the Use of

²⁰ Treaty between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, 28 January 2003 (RU-19).

the Sea of Azov and the Kerch Strait (the “Azov/Kerch Cooperation Treaty”).²¹ Further, Ukraine has failed to engage in genuine negotiations with Russia concerning the dispute it seeks to submit to this Tribunal, thus failing to satisfy a separate precondition to the Tribunal’s jurisdiction pursuant to Article 281 of UNCLOS and the relevant bilateral treaties.

20. The Preliminary Objections conclude with Russia’s formal **Submission (Chapter 8)**.

²¹ Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, 24 December 2003 (**RU-20**).

page intentionally left blank

CHAPTER 2
THE TRIBUNAL HAS NO JURISDICTION OVER UKRAINE’S SOVEREIGNTY
CLAIM

21. As set out in Chapter 1,²² it is for the Tribunal to identify the dispute before it.
22. As developed in further detail in **Section I** below, the dispute in this case concerns Ukraine’s claim to sovereignty over Crimea. This was manifest from Ukraine’s description of the dispute in the Statement of Claim: “Dispute concerning *coastal State rights* in the Black Sea, Sea of Azov and Kerch Strait”.²³ It is also manifest from the description of the case in the Introduction to Ukraine’s Memorial, where it is said: “This case focuses instead upon ... violations of Ukraine’s sovereignty and sovereign rights within Ukraine’s maritime zones in the Black Sea, Sea of Azov, and Kerch Strait”.²⁴ The prerequisite to determining the claim that Ukraine puts forward is the determination of who has “coastal State rights”, i.e., whether or not Ukraine is the coastal State with sovereignty (and sovereign rights) in the appurtenant maritime zones.
23. As developed in further detail in **Section II**, the jurisdiction of this Tribunal is established by, and limited to, disputes “concerning the interpretation or application of this Convention” pursuant to Article 288(1).²⁵ There is thus an inevitable and critical issue for the Tribunal as to whether it has jurisdiction under Article 288(1) to decide the issue of who has “coastal State rights”. Russia will show in the present Chapter that the Tribunal does not, and that it lacks jurisdiction to decide the claim that has been put before it.

I. Characterisation of the dispute: Ukraine’s claim to sovereignty over Crimea

24. Ukraine has sought to characterize the dispute as concerning law of the sea issues. The Tribunal is not, however, confined by Ukraine’s characterization of the dispute, and it is well-

²² See above, paras. 4-7.

²³ Emphasis added.

²⁴ UM, para. 8. See also the very first sentence of the Memorial: “As a littoral State of the Black Sea, Sea of Azov, and Kerch Strait, Ukraine enjoys the rights and bears the responsibilities accorded to *coastal States* by the United Nations Convention on the Law of the Sea” (emphasis added).

²⁵ See Statement of Claim, para. 47; UM, paras. 15-16. See above, Chapter 1, para. 6.

established that international courts and tribunals can and must identify the real dispute before them.²⁶ Indeed, this is plain from the recent Annex VII arbitrations where there has been a question as to whether the claimant State was seeking resolution of an underlying dispute as to territorial sovereignty:

(a) In *Philippines v. China*, the Tribunal had regard to “whether (a) the resolution of the [Claimant’s] claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the [Claimant’s] claims was to advance its position in the Parties’ dispute over sovereignty”.²⁷

(b) The Tribunal in *Mauritius v. UK* addressed the issue of characterization in a similar vein, focusing on where “the relative weight of the dispute lies”.²⁸

25. As will be demonstrated below, the claim as advanced by Ukraine would require the Tribunal first to render a decision on sovereignty over Crimea, either expressly or implicitly, while the actual objective of Ukraine’s claims is in fact to advance its position in the Parties’ dispute over Crimean sovereignty. To similar effect, the relative weight of the dispute lies (overwhelmingly) with that sovereignty dispute.

26. In demonstrating the central nature of the disputed territorial sovereignty issue to the current claim, Russia considers Ukraine’s Statement of Claim (**sub-section A**), contemporaneous statements of Ukraine (**sub-section B**), and Ukraine’s Memorial (**sub-section C**).

²⁶ See above, para. 5.

²⁷ *Philippines v. China*, Award on Jurisdiction and Admissibility, para. 153 (UAL-3).

²⁸ *Mauritius v. UK*, para. 211: “For the purpose of characterizing the Parties’ dispute, however, the Tribunal must evaluate where the relative weight of the dispute lies. Is the Parties’ dispute primarily a matter of the interpretation and application of the term ‘coastal State’, with the issue of sovereignty forming one aspect of a larger question? Or does the Parties’ dispute primarily concern sovereignty, with the United Kingdom’s actions as a ‘coastal State’ merely representing a manifestation of that dispute? In the Tribunal’s view, this question all but answers itself.” (UAL-18).

A. UKRAINE'S STATEMENT OF CLAIM

27. In its Statement of Claim, Ukraine has framed the dispute, and put forward its claim, on the basis of an alleged infringement of its rights as a coastal State. The assertion of such rights is predicated on a claim to sovereignty over the land territory of Crimea.²⁹

28. The Statement of Claim is entitled “*Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*”.³⁰ In the opening paragraphs, Ukraine explains that it “institutes this arbitration under Annex VII of the Convention to vindicate *its coastal State rights* under the Convention”.³¹ Alleging “an unlawful use of force in blatant violation of the U.N. Charter and fundamental norms of international law”,³² Ukraine asserts that

“Since the seizure of Crimea, the Russian Federation has persistently and flagrantly violated the Convention through its actions in areas of the Black Sea, Sea of Azov, and Kerch Strait where *Ukraine’s sovereignty, sovereign rights, and right to exercise jurisdiction* are indisputable. Ukraine brings this arbitration because one apparent purpose of the seizure of Crimea – and certainly one of its results – was to effect a massive theft of Ukraine’s valuable maritime resources in the Black Sea, Sea of Azov, and Kerch Strait, in violation of Ukraine’s rights under the Convention.”³³

29. In the section entitled ‘Jurisdiction’, referring to its “indisputable sovereignty over Crimea” and alleging Russia’s “unlawful occupation and purported annexation of Crimea”, Ukraine again asserts that “[t]he Russian Federation’s actions in the Black Sea, Sea of Azov, and Kerch Strait are inconsistent with Ukraine’s rights under the Convention, including *its*

²⁹ For judicial statements confirming that (i) maritime rights derive from the coastal State’s sovereignty over the land, a principle which can be summarized as ‘the land dominates the sea’ and that (ii) it is the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State see e.g., *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, p. 674, para. 140 (RUL-33); *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 89, para. 77 (UAL-2); *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 696, para. 113 (RUL-30); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, p. 97, para. 185 (RUL-25); *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 312, para. 157 (RUL-12); *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 61, para. 73 (RUL-10); *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, p. 36, para. 86 (RUL-9); *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 51, para. 96 (RUL-8).

³⁰ See the cover page of the Statement of Claim (emphasis added).

³¹ Para. 2.

³² Para. 4.

³³ Para. 5 (emphasis added).

coastal state rights and violate Ukraine's sovereignty, sovereign rights, and rights to exercise jurisdiction at sea".³⁴

30. Ukraine's claim thus puts the issue of sovereignty over land territory, i.e., Crimea, squarely into dispute. It makes no difference that the territorial sovereignty issue is presented by Ukraine as an issue as to enjoyment of the rights of the coastal State. That merely begs the question as to who is the coastal State, which is a question going to territorial sovereignty that this Tribunal lacks jurisdiction to determine.

B. CONTEMPORANEOUS STATEMENTS OF UKRAINE

31. The statements of Ukraine leading up to the filing of the Statement of Claim, and subsequently, confirm that the central issue is the land sovereignty dispute.

32. On 6 December 2015, the President of Ukraine stated that

"For Putin, Crimea is a territory that must be turned into a military base. For me, it is Ukrainian territory. Crimeans are Ukrainians. *I will do everything to return Crimea through international legal mechanisms, judicial decisions and political mechanisms and diplomatic means*".³⁵

33. In a statement announcing the current claim, Ukraine's Foreign Ministry said:

"Ukraine has instituted arbitration proceedings against the Russian Federation under the 1982 United Nations Convention on the Law of the Sea ('UNCLOS') to *vindicate its rights as the coastal state in maritime zones adjacent to Crimea* in the Black Sea, Sea of Azov, and Kerch Strait. *Since the Russian Federation's illegal acts of aggression in Crimea, Russia has usurped and interfered with Ukraine's maritime rights in these zones.* Ukraine seeks to end the Russian Federation's violations of UNCLOS and vindicate Ukraine's rights in the Black Sea, Sea of Azov, and Kerch Strait, including Ukraine's rights to the natural resources offshore Crimea which belong to the Ukrainian people."³⁶

³⁴ Paras. 41 and 42 (emphasis added).

³⁵ President of Ukraine official website, "President: We will do everything to return Crimea via international legal mechanisms", 6 December 2015, available at <http://www.president.gov.ua/en/news/zrobimo-vse-dlya-togo-shob-shlyahom-mizhnarodnih-pravovih-me-36441> (emphasis added) (RU-38).

³⁶ See Ministry of Foreign Affairs of Ukraine official website, "Statement of the Ministry of Foreign Affairs of Ukraine on the Initiation of Arbitration against the Russian Federation under the United Nations Convention on the Law of the Sea", 14 September 2016, available at <http://mfa.gov.ua/en/press-center/news/50813-zajava-mzs-ukrajini-shhodo-porushennya-arbitrazhnogo-provazhennya-proti-rosijsykoji-federaciji-vidpovidno-do-konvenciji-oon-z-morsykogo-prava> (emphasis added) (RU-44).

34. The President was reported on his official website as emphasizing that

“[T]he lawsuit is filed due to the gross violation of the international law by Russia, aggression against Ukraine, annexation of Crimea, violation of Ukraine’s right to natural resources in the Black and Azov Seas ... the launch of that process would facilitate the restoration of full control over the maritime area of Ukraine and reimbursement of damages suffered by Ukraine as a result of the Russian armed aggression”.³⁷

35. Further, the day after filing its Memorial, Ukraine stated before a UN Committee:

“It is a sad irony that exactly 4 years ago one of the most blatant violations of the UN Charter in recent history has been committed. *The armed aggression against Ukraine* was launched by one of the permanent members of the Security Council. Instead of fulfilling its obligation to maintain peace and security, *it continues to temporarily occupy the Autonomous Republic of Crimea* and the city of Sevastopol, as well as certain areas of the Donetsk and Luhansk regions.

... we are resorting to all means available to UN Members States to resolve the situation that arose as the result of the Russian military aggression against Ukraine.

...

Just yesterday, Ukraine filed its Memorial in arbitration proceedings against the Russian Federation under the 1982 United Nations Convention on the Law of the Sea (‘UNCLOS’). *The Memorial establishes that Russia has violated Ukraine’s sovereign rights in the Black Sea, Sea of Azov, and Kerch Strait.*”³⁸

36. The current claim has thus been presented by Ukraine as a response to alleged Russian aggression, and as aimed at securing the “restoration” and “return” of Crimean sovereignty to Ukraine.

³⁷ President of Ukraine official website, “President instructed Foreign Ministry to file a lawsuit against Russia to international arbitration”, 14 September 2016, available at <http://www.president.gov.ua/en/news/prezident-doruchiv-mzs-podati-pozov-proti-rosiyi-do-mizhnaro-38147> (emphasis added) (RU-45). The President’s Facebook page dated 23 December 2016 stated that “[i]n September, upon my instructions the MFA of Ukraine initiated a dispute on the violation by Russia of the UN Convention on the Law of the Sea. Ukraine is ready to prove in this arbitration that the aggressor bluntly violates the sovereign rights of Ukraine to use its guaranteed rights in its maritime areas and on the continental shelf in the maritime zones adjacent to the Autonomous Republic of Crimea” (available at <https://www.facebook.com/petroporoshenko/>) (RU-46).

³⁸ Statement of the Delegation of Ukraine at the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization United Nations, 20 February 2018, available at <http://ukraineun.org/en/press-center/303-statement-of-the-delegation-of-ukraine-at-the-special-committee-on-the-charter-of-the-united-nations-and-on-the-strengt...> (emphasis added) (RU-49).

C. UKRAINE'S MEMORIAL

37. In the Memorial, Ukraine's claim is underpinned by the contention that it is the coastal State, and by assertions as to Russia's allegedly "unlawful invasion" and Ukraine's sovereignty over Crimea. Thus, the opening paragraph of the Memorial states:

"As a littoral State of the Black Sea, Sea of Azov, and Kerch Strait, Ukraine enjoys the rights and bears the responsibilities accorded to coastal States by the United Nations Convention on the Law of the Sea ... Since 2014, those rights have been the subject of systematic, brazen, and ongoing violations by the Russian Federation."³⁹

38. Ukraine presents the relevant conduct as falling into three parts:⁴⁰

(a) Russia allegedly excluding Ukraine from accessing and using "its own territorial sea, exclusive economic zone and continental shelf";⁴¹

(b) Russia allegedly exploring and exploiting the natural resources of "Ukraine's maritime areas in violation of Ukraine's sovereign rights";⁴² and

(c) Russia allegedly usurping Ukraine's authority to regulate "Ukrainian maritime entitlements".⁴³

39. Ukraine then devotes a chapter of its Memorial (Chapter 3) to its exercise of duties and responsibilities as "*the coastal State* in the bodies of water relevant to this dispute".⁴⁴

40. The chapter on Russia's alleged breach of UNCLOS (Chapter 4) is then introduced as follows:

"Across an expanse of sea extending out from Crimea west toward Odesa, east toward Mariupol, and south toward Anatolia, the Russian Federation is systematically and

³⁹ UM, para. 1.

⁴⁰ See UM, para. 8 "Russia's conduct amounts to a campaign of unrestrained theft of Ukraine's maritime resources and unlawful appropriation of Ukraine's UNCLOS-assigned role in these waters. This campaign has proceeded in three parts".

⁴¹ UM, para. 9.

⁴² UM, para. 10.

⁴³ UM, para. 11.

⁴⁴ UM, para. 22 (emphasis added). See further para. 5: "since its independence in 1991, Ukraine has asserted and exercised both its rights and its responsibilities *as a coastal State* with respect to these bodies of water" (emphasis added).

brazenly violating Ukraine’s coastal State rights, in violation of the Convention. ... Russia’s violations of the Convention began in 2014 – i.e. at the time that the Russian Federation invaded and occupied the Crimean Peninsula, and then purported to annex it”.⁴⁵

41. It follows that, so far as concerns the central thrust of the claim as formulated by Ukraine:

- (a) All depends on which State (Russia or Ukraine) enjoys the coastal State rights.
- (b) The alleged violations are portrayed by Ukraine as the direct result of what it regards as an unlawful seizure of Crimea in 2014.⁴⁶
- (c) The Tribunal could only get to those claims following on from a determination of the assertion that Russia has conducted an “unlawful invasion” that did not “alter the status of Crimea as Ukraine’s indisputable sovereign territory”.⁴⁷
- (d) The alleged violations follow ineluctably from the disputed issue of whether there has been this alleged unlawful seizure of land territory with the effect that Ukraine’s rights as the coastal State have been unlawfully usurped. If yes, then there may be interference with the exercise of sovereign rights as alleged in different ways. If no, as Russia maintains as a matter of public record,⁴⁸ then there is no question of an unlawful exercise because Russia is the coastal State. This key disputed issue cannot somehow be bypassed or assumed in Ukraine’s favour by the assertion that the “case does not address Russia’s unlawful invasion of Crimea – which under international law cannot, and in the clear view of the international community does not, alter the status of Crimea as Ukraine’s indisputable sovereign territory”.⁴⁹

⁴⁵ UM, paras. 101 and 102. There are other examples where the nexus to the events of 2014 is clear: see e.g., para. 136: “*Since 2014*, Russia has purported to extend its prescriptive jurisdiction — including its laws on the territorial sea, exclusive economic zone, continental shelf, and its other maritime laws — to Ukrainian waters adjacent to Crimea, and beyond” (emphasis added); para. 146: “UNCLOS provides Ukraine with exclusive rights to the living resources within its territorial sea and exclusive economic zone. *Since 2014*, the Russian Federation has deliberately and blatantly violated those rights” (emphasis added).

⁴⁶ UM, para. 102.

⁴⁷ UM, para. 8. See also Statement of Claim, para. 4, alleging Russia acted “through an unlawful use of force in blatant violation of the U.N. Charter and fundamental norms of international law”.

⁴⁸ See below, fn. 92.

⁴⁹ UM, para. 8. See further below, paras. 61-63.

42. It matters little how it is put: the dispute with respect to sovereignty over land territory is central, is the real dispute, is where the relative weight of the dispute lies (and overwhelmingly so), and the determination of that dispute is the unavoidable prerequisite to addressing the specific claims. So far as concerns such specific claims:

(a) Regarding Ukraine's claim with respect to hydrocarbon resources (Memorial, paras. 109-145), Ukraine relies upon Articles 2,⁵⁰ 56,⁵¹ 60⁵² and 77.⁵³ In each case, the claim is based on Ukraine's alleged rights "as the coastal State" pursuant to UNCLOS.⁵⁴ The claim with respect to Article 92⁵⁵ comes down to the same point.⁵⁶

(b) Regarding Ukraine's claim with respect to living resources (Memorial, paras. 146-180), Ukraine relies upon Articles 2,⁵⁷ 21,⁵⁸ 33,⁵⁹ 56,⁶⁰ 58,⁶¹ 61,⁶² 62,⁶³ 73,⁶⁴ and 77.⁶⁵ This claim is likewise based on Ukraine's alleged rights "as the coastal State" pursuant to UNCLOS, in particular with respect to alleged "exclusive rights to the living resources within *its* territorial sea and exclusive economic zone".⁶⁶

⁵⁰ UM, submissions para. 265 (a), (c), (d), (e). See further UM, paras. 140, 143, 144, 145.

⁵¹ UM, submissions para. 265 (b), (c), (d), (e). See further UM, paras. 141, 143, 144, 145.

⁵² UM, submissions para. 265 (e). See further UM, para. 145.

⁵³ UM, submissions para. 265 (b), (c), (d), (e). See further UM, paras. 141, 143, 144, 145. In its Statement of Claim, Ukraine also relied upon Article 81 (para. 7). There is no claim with respect to Article 81 in its Memorial, (fn. 217 and 218 cite Article 81 as relevant context supporting its interpretation of other Articles).

⁵⁴ See e.g., UM, paras. 109, 111, 116.

⁵⁵ Article 92 provides: "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas."

⁵⁶ See UM, para. 145 and submissions para. 265 (d).

⁵⁷ UM, submissions para. 265 (f), (h), (i). See further UM, paras. 176 and 177.

⁵⁸ UM, submissions para. 265 (f), (i). See further UM, para. 178.

⁵⁹ UM, submissions para. 265 (i). See further UM, para. 180.

⁶⁰ UM, submissions para. 265 (g), (h), (i). See further UM, paras. 176 and 177.

⁶¹ UM, submissions para. 265 (g), (h), (i). See further UM, para. 178.

⁶² UM, submissions para. 265 (g). See further UM, para. 179.

⁶³ UM, submissions para. 265 (g). See further UM, para. 179.

⁶⁴ UM, submissions paras. 265 (g), (i). See further UM, para. 178.

⁶⁵ UM, submissions para. 265 (h).

⁶⁶ UM, para. 146 (emphasis added). See further UM, para. 147, and headings of Section II.A at p. 67, and Section II.B at p. 69. See also with respect to Article 92, UM, para. 180 and submissions paras. 265 (g), (h), (i).

(c) With respect to the Kerch Strait (Memorial, paras. 181-211) Ukraine advances its claim on the basis of Ukraine “[a]s the coastal state on one side of the Kerch Strait”,⁶⁷ relying on Article 2.⁶⁸

(d) Ukraine’s starting point regarding its claim with respect to underwater cultural heritage (Memorial, paras. 218-239) is that “UNCLOS accords Ukraine, *as coastal State*, specific rights with regard to UCH located in *its coastal waters* around Crimea, as well as imposing corresponding duties on the Russian Federation.”⁶⁹ Ukraine casts its claim with reference to Article 2 (“the sovereignty of a *coastal state*”)⁷⁰ and also Article 303 (referring to the position of the *coastal State* with respect to controlling traffic in objects of an archaeological and historical nature found at sea).⁷¹

43. The relief claimed by Ukraine is also instructive, emphasizing the central nature of the disputed land sovereignty issue.

44. Ukraine requests the Tribunal to determine that Russia has violated a series of articles in UNCLOS, the majority of which would, as Ukraine expressly concedes, necessitate a determination that Ukraine is sovereign in Crimea, i.e., that Russia is not sovereign or is less than fully sovereign over Crimea. Ukraine states that it asks for declarations that *inter alia* “Russia is violating *Ukraine’s sovereignty and sovereign rights*”⁷² and “Russia has interfered with *Ukraine’s sovereignty*”.⁷³

⁶⁷ UM, para. 183. (See further Statement of Claim, para. 21. See also paras. 27 and 28 referring to conduct in “parts of the strait that are within Ukraine’s territorial sea”).

⁶⁸ UM, submissions para. 265 (j), (k), (l). See further UM, paras. 183, 188, 194. In its Statement of Claim, Ukraine had also relied upon Article 79(4) (para. 21). There is no claim with respect to Article 79(4) in its Memorial.

⁶⁹ UM, para. 219 (emphasis added). See also Statement of Claim, para. 34.

⁷⁰ UM, submissions para. 265 (q) (emphasis added). See further UM, paras. 234-236.

⁷¹ UM, submissions para. 265 (r), (s). See further UM, paras. 237-239. Article 303(1) also concerns a general duty on States to protect “objects of an archaeological and historical nature found at sea”, but even this aspect of the claim is presented as premised on Ukraine as the coastal State. See UM, paras. 220 and 222. See also paras. 237-239 and 253.

⁷² UM, para. 251 (emphasis added).

⁷³ UM, para. 252 (emphasis added). The present case can readily be distinguished from *Philippines v. China* where the Tribunal stated that it “does not see that success on these Submissions would have an effect on the Philippines’ sovereignty claims” (Award on Jurisdiction and Admissibility, para. 153) (UAL-3).

45. In setting out its claimed “entitlement to relief”, Ukraine concludes that “[c]ollectively, [the alleged violations] amount to a sweeping, comprehensive displacement of *Ukraine’s coastal State rights* within a majority of Ukraine’s exclusive economic zone and continental shelf, as well as long stretches of its territorial sea”.⁷⁴ This only serves to reinforce Russia’s position that the objective of Ukraine’s claim is to secure a favourable determination on the sovereignty of Crimea. Indeed, this objective is spelled out in express terms in Ukraine’s claim for moral damages; Ukraine advances this claim on the basis that it would “*vindicate Ukraine’s national sovereignty*”.⁷⁵

46. In addition, Ukraine seeks “public assurances and guarantees of non-repetition” from Russia “with respect to Russia’s interference with *Ukraine’s sovereignty and sovereign rights* over the living and non-living resources of Ukraine’s territorial sea, exclusive economic zone, and continental shelf”.⁷⁶ It requests the Tribunal to require that Russia takes various steps, including “withdrawing its vessels and personnel from Ukraine’s territorial sea, exclusive economic zone, and continental shelf”, and “ending its purported exercise of prescriptive jurisdiction over the living and non-living resources found in ... [Ukraine’s] territorial sea, exclusive economic zone, and continental shelf”.⁷⁷ Such relief necessarily presupposes a prior determination that Ukraine is indeed sovereign in Crimea.

II. Application of Article 288(1)

47. A dispute regarding sovereignty over Crimea is a matter that falls outside of the dispute settlement provisions of UNCLOS. A dispute over territorial sovereignty is not a dispute concerning the “interpretation or application of the Convention” pursuant to Article 288(1) of UNCLOS, the sole jurisdictional basis invoked by Ukraine.⁷⁸ This follows from an application

⁷⁴ UM, para. 254 (emphasis added).

⁷⁵ UM, para. 264 (emphasis added).

⁷⁶ UM, para. 266 (e) (emphasis added).

⁷⁷ UM, para. 266 (a).

⁷⁸ Statement of Claim, para. 47: “Ukraine therefore submits this dispute with the Russian Federation concerning the interpretation or the application of the Convention to an arbitral tribunal constituted in accordance with Annex VII, which has jurisdiction over the dispute under Article 288(1)”. See also UM, paras. 15-16.

of the usual rules on treaty interpretation, and has been confirmed in recent Annex VII proceedings.⁷⁹

A. SCOPE OF ARTICLE 288(1)

48. The meaning and intended scope of Article 288(1) is straightforward to ascertain applying the usual rules on interpretation.⁸⁰

49. Article 288(1) provides that

“A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.”

50. As a matter of the ordinary meaning of these words, jurisdiction is restricted to disputes of a specified nature, i.e., those “concerning the interpretation or application of this Convention”. UNCLOS contains no provisions regarding sovereignty over land territory, and there is no *renvoi* in any relevant provision of the Convention that allows provisions regarding sovereignty over land territory to be imported from other treaties or customary international law.

51. As a matter of the relevant context, Article 298(1) establishes an opt-out mechanism with respect to certain matters, including maritime boundary delimitations. It is inconceivable that, if disputes concerning sovereignty over land territory (as to which States are all the more sensitive) could be brought within Article 288(1), there would not be an equivalent opt-out with respect to such disputes. Yet there is none. This can only be because it was never intended that jurisdiction under Part XV would extend to disputes concerning sovereignty over land territory.

52. Moreover, through Article 297(1), the States parties to UNCLOS expressly and materially restricted the types of disputes concerning the exercise by a coastal State of its sovereign rights or jurisdiction under the Convention. It is not tenable to consider that State parties would agree to such a restriction on settlement of disputes concerning the exercise of

⁷⁹ See below, paras. 54-57.

⁸⁰ Article 288(1) is interpreted in accordance with the rules on interpretation set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

coastal State rights or jurisdiction, and yet agree at the same time to jurisdiction over the anterior and more fundamental question as to whether there was any basis for the exercise of such sovereign rights or jurisdiction in the first place, i.e., whether the given State asserting sovereign rights or jurisdiction was the coastal State.

53. The above interpretation is reinforced by consideration of the object and purpose of the Convention, most obviously so far as concerns the wish as reflected in the Preamble to establish “a legal order for the seas and oceans” (not with respect to abutting coastal territory).⁸¹

54. Further, as indicated above, the fact that a dispute over territorial sovereignty is not a dispute concerning the “interpretation or application of the Convention” for the purposes of Article 288(1) has been recently confirmed in Annex VII proceedings.

55. In *Mauritius v. UK*, the Arbitral Tribunal stated that

“Given the inherent sensitivity of States to questions of territorial sovereignty, the question must be asked: if the drafters of the Convention were sufficiently concerned with the sensitivities involved in delimiting maritime boundaries that they included the option to exclude such disputes from compulsory settlement, is it reasonable to expect that the same States accepted that more fundamental issues of territorial sovereignty could be raised as separate claims under Article 288(1)?

In the Tribunal’s view, had the drafters intended that such claims could be presented as disputes ‘concerning the interpretation or application of the Convention’, the Convention would have included an opt-out facility for States not wishing their sovereignty claims to be adjudicated, just as one sees in Article 298(1)(a)(i) in relation to maritime delimitation disputes.

...

In the Tribunal’s view, to read Article 298(1)(a)(i) as a warrant to assume jurisdiction over matters of land sovereignty on the pretext that the Convention makes use of the term ‘coastal State’ would do violence to the intent of the drafters of the Convention to craft a balanced text and to respect the manifest sensitivity of States to the compulsory settlement of disputes relating to sovereign rights and maritime territory.”⁸²

⁸¹ See the Preamble referring to “Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans”.

⁸² Paras. 216-219 (**UAL-18**). See the dissenting views expressed by Judges Kateka and Wolfrum which (incorrectly) accord to the Court or Tribunal under Part XV an essentially unlimited jurisdiction to decide issues of territorial sovereignty as long as a claimant has brought these issues before it with some reference to a provision of UNCLOS.

56. The possibility was raised in the *Mauritius v. UK* Award that, in some instances, a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention.⁸³ That is not an issue that this Tribunal need decide. The territorial sovereignty issue in the current case is plainly not a “minor issue” that is “ancillary” to some broader dispute. To the contrary, it is at the very heart of the dispute.⁸⁴

57. As to the *Philippines v. China* Award, the Arbitral Tribunal was able to address the issues before it without making any ruling as to which State enjoys sovereignty over any land territory in the South China Sea. It was careful to emphasise that “[n]one of the Tribunal’s decisions in this Award are dependent on a finding of sovereignty, nor should anything in this Award be understood to imply a view with respect to questions of land sovereignty”.⁸⁵ In this respect, the Tribunal was in a position to note that it was “entirely possible to approach the Philippines’ Submissions from the premise – as the Philippines suggests – that China is correct in its assertion of sovereignty over Scarborough Shoal and the Spratly”.⁸⁶ In the present case, by contrast, Ukraine’s claim relies upon precisely the reverse premise, i.e., that its claim should be approached from the premise that Russia is incorrect in its assertion of sovereignty over Crimea.⁸⁷ Thus any consideration of Ukraine’s claim inevitably requires an impermissible assertion of jurisdiction over land sovereignty disputes.

B. ARTICLE 288(1) AND UKRAINE’S CLAIM

58. Whichever way it is looked at, the determination of a dispute concerning sovereignty over land territory (Crimea) is at the very heart of Ukraine’s claim. It is the real issue that divides the Parties which would have to be addressed to determine the individual claims for

⁸³ *Mauritius v. UK*, para. 221: “The Tribunal does not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention” (UAL-18).

⁸⁴ See above, Section I.

⁸⁵ *Philippines v. China*, Award, 12 July 2016, para. 5 (UAL-11).

⁸⁶ *Philippines v. China*, Award on Jurisdiction and Admissibility, para. 153 (UAL-3).

⁸⁷ The present case is analogous to the first and second submissions of Mauritius’s claim in *Mauritius v. UK* in that respect – see *Philippines v. China*, Award on Jurisdiction and Admissibility, para. 153: “In this respect, the present case is distinct from the recent decision in Chagos Marine Protected Area. The Tribunal understands the majority’s decision in that case to have been based on the view both that a decision on Mauritius’ first and second submissions would have required an implicit decision on sovereignty and that sovereignty was the true object of Mauritius’ claims” (UAL-18).

breach. The question for the Tribunal is whether it has jurisdiction under Article 288(1) of UNCLOS to determine the issue of sovereignty over land territory. The answer to that question is clear: the Tribunal does not have jurisdiction to determine that issue.

59. The relief claimed by Ukraine is set out at paragraphs 43-46 above, including a claim for moral damages on the basis that this would “vindicate Ukraine’s national sovereignty”.⁸⁸ These are not the sort of consequences that follow from a dispute as to the “interpretation and application” of UNCLOS.⁸⁹

60. More broadly, the consequences of accepting Ukraine’s claim would be that whenever a State invoked one of the 64 articles of UNCLOS which use the term “coastal State”, there would be jurisdiction under Part XV to resolve all or any disputes over sovereignty to determine whether State A is indeed the “coastal State” as opposed to State B. All territorial issues involving some island or mainland with a coast could be presented as an UNCLOS claim whenever a coastal State exercised some form of right falling within one of UNCLOS articles that establish rights of a coastal State. However, State parties to UNCLOS did not agree to compulsory settlement of territorial disputes over islands or mainland territories with a coastline, for the reasons set out above.

61. The limits on the Tribunal’s jurisdiction cannot somehow be bypassed by asserting that Russia has engaged in an “unlawful invasion”,⁹⁰ and that the current dispute is not a *bona fide* territorial dispute.⁹¹ It is not by characterising Russia as an aggressor / Russia’s position as *mala fide* that Ukraine can avoid the basic point that

⁸⁸ UM, para. 264, referred to above, para. 45.

⁸⁹ See *Mauritius v. UK*, paras. 211 and 229: “These are not the sort of consequences that follow from a narrow dispute regarding the interpretation of the words ‘coastal State’ for the purposes of certain articles of the Convention ... Mauritius asks only for the Tribunal to determine that it has rights as ‘a coastal State’, the Tribunal considers that such a determination would effectively constitute a finding that the United Kingdom is less than fully sovereign over the Chagos Archipelago” (UAL-18).

⁹⁰ UM, para. 8: “This case does not address Russia’s unlawful invasion of Crimea — which under international law cannot, and in the clear view of the international community does not, alter the status of Crimea as Ukraine’s indisputable sovereign territory”. See also UM, para. 102 and Statement of Claim, paras. 42-43. As to the separate matter of the exclusion of any dispute concerning “military activities” pursuant to the Article 298(1) declarations of both Russia and Ukraine, see further below, Chapter 4.

⁹¹ *Ibid.* See also Ukraine’s comments in the August 2016 meeting that “a *bona fide* territorial dispute may not be a consequence of aggression against a sovereign state. Proceeding from this, the Ukrainian Party declares that its claims are based on concrete violations in respect of sea waters guaranteed by the Convention and do not in any

- (a) Ukraine considers that it is sovereign over Crimea and thereby exercises the rights in the appertaining maritime zones, whilst
- (b) Russia considers that it is sovereign and that, as a consequence, it enjoys the relevant rights; and it has repeatedly set out its position with respect to the lawfulness of its activities in Crimea and on the status of Crimea,⁹²
- (c) the two States are engaged in a dispute over this critical issue of sovereignty.

62. The acts of Russia that are the subject of Ukraine's claims have been and are carried out by Russia in implementation of its sovereignty, sovereign rights and jurisdiction that emanate from its sovereignty over Crimea.

63. To assert, as Ukraine does, that, under international law, Crimea remains Ukraine's sovereign territory is to ask the Tribunal to assume in Ukraine's favour the issue that is of critical importance to the dispute (and to the Parties' relations more broadly).⁹³ At best, this merely re-states the issue in dispute, placing the disputed territorial issue into more extreme terms. The underlying issue is one that this Tribunal cannot decide – whether it is cast as Russia lacking territorial sovereignty or as Russia conducting an unlawful invasion.

64. In conclusion, for the reasons set out above, a dispute regarding sovereignty over Crimea has been brought by Ukraine, and this is a matter that falls outside of the dispute settlement provisions of UNCLOS. Moreover, it is this dispute that is the real dispute in this

way relate to the sovereignty over the Crimean Peninsula”, Transcript of the Russian-Ukrainian Consultations on the United Nations Convention on the Law of the Sea, Minsk, 11 August 2016, p. 20 (RU-41).

⁹² See e.g., the speech by the Russian Foreign Minister, Sergey Lavrov, during the high-level segment of the 25th session of the United Nations Human Rights Council, Geneva, 3 March 2014, available at http://www.mid.ru/en/foreign_policy/un/-/asset_publisher/U1StPbE8y3al/content/id/72642 (RU-28). For examples of Russia's statements as to the legitimacy of the Crimean referendum see the comment by the Russian Ministry of Foreign Affairs regarding statements by the OSCE Chair-in-Office, 14 March 2014, available at http://www.mid.ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/70498 (RU-31); the speech by Russia's Permanent Representative to the United Nations, Vitaly Churkin, at the session of the UN General Assembly, New York, 27 March 2014, available at http://www.mid.ru/en/general_assembly/-/asset_publisher/lrzZMhfoyrUj/content/id/68754 (RU-35); and the statement by the Russian Ministry of Foreign Affairs regarding the adoption of the Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol, 11 March 2014, available at http://www.mid.ru/en/maps/ua/-/asset_publisher/ktn0ZLTvbbS3/content/id/71274 (RU-30).

⁹³ See in particular UM, paras. 1, 8 and 102.

case, and it is from this dispute that the individual allegations of breach flow. Accordingly, this Tribunal lacks jurisdiction over the entirety of the claim.

65. As noted above, the further objections made by Russia in Chapters 3 – 7 are without prejudice to this first objection.

CHAPTER 3
THE TRIBUNAL HAS NO JURISDICTION OVER CLAIMS CONCERNING
ACTIVITIES IN THE SEA OF AZOV AND IN THE KERCH STRAIT

66. Independently of the lack of jurisdiction to decide the question of sovereignty over Crimea, this Tribunal also does not have jurisdiction over any of Ukraine's claims pertaining to the Sea of Azov and the Kerch Strait.

67. These maritime areas have been historically internal waters of the Russian Empire, then the USSR, and since 1991 they are common internal waters of Russia and Ukraine (**Section I**).

68. The present position of Ukraine, as reflected in the Memorial at paragraph 26, is that, since its independence, the waters of the Sea of Azov and the Kerch Strait are not internal, but include a Ukrainian territorial sea, EEZ and continental shelf. This position is wrong under international law, and contrary to the practice and statements of Ukraine.

69. As will be shown in the present Chapter, the internal waters status of the maritime areas of the Sea of Azov and the Kerch Strait has been established long ago and confirmed by the Parties in their practice.

70. Since UNCLOS does not regulate the regime of internal waters, the jurisdiction of the Tribunal is excluded because issues pertaining to the Sea of Azov and the Kerch Strait are not issues of interpretation or application of the Convention as required by Article 288(1) on which Ukraine relies (**Section II**).⁹⁴

I. The Sea of Azov and the Kerch Strait are internal waters

71. In the present Section it will be shown: that the Sea of Azov and the Kerch Strait were uncontested internal waters before the dissolution of the USSR (**sub-section A**), that this status remained unchanged afterwards and that Ukraine's position to the contrary must be rejected in light of international law, of the practice of Russia and Ukraine and of historic title (**sub-**

⁹⁴ UM, paras. 15-16.

section B). It will also be shown that the unilateral practice of Ukraine is consistent with the internal waters status of the above-mentioned maritime areas (**sub-section C**).

A. THE SEA OF AZOV AND THE KERCH STRAIT BEFORE THE DISSOLUTION
OF THE USSR: UNCONTESTED INTERNAL WATERS

72. The Russian Empire exercised sovereignty over the Sea of Azov and the Kerch Strait. Already in 1856, Baron Ferdinand De Cussy stated that the Sea of Azov is one “among the gulfs and straits which may be regarded as part of the *territorial* sea, subject to the jurisdiction and control of the State by virtue of the right of self-preservation inherent in its independence”.⁹⁵ The mention of “straits” includes the Kerch Strait as the only entrance to the Sea of Azov. The term “territorial sea” includes what in modern terminology would be “internal waters” as it alludes to the jurisdiction and control of the coastal State over the whole of the Sea of Azov.⁹⁶

73. The classification of the Sea of Azov as internal waters of the USSR is contained in USSR legislation of 1925, 1928 and 1935. General instructions for interaction of the USSR authorities with foreign military and merchant ships at peacetime of 22 June 1925 explicitly provide that the Sea of Azov, along with the White Sea, constitutes internal waters of the USSR.⁹⁷ Act No. 431 of 24 July 1928 concerning the use of radio equipment for foreign vessels within the territorial waters of the USSR⁹⁸ and the Order of the Council of People’s

⁹⁵ Baron Ferdinand De Cussy, *Phases et causes célèbres du droit maritime des Nations*, Vol. I, F.A. Brockhaus, 1856, pp. 97-98 (**RUL-1**, cited in *Historic Bays: Memorandum by the Secretariat of the United Nations*, doc. A/CONF.13/1, p. 3, fn. 4 (**RU-5**)). In the original French, the Sea of Azov is:

“[a]u nombre des golfes et détroits que l’on peut considérer comme appartenant à la mer territoriale soumise aux lois et la surveillance de l’Etat, en vertu du droit de propre conservation inhérent à l’indépendance qui appartient à chaque Etat ...” (emphasis in the original).

⁹⁶ The well-known *Historic Bays: Memorandum by the Secretariat of the United Nations* notes that the language used by certain authors including De Cussy gives the impression that they “confuse the waters of historic bays with the territorial sea” and observes that this may be due “to the looseness of the terminology employed rather than to differences of opinion on the actual principle” (doc. A/CONF.13/1, extract from the *Official Records of the United Nations Conference on the Law of the Sea*, Vol. I (Preparatory Documents), para. 98, available at http://legal.un.org/docs/?path=../diplomaticconferences/1958_los/docs/english/vol_1/a_conf13_1.pdf&lang=En) (**RU-5**).

⁹⁷ General instructions for interaction of the USSR authorities with foreign military and merchant ships at peacetime, approved by Order of the Revolutionary Military Council of the USSR No. 641, 22 June 1925, Article 2 (**RU-2**).

⁹⁸ Act No. 431 concerning the use of radio equipment for foreign vessels within the territorial waters of the Union, 24 July 1928, Articles 1 and 3, *UN Legislative Series, Laws and Regulations on the Regime of the High Seas*, Vol. I, United Nations, 1951, p. 121 (**RU-3**).

Commissars No. 2157 of 25 September 1935 for the regulation of fishing and the conservation of fisheries resources⁹⁹ treat the Sea of Azov as “inland waters.”¹⁰⁰

74. This status did not provoke protests from other States.

75. The above-mentioned legislative acts of 1928 and 1935 were applicable to the Soviet Socialist Republic of Ukraine. Under Article 38 of the 1924 Constitution of the USSR, Acts of the Council of People’s Commissars applied throughout the territory of the USSR.¹⁰¹

76. This classification of the Sea of Azov as internal waters was also uniformly recognized in the Soviet international law doctrine.¹⁰²

77. The USSR ratified the Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958 (“the Geneva Convention”) on 22 November 1960. The Sea of Azov and the Kerch Strait satisfied the requirements of a bay as set out in Article 7 of the Geneva Convention (corresponding to Article 10 of UNCLOS). The shape of the Sea of Azov met the description in Article 7(2) and, in accordance with Article 7(4), the opening of the bay, namely the Kerch

⁹⁹ Order of the Council of People’s Commissars, No. 2157, for the regulation of fishing and the conservation of fisheries resources, 25 September 1935, Article 2 and Schedule I, *UN Legislative Series, Laws and Regulations on the Regime of the High Seas*, Vol. I, United Nations, 1951, p. 124 (RU-4).

¹⁰⁰ Act No. 431, after distinguishing in Article 1 “marginal seas” from “inland waters” of the USSR, contains in Article 3 the same rule for foreign non-military vessels “in the sea of Azov” and for such vessels when they are in ports. This shows that the Sea of Azov is considered as “inland waters” (RU-3). Order No. 2157 similarly distinguishes marine fishing waters embracing “inland maritime waters of the USSR” and those consisting in “a maritime coastal zone twelve sea miles in breadth.” In Schedule I, it then provides that, as regards the Sea of Azov, the “whole area together with all bays, river mouths and estuaries” is a Union fishery. This implies that it belongs to “inland waters” (RU-4).

¹⁰¹ Constitution of the USSR, 21 January 1924, Article 38: “The Council of People’s Commissars of the U.S.S.R., in the limits of the power granted to it by the Central Executive Committee of the U.S.S.R. and on the basis of rules regulating the Council of People’s Commissars of the U.S.S.R., publishes the decrees and decisions that become effective throughout the territory of the U.S.S.R.” (RU-1).

¹⁰² V.N. Durdenevskiy, S.B. Krylov (eds.), *Mezhdunarodnoye pravo* [International Law], Institut prava Akademii Nauk SSSR, Jurizdat Minjusta SSSR, 1947, pp. 247-248 (RUL-5); A.D. Keilin, *Sovetskoye Morskoye Pravo* [Soviet Maritime Law], Gosudarstvennoye Izdatelstvo Vodnogo Transporta, 1954, p. 91 (RUL-6); *Kurs mezhdunarodnogo prava v 6 tomakh* [Course of International Law in 6 volumes], Vol.III, Izdatelstvo “Nauka”, 1967, p. 132 (RUL-7); S.V. Molodtsov, *Mezhdunarodnoye morskoye pravo* [International Maritime Law], *Mezhdunarodnye otnosheniya*, 1987, p. 51 (RUL-13). See also A.N. Nikolayev, *Problema Territorialnykh Vod v Mezhdunarodnom Prave*, Gosudarstvennoye Izdatelstvo Yuridicheskoi Literatury, 1954, pp. 207-208 (cited in *Historic Bays: Memorandum by the Secretariat of the United Nations*, doc. A/CONF.13/1, p. 19 (RU-5)).

Strait, was less than 24 miles wide.¹⁰³ Thus, the waters of the Sea of Azov, once a closing line was drawn, were to be considered internal waters under Article 7(4).

78. As a matter of fact, the USSR with its Declaration 4450 of 25 January 1985 drew straight baselines including in them the Kerch Strait.¹⁰⁴ This declaration did not meet protests by other States. In any case, such a closing line had already been indicated, without raising protests, in the Statute on the State Border adopted by the USSR in 1960 from which it follows that the Sea of Azov and the Kerch Strait were internal waters.¹⁰⁵

79. Thus, the participation of the USSR in the Geneva Convention and the drawing of baselines across the mouth of the Kerch Strait confirmed the customary internal waters status of the Sea of Azov and the Kerch Strait and established a treaty obligation for the other parties to recognize such status.

80. The same conclusion applies for both States after the dissolution of the USSR. Russia and Ukraine ratified UNCLOS, respectively in 1997 and 1999. Article 10 of UNCLOS repeats Article 7 of the Geneva Convention.

¹⁰³ A. Gioia in 1990 stated:

“[T]he width of the strait giving access to the Sea of Azov, which must certainly be classified as a ‘bay’ in the legal meaning of the term, is about ten miles. There is, consequently, no need to rely on the ‘historic bays’ theory in order to include its waters among the internal waters of the USSR.”

A. Gioia, *Titoli storici e linee di base del mare territoriale*, CEDAM, 1990, pp. 569-570 (translation from the original Italian: “l’ampiezza dello stretto che dà accesso al Mar d’Azov, sicuramente classificabile tra le ‘baie’ in senso giuridico, è di circa dieci miglia. Non vi è alcun bisogno, pertanto, di ricorrere alla teoria delle ‘baie storiche’ al fine di includerne le acque tra quelle interne dell’Unione Sovietica.”) (RUL-17). G. Gidel, *Le Droit international public de la mer*, Vol. III, Mellottée, 1934, p. 663 (RUL-4) had already identified a category of bays which are sometimes designated as historic but should not be treated as falling within this category “because pursuant to the rules of the ordinary international law of the sea, these areas are in any case internal waters” (translation by the UN Secretariat from original French: “parce que les règles du droit international maritime commun suffisent à en faire des eaux intérieures”) (cited in *Historic Bays: Memorandum by the Secretariat of the United Nations*, doc. A/CONF.13/1, p. 3, para. 12 (RU-5)).

¹⁰⁴ Declaration 4450 containing list of geographical coordinates defining the position of the baselines, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1985_Declaration.pdf (RU-12).

¹⁰⁵ Statute on the Protection of the State Border of the Union of SSR, approved by the Presidium of the Supreme Soviet of the USSR on 5 August 1960, Article 4 (RU-6).

B. THE STATUS OF INTERNAL WATERS REMAINED UNCHANGED AFTER
THE DISSOLUTION OF THE USSR AND THE INDEPENDENCE OF UKRAINE

1. *Ukraine's position in the Memorial*

81. According to Ukraine, the Sea of Azov and the Kerch Strait cannot be considered internal waters after its independence. Ukraine in fact claims to have in these waters a territorial sea, an EEZ and a continental shelf.¹⁰⁶

82. In its Memorial, after acknowledging that the waters of the Sea of Azov and of the Kerch Strait were considered by the USSR as internal waters, Ukraine states:

“That situation changed in 1991 with the dissolution of the Soviet Union and the independence of Ukraine, whereupon the Sea of Azov and Kerch Strait ceased to fall within the borders of a single State and became subject to the general rules of the law of the sea.”¹⁰⁷

83. Ukraine refers to the “general rules of the law of the sea” reflected in UNCLOS Article 10(1) and 10(4) which state the following:

“Article 10

Bays

1. This article relates only to bays the coasts of which belong to a single State.

...

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 nautical miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.”

Thus, Ukraine argues that the Sea of Azov is a bay and that the consequence of it becoming a bay with two coastal States is that its waters cannot be internal waters pursuant to Article 10. To say, however, that there is a territorial sea, an EEZ and a continental shelf in the Sea of Azov is incorrect for the reasons that follow.

¹⁰⁶ UM, paras. 26 and 28.

¹⁰⁷ UM, para. 26.

2. *The position of Ukraine must be rejected: after 1991 the Sea of Azov and the Kerch Strait remained internal waters*

84. Since the dissolution of the USSR, the Sea of Azov is a bay with more than one coastal State. This does not, however, imply a change in the status of the waters of the Sea of Azov or the Kerch Strait.

85. Any such change would have as a consequence that Russia and Ukraine would lose certain rights they enjoyed in the internal waters constituting the bay. There is, however, no basis for supposing that Russia and Ukraine intended to change their position as regards the status of the waters of the Sea of Azov and the Kerch Strait. As stated by the ICJ: “waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its rights.”¹⁰⁸ In the present case, there is no such express or unequivocally implied waiver. To the contrary, Russia and Ukraine expressly confirmed that the Sea of Azov and the Kerch Strait retain their internal waters status, *inter alia*, in the State Border Treaty of 28 January 2003 and in the Treaty and Joint Statement of 24 December 2003 considered below.¹⁰⁹

86. The following statement in the ninth edition of *Oppenheim’s International Law* supports Russia’s position:

“[I]t would seem anomalous if the coastal states of a pluristatal bay should ... be supposed jointly to enjoy markedly inferior powers of jurisdiction and control over the waters of their bay than might be enjoyed by the littoral state of a single-state bay.”¹¹⁰

To complete the argument, addressing a situation comparable to that of the Sea of Azov, the learned authors further state: “[t]he anomaly would be the greater in a pluristatal bay like the Gulf of Fonseca which formerly was a bay surrounded only by a single state.”¹¹¹

¹⁰⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 168, para. 293 (UAL-32).

¹⁰⁹ See below, paras. 95-97.

¹¹⁰ Sir R. Jennings and Sir A. Watts (eds.), *Oppenheim’s International Law*, Vol. I, Peace, Longman, 1992, pp. 632-633 (RUL-18).

¹¹¹ *Ibid.*, p. 633, fn. 4.

3. *International case law and practice confirm that there can be bays with more than one coastal State consisting of internal waters*

87. That bays with more than one coastal State can consist of internal waters is supported by important precedents.

88. The ICJ in the *Land, Island and Maritime Frontier Dispute* stated that the waters of the Gulf of Fonseca (considered as a historic bay and, therefore, consisting of internal waters) were held in sovereignty by the three riparian States.¹¹² Thus, the Court did not consider that the existence of internal waters of more than one State within a bay is a logical and legal impossibility.

89. In 1988, Tanzania and Mozambique adopted by agreement a line closing the Rovuma Bay, bordered by the two States. The relevant provision states that “[a]ll waters on the landward side of this line constitute the internal waters of the two countries.”¹¹³ The agreement further provided for the delimitation of these internal waters. Again, there was no difficulty in accepting that the waters of a bay with two riparian States could be internal waters.

90. Most importantly, the Award of 29 June 2017 in the *Croatia/Slovenia* case¹¹⁴ is a very clear recent precedent confirming this view. The dispute concerned, among other things, the Bay of Piran, which, up to the dissolution in 1991 of the Socialist Federal Republic of Yugoslavia (“SFRY”), was under the latter’s sovereignty and after the dissolution of the SFRY became surrounded by two riparian States, Slovenia and Croatia. As determined by the Arbitral Tribunal, the waters of the Bay of Piran were internal waters of the SFRY as the SFRY had drawn a closing line across its opening.¹¹⁵

¹¹² *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 351, paras. 412 and 432 (RUL-19).

¹¹³ Agreement between the Government of the United Republic of Tanzania and the Government of the People’s Republic of Mozambique regarding the Tanzania/Mozambique Boundary, Maputo, 28 December 1988, Article 2, available at <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/TZA-MOZ1988TM.PDF> (RU-13).

¹¹⁴ *Arbitration between the Republic of Croatia and the Republic of Slovenia*, Final Award, 29 June 2017 (RUL-41).

¹¹⁵ *Ibid.*, para. 880.

91. The similarity with the Sea of Azov is evident. This Sea was surrounded by the territory of the USSR up to 1991. A closing line had been drawn by the USSR in 1985. After 1991, its riparian States became two: Russia and Ukraine.

92. As to the key issue of the status of the Bay of Piran's waters after the dissolution of the SFRY,

“881. The Tribunal recalls that the Bay was established as a juridical bay, with the character of internal waters, at a time when its coasts belonged only to one State. The status of the Bay was then determined in conformity with international law. The question to be addressed is whether the dissolution of the SFRY has altered this status.

882. A comparable question was addressed in 1992 by the ICJ in relation to the Gulf of Fonseca. In that case the Court noted that the Gulf had been under Spanish sovereignty until 1821. Later it was bordered by three States, El Salvador, Honduras and Nicaragua. The Court decided that the rights of those States in the Gulf ‘were acquired like their land territory by succession from Spain.’ The Gulf, having been internal waters before 1821, kept that status after decolonisation.

883. Similarly, in the present case, the Bay was internal waters before the dissolution of the SFRY in 1991, and it remained so after that date. *The dissolution, and the ensuing legal transfer of the rights of Yugoslavia to Croatia and Slovenia as successor States, did not have the effect of altering the acquired status.*”¹¹⁶

93. Having clarified that the waters of the Bay of Piran retained their status of internal waters after the dissolution of the SFRY and after it had become a bay with two riparian States, the Award turns to the interpretation of Articles 7(1) of the Geneva Convention and 10(1) of UNCLOS:

“884. *The Tribunal further notes that Article 7(1) of the 1958 Geneva Convention and UNCLOS Article 10(1) relate ‘only to bays the coasts of which belong to a single state.’ As a consequence of the dissolution of the SFRY, the Bay no longer falls under these provisions. The limitation of the scope of application of these provisions does not, however, imply that they exclude the existence of bays with the character of internal waters, the coasts of which belong to more than one State.*

885. In any case, the effect of the dissolution of the SFRY is a question of State succession. *The Tribunal thus determines that the Bay remains internal waters within the pre-existing limits.*”¹¹⁷

¹¹⁶ *Ibid.*, paras. 881-883 (emphasis added).

¹¹⁷ *Ibid.*, paras. 881-885 (emphasis added – footnotes omitted).

94. In light of the reasons and precedents set out above, there is no doubt that the Sea of Azov and the Kerch Strait constitute internal waters.

4. *The practice of Russia and Ukraine is consistent with the internal waters status of the Sea of Azov and the Kerch Strait*

95. After the dissolution of the USSR, Russia and Ukraine confirmed that the Sea of Azov and the Kerch Strait constitute internal waters of both States in a number of instruments.

96. The first of such instruments is the State Border Treaty of 28 January 2003. In Article 5, Russia and Ukraine state:

“Nothing in this Treaty shall prejudice the positions of the Russian Federation and Ukraine with respect to the status of the Sea of Azov and the Kerch Strait as internal waters of the two States.”¹¹⁸

97. Russia and Ukraine further confirmed the internal waters status of the Sea of Azov and of the Kerch Strait in two bilateral instruments of 24 December 2003: the Azov/Kerch Cooperation Treaty and the Joint Statement by the President of the Russian Federation and the President of Ukraine on the Sea of Azov and the Kerch Strait. In these instruments, which set out a special regime for navigation in the Kerch Strait and in the Sea of Azov, the two States agreed that “the Sea of Azov and the Kerch Strait are historically internal waters of the Russian Federation and Ukraine.”¹¹⁹

98. Russia and Ukraine’s agreed position had already been expressed in previous bilateral negotiations. In the Working Minutes of the Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation held in Moscow on 14 August 1996 it was reported that “[t]he sides ... believe that the Sea of Azov and the Kerch Strait

¹¹⁸ **RU-19**. The English text annexed has been translated from the authentic Russian and Ukrainian texts and differs from the one deposited by Ukraine with the United Nations (UN Registration No. 54132) since the translation provided in the latter is not accurate. Indeed, the translation by Ukraine refers to “the Sea of Azov or the Kerch Strait” while “Азовского моря и Керченского пролива” in Russian and “Азовського моря і Керченської протоки” in Ukrainian both mean “the Sea of Azov and the Kerch Strait” (emphasis added); it also omits the phrase “of the two States” at the end of the quoted sentence while such precision is provided in the authentic texts (“двух государств” in Russian and “двох держав” in Ukrainian).

¹¹⁹ Azov/Kerch Cooperation Treaty, Article 1(1) (**RU-20**). See also the Joint Statement by the President of the Russian Federation and the President of Ukraine on the Sea of Azov and the Strait of Kerch, 24 December 2003, *Law of the Sea Bulletin*, 2004, Vol. 54, p. 131 (**RU-21**).

should have the status of internal waters of the Russian Federation and Ukraine.”¹²⁰ Even more explicitly, in the Minutes of the Second Session of the same Sub-Commission, held in Kiev on 6 May 1997, it was reported that

“The Ukrainian side ... noted that that the Sea of Azov and the Kerch Strait should preserve the status of internal waters of the Russian Federation and Ukraine”

with the Russian side expressing agreement on this point.¹²¹

5. *Russia and Ukraine have also acquired historic title to the Sea of Azov and the Kerch Strait*

99. The long time elapsed since the Russian Empire and the USSR started claiming that the Sea of Azov and the Kerch Strait are internal waters explains why in the Treaty and Joint Statement of 24 December 2003 Russia and Ukraine stated that these waters were *historically* internal.¹²² These statements are claims to historic bay status for the Sea of Azov including the Kerch Strait which is its opening.

100. These claims, which were publicized in the *Law of the Sea Bulletin* of the United Nations, did not provoke objections of third States. By way of example, the United States elected to protest Russia’s claim to historic title over the Peter the Great Bay, but it did *not* protest Russia and Ukraine’s Treaty and Joint Statement of 24 December 2003 regarding the Sea of Azov and the Kerch Strait.¹²³

101. Moreover, the Sea of Azov is the first example of a historic bay quoted in the UN Memorandum on Historic Bays.¹²⁴

¹²⁰ Working Minutes of the Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, No. 426/2dsng, 14 August 1996, para. 4 (RU-16).

¹²¹ Minutes of the Second Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, 6 May 1997 (RU-17).

¹²² Article 1(1) of the Azov/Kerch Cooperation Treaty (RU-20); Joint Statement by the President of the Russian Federation and the President of Ukraine on the Sea of Azov and the Strait of Kerch, 24 December 2003, *Law of the Sea Bulletin*, 2004, Vol. 54, p. 131 (RU-21).

¹²³ See *Maritime Claims Reference Manual*, issued by the U.S. Department of Defense Representative for Ocean Policy Affairs, available at http://www.jag.navy.mil/organization/documents/mcrm/Russian_Federation_2016.pdf (RU-39).

¹²⁴ *Historic Bays: Memorandum by the Secretariat of the United Nations*, doc. A/CONF.13/1, extract from the *Official Records of the United Nations Conference on the Law of the Sea*, Vol. I (Preparatory Documents), para. 12

102. The claim of historically internal waters should be interpreted also as claims that the rights exercised in the Sea of Azov and the Kerch Strait are based on historic title.

103. The 2016 Award in the *Philippines v. China* case states that the expression “[h]istoric title’ ... is used specifically to refer to historic sovereignty to land or maritime areas”.¹²⁵ Moreover, the already mentioned UN Memorandum on Historic Bays states that

“[T]he theory of historic bays is of general scope. Historic rights are claimed not only in respect of bays, but also in respect of maritime areas which do not constitute bays, such as the waters of archipelagos and the water area lying between an archipelago and the neighbouring mainland; historic rights are also claimed in respect of *straits*, estuaries and other similar bodies of waters.”¹²⁶

104. Therefore, if the Kerch Strait were not to be seen as included as the mouth of the historic bay of the Sea of Azov, it should be held that the rights over its waters are based on historic title.

105. The historic bay and historic title status of the Sea of Azov and the Kerch Strait are also invoked by Russia as a basis for objecting to the Tribunal’s jurisdiction in light of the declarations made by Russia and Ukraine pursuant to UNCLOS Article 298(1)(a). This further preliminary objection is set out in the next chapter.¹²⁷

C. UKRAINE’S UNILATERAL PRACTICE CONSISTENTLY SUPPORTS THE INTERNAL WATERS STATUS OF THE SEA OF AZOV AND THE KERCH STRAIT

106. Since its independence and up to the beginning of the present dispute, Ukraine has treated the Sea of Azov and the Kerch Strait as internal waters as emerges not only from the bilateral practice illustrated above but also from Ukraine’s other conduct and statements as set out at paragraphs 107 – 112 below.

(RU-5). This document refers to the opinions of P.C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, G. A. Jennings Co., 1927, p. 383; G. Gidel, *Droit international public de la mer*, Vol. III, Mellottee 1930-1934, p. 663; A.N. Nikolayev, *Problema Territorialnykh Vod v Mezhdunarodnom Prave*, Gosudarstvennoye Izdatelstvo Yuridicheskoi Literatury, 1954, pp. 207-208.

¹²⁵ *Philippines v. China*, Award, 12 July 2016, para. 225 (UAL-11).

¹²⁶ *Historic Bays: Memorandum by the Secretariat of the United Nations*, para. 8 (emphasis added) (RU-5).

¹²⁷ See Chapter 4, Section III.

107. The first aspect of the practice of Ukraine that must be recalled is the imposition of mandatory pilotage for vessels navigating through the Kerch Strait and collecting fees for it¹²⁸ to which no State has ever objected. Such lack of objection confirms the conclusion that the Sea of Azov consists of internal waters. In fact, strong objections are raised when mandatory pilotage is imposed in straits to which transit passage applies as occurred with Australia when it imposed mandatory pilotage for passage through the Strait of Torres.¹²⁹ In that case various States argued that compulsory pilotage was incompatible with transit passage through straits used for international navigation under UNCLOS. One eloquent, but not isolated, example is the statement of the representative of Singapore at the UN General Assembly in 2007:

“If the international community allows this implementation of compulsory pilotage to go uncensored, this could potentially lead to an erosion of the right of transit passage in international straits, as well as navigational rights in other maritime zones enshrined by the Convention.”¹³⁰

108. The unchallenged imposition of compulsory pilotage by Ukraine in the Kerch Strait is thus a confirmation that in Ukraine’s view the Kerch Strait is not a strait to which transit passage applies as it links an EEZ to the Sea of Azov’s internal waters.

109. Moreover, in the draft Treaty between Ukraine and the Russian Federation on the Legal Status of the Sea of Azov and Navigation in its Water Area, submitted by Ukraine to Russia for the purposes of negotiations as an Annex to a Note of 19 October 1995, Ukraine proposed to state in the preamble: “Assuming that nowadays the Sea of Azov laps the shores of two neighboring, sovereign, independent and friendly States.” Ukraine then proposed to state in Article 1 that “[t]he water area of the Sea of Azov shall be given the legal status of internal sea

¹²⁸ Order of the Ministry of Transport of Ukraine No. 721, Rules of Navigation by Ships through the Kerch-Enikalskiy Channel and the Approach Channels to It, 9 October 2002, paras. 7.1 and 7.12 (RU-18); *Black Sea and Sea of Azov Pilot*, United Kingdom Hydrographic Office, 2003, p. 239 (UA-222).

¹²⁹ See Y. Tanaka, *The International Law of the Sea*, 2nd ed., Cambridge University Press, 1995, pp. 108-109 (RUL-21).

¹³⁰ United Nations General Assembly, Sixty-second session, 65th Plenary Meeting, 10 December 2007, A/62/PV.65, p. 23 (Mr. Menon) (RU-24). See also the interventions of the representatives of the United States and Japan respectively in United Nations General Assembly, Sixty-first session, 68th Plenary Meeting, 7 December 2006, A/61/PV.68, p. 5 (Mr. Floyd) (RU-22) and in United Nations General Assembly, Sixty-third session, 62nd Plenary Meeting, 4 December 2007, A/63/PV.62, p. 27 (Mr. Okuda) (RU-23).

waters of Ukraine and the Russian Federation.”¹³¹ These proposals were later adopted in the binding provisions of the Azov/Kerch Cooperation Treaty.

110. Other instances of Ukraine’s practice establish in clear terms Ukraine’s support for the internal waters status of the Sea of Azov.

111. At the time the present dispute was materializing, Ukraine stated the following in its Note to the Russian Federation dated 29 July 2015:

“[T]he Ukrainian Side draws the attention of the Russian Side to the fact that, in accordance with the current bilateral agreements, *the Azov Sea and the Kerch Strait are historically defined as internal waters of Ukraine and Russia* and the issues related to that maritime area are resolved solely by arrangements between Ukraine and Russia in compliance with international law.”¹³²

112. Furthermore, Ukraine effected with the UN Secretariat the registration of the State Border Treaty on 1 December 2016.¹³³ Thus, some two months after the commencement of the present proceedings, Ukraine decided to give full publicity to a 2003 treaty which explicitly confirmed the position of Ukraine (and of Russia) “with respect to the status of the Sea of Azov and the Kerch Strait as internal waters of the two States.”¹³⁴

113. Despite this unequivocal practice, Ukraine relies on one episode to support its assertion that with Ukraine’s independence “the Sea of Azov and Kerch Strait ceased to fall within the borders of a single State and became subject to the general rules of the law of the sea”. Ukraine’s Memorial states:

“Reflecting this altered status, in 1992, the list of coordinates that Ukraine deposited with the United Nations included points that were expressly for the purpose of ‘measuring the width of the territorial waters, economic zone and the continental shelf of the Sea of

¹³¹ Draft Treaty between Ukraine and the Russian Federation on the Legal Status of the Sea of Azov and Navigation in its Water Area, Annex to *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 12/42-994, 19 October 1995 (RU-15).

¹³² Note from the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 610/22-110-1132, 29 July 2015 (emphasis added) (UA-233).

¹³³ UN Registration No. 54132, *UN Treaty Series*, no volume has yet been determined. See Certificate of registration No. 67410 (RU-47).

¹³⁴ State Border Treaty, Article 5 (RU-19).

Azov.’ Ukraine’s deposit marked the first time baselines were announced for the Sea of Azov, reflecting the Sea’s change in status.’¹³⁵

114. This position of Ukraine is based upon a single isolated episode entirely inconsistent with Ukraine’s conduct and statements concerning the Sea of Azov and the Kerch Strait since its independence, and immaterial in light of the practice of the two States.

115. Moreover, the deposit of coordinates was not circulated by the UN Secretariat to other States parties to UNCLOS because at that time UNCLOS was not yet in force.¹³⁶ Once the coordinates became known to Russia, there was no reason to attach any significance to this information in view of the fact that Ukraine had indicated its agreement with Russia’s view on the legal characterization of the Sea of Azov and the Kerch Strait as internal waters of the two States.

116. In summary, although in 1992 Ukraine submitted coordinates for drawing baselines in the Sea of Azov in connection with a territorial sea, an EEZ and a continental shelf, in fact its subsequent conduct and statements were consistent with the long-standing position of both Russia and Ukraine that the Sea of Azov and the Kerch Strait are internal waters. As noted above, in 2003 Ukraine agreed that the Sea of Azov and the Kerch Strait are internal waters in three different bilateral instruments. Significantly, and much more recently, in a diplomatic note of 2015 to Russia, Ukraine reiterated the same position, confirming it in 2016 by registering the State Border Treaty with the UN Secretariat.¹³⁷ Therefore, the consequences Ukraine claims to emerge from the deposit of coordinates in 1992 could at best be seen as an anomaly in a consistent pattern.

¹³⁵ UM, para. 26. United Nations Division for Oceans and the Law of the Sea, Office of Legal Affairs, *Law of the Sea Bulletin*, 1998, Vol. 36, pp. 49-52 (UA-4).

¹³⁶ Note from the Office of Legal Affairs of the United Nations to the Permanent Mission of the Russian Federation to the United Nations, 28 March 2018 (RU-50).

¹³⁷ See above fn. 116.

II. The Tribunal lacks jurisdiction because the waters of the Sea of Azov and the Kerch Strait are not regulated by UNCLOS

117. Three interconnected consequences follow from the fact that the waters of the Sea of Azov and the Kerch Strait are internal waters:

- (a) the regime of these waters is not regulated by UNCLOS;
- (b) the Kerch Strait is not a strait regulated by UNCLOS;
- (c) any dispute concerning the regime of the Sea of Azov and the Kerch Strait is not a “dispute concerning the interpretation or application” of UNCLOS, so that the Tribunal lacks jurisdiction to adjudicate it.

A. UNCLOS DOES NOT REGULATE INTERNAL WATERS

118. Although it mentions internal waters in various provisions (as described below), UNCLOS does not regulate this maritime zone by prescribing the legal regime applicable to such an area as it does for other maritime zones.

119. UNCLOS defines internal waters as the waters on the landward side of the baseline (Article 8(1)) and specifies that, if the establishment of straight baselines has the effect of enclosing as internal waters areas that previously were not considered as such, a right of innocent passage shall exist in these waters (Article 8(2)).

120. Article 2 of UNCLOS states:

“The sovereignty of a coastal State extends, *beyond its land territory and internal waters* ... to an adjacent belt of sea, described as the territorial sea.”¹³⁸

¹³⁸ Emphasis added. Correspondence of this provision to customary international law is confirmed by the ICJ: “The basic legal concept of State sovereignty in customary international law, expressed in, *inter alia*, Article 2 paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory. ... The Court has no doubt that these prescriptions of treaty-law [referring *inter alia* to UNCLOS] merely respond to firmly established and longstanding tenets of customary international law” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, para. 212 (UAL-25)).

In this provision the reference to the land territory and to internal waters merely refers to the location of territorial waters. The object of the rule is exclusively the regime of the territorial sea. Commenting Article 2, Judges Cot and Wolfrum, in their separate opinion in the *Ara Libertad* case, state the following:

“The provision is quite telling. It equates internal waters and archipelagic waters with the land territory whereas it ‘extends the sovereignty to an adjacent belt of sea called the territorial sea’. This clearly establishes that internal waters originally belong to the land whereas the territorial sea so belongs but only on the basis of international treaty and customary international law. As a consequence thereof limitations of the coastal States’ sovereignty over internal waters cannot be assumed.”¹³⁹

121. That the regime of internal waters, albeit with the minor specifications of Articles 8(2) and 35(a), is not established by UNCLOS, emerges also from various further textual elements:

(a) Article 2(2) specifies that the coastal State’s sovereignty over the territorial sea “extends to the air space over the territorial sea as well as to its bed and subsoil.” The Convention does not state the same for the internal waters.

(b) Article 2(3) provides that sovereignty over the territorial sea “is exercised subject to this Convention and to other rules of international law.” There is no corresponding rule as regards internal waters. A similar – but more favourable to the coastal State – rule is set out in Article 49 as regards the exercise of sovereignty of the archipelagic State over its archipelagic waters and their airspace and bed and subsoil: “[t]his sovereignty is exercised subject to this Part.” Again, there is no corresponding rule as regards internal waters.

(c) UNCLOS does not contain rules on delimitation of internal waters between States whose coasts are opposite or adjacent to each other.¹⁴⁰

¹³⁹ “*Ara Libertad*” (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012, Separate Opinion of Judges Cot and Wolfrum, ITLOS Reports 2012*, p. 363, para. 25 at p. 370 (**RUL-34**). Similarly, K. Trümpler, “Article 8, Internal Waters”, in A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary*, Beck, Hart, Nomos, 2017, p. 90, para. 15 (**RUL-40**).

¹⁴⁰ B. Vukas, “Sea Boundary Delimitation and Internal Waters”, in T. M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes, Liber Amicorum Judge Thomas A. Mensah*, Nijhoff, 2007, p. 557 (**RUL-29**). Vukas – following L. Caflisch, “Les zones maritimes sous juridiction nationale, leurs limites et leur delimitation”, in D. Bardonnet and M. Virally (eds.) *Le nouveau droit international de la mer*, Pedone, 1983, pp. 40-41 (**RUL-11**) – holds the view that delimitation of internal waters should be effected

(d) UNCLOS does not contain provisions on fishing in internal waters, on exploration and exploitation of mineral resources on the seabed and subsoil of internal waters, on laying of cables and pipelines in internal waters, on marine scientific research in internal waters. These questions are all covered by the principle that the coastal State is sovereign in its internal waters. UNCLOS has no role in regulating them.

122. Recent scholarly literature is consistent in stating that the law of the sea codification conventions (the Geneva Convention and UNCLOS) do not cover the regime of internal waters.

123. So Churchill and Lowe state that

“[J]ust as the State is in principle free to deal with its land territory, so it should be free to deal with its internal waters as it chooses; and for this reason those waters have not been made the subject of detailed regulation in any of the Conventions on the Law of the Sea.”¹⁴¹

124. Vukas holds the view that in UNCLOS:

“The only provision dealing with the regime of internal waters is the one exceptionally recognizing the right of innocent passage in those waters. Innocent passage in internal waters exists only ‘[w]here the establishment of a straight baseline ... has the effect of enclosing as internal waters areas which had not previously been considered as such ...’ (art. 8(2))”¹⁴²

125. According to Bangert, in the *Max-Planck Encyclopedia of Public International Law*:

“The internal waters regime is a customary law regime. Internal waters and the partly-overlapping regime of historic waters are the only regimes in the law of the sea that are exclusively regulated under general customary law. Both regimes have been deliberately excluded from the UN Convention on the Territorial Sea and the Contiguous zone and the UN Convention on the Law of the Sea.”¹⁴³

applying UNCLOS Article 15 on delimitation of the territorial sea, while the *Croatia/Slovenia Award* considers that “such delimitations are to be made on the basis of the same principles as are applicable to the delimitation of land territories” (*Arbitration between the Republic of Croatia and the Republic of Slovenia*, Final Award, 29 June 2017, para. 886 (RUL-41)).

¹⁴¹ R.R. Churchill and V. Lowe, *The Law of the Sea*, 3rd ed., Manchester University Press, 1999, p. 61 (RUL-23).

¹⁴² B. Vukas, “Sea Boundary Delimitation and Internal Waters”, in T. M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes, Liber Amicorum Judge Thomas A. Mensah*, Nijhoff, 2007, p. 554 (RUL-29).

¹⁴³ K. Bangert, “Internal Waters”, in *Max Planck Encyclopedia of Public International Law* (Oxford online edition last updated August 2013), para. 6 (RUL-35).

126. In the same vein, Rothwell and Stephens state that “the LOSC [Law of the Sea Convention] does not in any way seek to interfere with the regime of internal waters.”¹⁴⁴

127. This point has also been made, in a detailed analysis, by Judges Cot and Wolfrum in their joint separate opinion in the International Tribunal for the Law of the Sea’s Order of 2012 in the *Ara Libertad* case.¹⁴⁵ They state, *inter alia*, that “internal waters in principle are not covered by the Convention but by customary international law.”¹⁴⁶

128. In light of the text of UNCLOS and the authorities cited above, it can safely be concluded that – with the limited exceptions set out in Articles 8(2) and 35(a) – the regime of internal waters is not regulated by UNCLOS. UNCLOS assumes that this regime is that of sovereignty under customary international law.

B. THE KERCH STRAIT IS NOT A STRAIT REGULATED BY UNCLOS

129. Ukraine contends that since its independence, the Kerch Strait is a strait to which transit passage applies under Article 37 of UNCLOS.¹⁴⁷

130. However, as already shown above in discussing compulsory pilotage,¹⁴⁸ the Kerch Strait, giving access to a sea composed only of internal waters, is not a strait as defined by Article 37 of UNCLOS; it is not a strait “between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”

131. Accordingly, disputes concerning activities conducted in it are not disputes concerning the interpretation or application of UNCLOS. The specific obligations provided by the Convention in Articles 43 and 44, which Ukraine alleges have been breached, are not applicable.

¹⁴⁴ D. R. Rothwell and T. Stephens, *The International Law of the Sea*, 2nd ed., Hart Publishing, 2016, p. 55 (RUL-39).

¹⁴⁵ “*Ara Libertad*” (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012, Separate Opinion of Judges Cot and Wolfrum, ITLOS Reports 2012*, p. 363, paras. 23-34 at pp. 396-372 (RUL-34).

¹⁴⁶ *Ibid.*, para. 26. See above, para. 120.

¹⁴⁷ UM, para. 22.

¹⁴⁸ See above, paras. 107-108.

C. DISPUTES CONCERNING INTERNAL WATERS ARE NOT COVERED
BY THE TRIBUNAL'S JURISDICTION

132. As the waters of the Sea of Azov and of the Kerch Strait are internal waters and as none of the issues that Ukraine raised with respect to the Sea of Azov and the Kerch Strait are covered by UNCLOS, the claims by Ukraine concerning activities in these areas do not relate to “disputes concerning the interpretation or application” of UNCLOS as required by Article 288(1) on which Ukraine relies.¹⁴⁹

133. As this Tribunal's jurisdiction covers only disputes “concerning the interpretation or application” of UNCLOS, the Tribunal lacks jurisdiction to adjudicate these claims and the disputes based on them.

¹⁴⁹ UM, para. 16.

page intentionally left blank

CHAPTER 4

THE TRIBUNAL HAS NO JURISDICTION IN LIGHT OF THE PARTIES' DECLARATIONS UNDER ARTICLE 298(1) OF UNCLOS

134. If the Tribunal were to hold that there were a dispute as to the interpretation or application of UNCLOS within Article 288(1) (*quod non*), it would then be faced with the exceptions to its jurisdiction set out in Article 298(1) of the Convention, which provides that

“1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;

...

(b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3”.

135. The object and purpose of Article 298(1) is to protect the sovereign will of States not to have certain sensitive matters subject to dispute settlement procedures with binding effect.

As underlined by the *Virginia Commentary*,

“The idea of a specific exemption clause for certain categories of disputes was considered early in the [Third United Nations Conference on the Law of the Sea] by the informal working group on the settlement of disputes in 1974. While some of its members believed that the integrity of the compromise packages to be embodied in the Convention had to be preserved at all costs against unravelling by reservations that would actually result in a disintegration of the package, *the majority agreed that various States consider certain matters to be so sensitive that they should not be subject to the far-reaching dispute settlement procedures being envisaged for inclusion in the Convention*. Consequently, the working group listed in its report ... alternative formulations of various items

suggested by its members... These items related to disputes concerning the exercise of a State’s regulatory or enforcement jurisdiction, sea boundary delimitations, historic bays, vessels and aircraft entitled to sovereign immunity under international law, and military activities.”¹⁵⁰

136. As set out in Chapter 1, Russia and Ukraine have availed themselves of the optional exceptions to compulsory jurisdiction with respect to disputes concerning military activities and law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297(3) (**Section I**), sea boundary delimitation disputes (**Section II**) as well as disputes involving historic bays or titles (**Section III**).¹⁵¹

I. The Tribunal has no jurisdiction over military activities and law enforcement activities

137. Russia has made a declaration by which it avails itself of both the exceptions provided for under Article 298(1)(b).¹⁵² Those exceptions relate to disputes concerning military activities (**sub-section A**) and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297(3) (**sub-section B**).

A. THE TRIBUNAL HAS NO JURISDICTION SINCE THE DISPUTE CONCERNS MILITARY ACTIVITIES

138. As pointed out by the Arbitral Tribunal in the *South China Sea Arbitration*,

“Article 298(1)(b) applies to ‘*disputes concerning military activities*’ and not to ‘*military activities*’ as such. Accordingly, the Tribunal considers the relevant question to be whether the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute.”¹⁵³

139. The Tribunal then rightly applied a low threshold for the application of Article 298(1)(b) since it can be triggered by the mere involvement of the military forces:

¹⁵⁰ M. Nordquist (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. V, Nijhoff, 1989, pp. 109-110, para. 298.2 (emphasis added) (**RUL-14**).

¹⁵¹ For the text of the declarations see above, para. 8.

¹⁵² *Ibid.*

¹⁵³ *Philippines v. China*, Award, 12 July 2016, para. 1158 (emphasis in the original) (**UAL-11**).

“the Tribunal finds that the essential facts at Second Thomas Shoal concern the deployment of a detachment of the Philippines’ armed forces that is engaged in a stand-off with a combination of ships from China’s Navy and from China’s Coast Guard and other government agencies. In connection with this stand-off, Chinese Government vessels have attempted to prevent the resupply and rotation of the Philippine troops on at least two occasions. Although, as far as the Tribunal is aware, these vessels were not military vessels, China’s military vessels have been reported to have been in the vicinity. In the Tribunal’s view, this represents a quintessentially military situation, involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another. As these facts fall well within the exception, the Tribunal does not consider it necessary to explore the outer bounds of what would or would not constitute military activities for the purposes of Article 298(1)(b).”¹⁵⁴

140. The present case, as presented by Ukraine, bears upon a quintessentially military situation. The core of Ukraine’s claims turns on alleged Russia’s military conduct in Crimea, described in turn as a “military aggression”,¹⁵⁵ “unlawful use of force”,¹⁵⁶ “annexation”,¹⁵⁷ “unlawful occupation”¹⁵⁸ or “unlawful invasion”.¹⁵⁹

141. The Statement of Claim affirms in particular that

“The Russian Federation’s unlawful acts did not and could not alter the area of Ukraine’s recognized territorial sea, exclusive economic zone, and continental shelf. Its acts of aggression do not license the Russian Federation’s illegal appropriation of valuable maritime natural resources which, under the Convention, belong to the people of Ukraine. Ukraine seeks to vindicate its maritime rights guaranteed by the Convention, and the tribunal has jurisdiction over the dispute relating to these rights.”¹⁶⁰

¹⁵⁴ *Ibid.*, para. 1161.

¹⁵⁵ Statement of the Delegation of Ukraine at the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, 20 February 2018, quoted above, para. 35 (**RU-49**). See also Statement of Claim, paras. 2 and 43; Ministry of Foreign Affairs of Ukraine official website, “Statement of the Ministry of Foreign Affairs of Ukraine on the Initiation of Arbitration against the Russian Federation under the United Nations Convention on the Law of the Sea”, 14 September 2016, quoted above, para. 33 (**RU-44**); President of Ukraine official website, “President instructed Foreign Ministry to file a lawsuit against Russia to international arbitration”, 14 September 2016, quoted above, para. 34 (**RU-45**).

¹⁵⁶ Statement of Claim, para. 4.

¹⁵⁷ Statement of Claim, paras. 2, 4 and 42; President of Ukraine official website, “President instructed Foreign Ministry to file a lawsuit against Russia to international arbitration”, 14 September 2016, quoted above, para. 34 (**RU-45**); UM, paras. 83 and 169.

¹⁵⁸ Statement of Claim, para. 42. See also UM, paras. 102 and 231; Statement of the Delegation of Ukraine at the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, 20 February 2018, quoted above, para. 35 (**RU-49**).

¹⁵⁹ UM, paras. 4 and 102.

¹⁶⁰ Statement of Claim, para. 43.

142. In light of both Parties' declarations made pursuant to Article 298(1),¹⁶¹ the present Tribunal has no jurisdiction.

143. Not only, as underlined in Chapter 2 above,¹⁶² is Ukraine's actual objective in fact to advance its position in the Parties' dispute over the legality of Crimea's reunification with Russia, but also, it plainly presents its claim as a response to Russia's alleged aggression.

144. Furthermore, *all* the asserted violations of UNCLOS are portrayed by Ukraine as the direct result of alleged military conduct of Russia. In the very introduction to its Statement of Claim, Ukraine affirms that "[t]he Russian Federation has repeatedly and unlawfully infringed Ukraine's maritime rights in the period following its unlawful acts of aggression and purported annexation of the Crimean Peninsula."¹⁶³ This causal link is underlined again in the introduction to the chapter of the Memorial dedicated to Russia's alleged breach of UNCLOS.¹⁶⁴

145. As already noted in Chapter 2,¹⁶⁵ the key disputed issue of whether there has been such an unlawful seizure cannot somehow be bypassed or assumed in Ukraine's favour by the assertion that the "case does not address Russia's unlawful invasion of Crimea – which under international law cannot, and in the clear view of the international community does not, alter the status of Crimea as Ukraine's indisputable sovereign territory".¹⁶⁶

146. A determination regarding the lawfulness of alleged military conduct of Russia is the unavoidable prerequisite to addressing the specific claims.

147. Several of these claims directly rely on alleged unlawful uses of force:

- (a) Submissions (a) and (b), and (f) and (g) are based on charges of "exclusion" of Ukraine from gas fields and fisheries allegedly appertaining to it and

¹⁶¹ For the text of the declarations see above, para. 8.

¹⁶² See notably above, paras. 28, 33-36, 41.

¹⁶³ Statement of Claim, para. 2. See also *ibid.*, paras. 4 and 5. See further Ministry of Foreign Affairs of Ukraine official website, "Statement of the Ministry of Foreign Affairs of Ukraine on the Initiation of Arbitration against the Russian Federation under the United Nations Convention on the Law of the Sea", 14 September 2016, quoted above, para. 33 (RU-44).

¹⁶⁴ UM, para. 102 quoted above, para. 40.

¹⁶⁵ See above, para. 41.

¹⁶⁶ UM, para. 8.

“usurpation” of Ukraine’s alleged jurisdiction. The Memorial asserts that Russia effected such exclusion through “physical force”.¹⁶⁷

- (b) Submissions (d), (e), (h) and (i) concern alleged unlawful interferences with Ukrainian-flagged vessels and fixed platforms. The Memorial notably refers to the detention of a Ukrainian-flagged vessel “by armed Russian FSB guards who verbally stated that they would use force, if necessary” to prevent it from fishing in the Black Sea.¹⁶⁸ Ukraine also asserts that “Russia physically seized CNG-UA vessels, rigs, and platforms”¹⁶⁹ and notably provides the statement of a witness who submits hearsay evidence of the occupation of offshore platforms by Russian military personnel.¹⁷⁰ It also refers to the interception of vessels by Russian warships and military aircrafts.¹⁷¹
- (c) Submission (m) claims that Russia would have impeded transit passage through the Kerch Strait, thus presumably implying that it did this by force, but without giving any evidence to that end.
- (d) Submissions (q) and (r) invoke alleged Russian interferences with Ukraine’s attempts to protect archaeological and historical objects in its maritime areas and the Memorial points out that the Russian military was involved in the archaeological expeditions complained of by Ukraine.¹⁷²

¹⁶⁷ See e.g., UM, paras. 9, 199-120.

¹⁶⁸ UM, para. 159.

¹⁶⁹ UM, para. 120.

¹⁷⁰ Witness Statement of Svetlana Nezhnova, para. 11 (emphasis added): “It quickly became clear that, during the post-invasion period, Russia was seeking to take over Chornomornaftogaz’s gas fields, as well as production from those fields. The Russian Federation began to *interfere* with Chornomornaftogaz’s operations *soon after the Russian invasion of Crimea*. For example, I learned from a former chief of a drilling supervision unit of Chornomornaftogaz that *Russian military personnel physically occupied the offshore platform* on which he was working in the Odeske gas field. On or about 29 March 2014, he and other employees traveling to the platform were followed by a *Russian military vessel*. *Troops on that vessel then boarded the platform* and remained on the platform for the duration of the chief’s two-week shift. The chief was in contact with other workers in our gas fields and, based on reports he received, Russian personnel also occupied all of Chornomornaftogaz’s other offshore platforms on the shelf of the Black Sea.”

¹⁷¹ UM, paras. 122-123; **UA-142**; Witness Statement of Captain Iaroslav Grabovskiy, paras. 8-10, 12-14; Witness Statement of Captain Oleksandr Penskiy, paras. 15-16, 19-20.

¹⁷² UM, paras. 229 and 227.

148. In sum, the central thrust of Ukraine’s claim is the alleged involvement of the Russian military forces in Crimea and all the specific claims concern, whether directly or implicitly, military activities. Therefore, the entirety of the dispute is excluded from compulsory jurisdiction not only because it relates essentially to the sovereignty over Crimea, but also because Ukraine maintains that Russian sovereignty was acquired through unlawful use of military force.

**B. THE TRIBUNAL HAS NO JURISDICTION OVER CLAIMS CONCERNING
LAW ENFORCEMENT ACTIVITIES**

149. Article 298(1)(b) covers law enforcement measures, which include boarding, inspection, arrest and judicial proceedings, in accordance with Article 73(1) of UNCLOS. More specifically, Article 298(1)(b) excepts from the jurisdiction of the Tribunal “disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction” that are “excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3”, i.e.:

“(i) disputes arising out of the exercise by the coastal State of a right or discretion with respect to marine scientific research in the exclusive economic zone and on the continental shelf (Articles 297(2)(a)(i) and 246);

(ii) disputes arising out of a decision by a coastal State to order suspension or cessation of a marine scientific research project (Articles 297(2)(a)(ii) and 253); and,

(iii) disputes related to a coastal State’s sovereign rights with respect to living resources in the exclusive economic zone or the exercise of such rights (Article 297(3)(a)).”¹⁷³

150. In the *South China Sea Arbitration*, the Tribunal held that Article 298 “would restrict the Tribunal’s jurisdiction over fishing and fisheries-related law enforcement in the event that the relevant areas formed part of China’s exclusive economic zone”¹⁷⁴ or the “activities took place ... in an area in which the Parties possess overlapping entitlements to an exclusive economic zone.”¹⁷⁵

¹⁷³ *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on Jurisdiction, 26 November 2014, para. 75 (**RUL-37**).

¹⁷⁴ *Philippines v. China*, Award on Jurisdiction and Admissibility, para. 406 (**UAL-3**).

¹⁷⁵ *Ibid.*, para. 395.

151. In the present case, there is no doubt that the coasts of Russia and Ukraine are capable of generating maritime entitlements in the Black Sea and it is submitted that the law enforcement activities took place within Russia's EEZ – or at the very least in an area in which the Parties possess overlapping entitlements to an EEZ. This is a bar to the Tribunal's jurisdiction over the Parties' disputes relating, among others, to Russia fisheries enforcement measures, and the operation of Russian law enforcement vessels in the Black Sea. The same objection would apply to the Sea of Azov if the Tribunal were to consider that its long-established and well-recognised status as internal waters¹⁷⁶ had been altered (*quod non*).

152. In particular, the Tribunal cannot rule on Ukraine's allegation that "Russian border and fisheries vessels patrol [the territorial sea around Crimea and parts of its EEZ] and take enforcement action against Ukrainian-flagged fishing vessels that they find in or near them",¹⁷⁷ and the related submissions according to which Russia has violated Articles 56, 58, 61, 62, 73, and 92 of UNCLOS by excluding Ukraine from accessing fisheries, by exploiting such fisheries, and by usurping Ukraine's exclusive jurisdiction over the living resources within "its" EEZ;¹⁷⁸ Articles 56, 58 and 92 by interfering with Ukraine's exclusive jurisdiction over Ukrainian-flagged fishing vessels in "its" EEZ,¹⁷⁹ as well as Articles 56, 58, 73 and 92 by interfering with the navigation of Ukrainian Sea Guard vessels through "its" EEZ.¹⁸⁰ Indeed, all these alleged violations are a consequence of Russia's law enforcement activities.

153. Finally, while Article 298(1)(b), read in conjunction with Article 297(3)(a), only restricts the Tribunal's jurisdiction over claims with respect to law enforcement activities in the EEZ, Ukraine's similar claims as regards the territorial sea and continental shelf must equally be rejected since it would be paradoxical that activities taking place in areas over which the coastal State possesses more (or at least equal) rights as those it has in the EEZ, would be submitted to the jurisdiction of the Tribunal while they are exempted from its jurisdiction when exercised in the EEZ.¹⁸¹ Indeed, the absence of a specific reference to the territorial sea and continental shelf in these provisions cannot be interpreted as being less favourable for the

¹⁷⁶ See above, Chapter 3.

¹⁷⁷ UM, para. 153.

¹⁷⁸ UM, para. 265(g).

¹⁷⁹ UM, para. 265(h).

¹⁸⁰ UM, para. 265(i).

¹⁸¹ See further below, paras. 195-196.

State's sovereignty than the situation prevailing in the EEZ. This is expressed in positive terms with regard to the territorial sea and internal waters by Article 2(1) which affirms the full sovereignty and jurisdiction of the coastal State therein. Foreign flagged vessels only have very limited rights which boil down to the right of innocent passage. The State is thus free to regulate fisheries and take enforcement measures in the event of non-compliance and such activities do not fall under the jurisdiction of the Tribunal as a consequence of the exception to its jurisdiction under Article 297(3).

II. The Tribunal has no jurisdiction over delimitation related claims

154. As shown above in Chapter 2, the real dispute between the Parties concerns sovereignty over Crimea – this alone excludes the jurisdiction of the Tribunal to decide on Ukraine's claim. Ukraine tries to circumvent this unavoidable obstacle by attempting to redefine the dispute as one "concerning natural resource exploitation and other unlawful activities in [its] maritime zones"¹⁸² and defining its sovereign rights and jurisdiction in areas of the Black Sea, Sea of Azov, and Kerch Strait as "indisputable".¹⁸³

155. Yet, without prejudice to the objections raised in Chapters 2 and 3 above, Russia submits that Ukraine's claims as regards its alleged sovereign rights could not be ruled upon without first delimiting the maritime areas at issue (**sub-section B**) and such a delimitation dispute is excluded from binding settlement in accordance with the Parties' declarations made pursuant to Article 298(1)(a)(i) of UNCLOS (**sub-section A**).

A. SCOPE OF THE OPTIONAL EXCEPTION TO BINDING SETTLEMENT IN ARTICLE 298(1)(A)(I) OF UNCLOS

156. Article 298(1)(a)(i) covers "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations". These terms must be interpreted in accordance with their ordinary meaning and in the light of the object and purpose of the optional exceptions, i.e., safeguarding the sovereign will and vital interests of States.¹⁸⁴ In this regard, the delegate of the Soviet Union during the Third United Nations Conference on the

¹⁸² Statement of Claim, Title of Section II, p. 1.

¹⁸³ *Ibid.*, para. 5.

¹⁸⁴ See above, para. 135.

Law of the Sea notably considered that “compulsory [settlement of sea boundary delimitation] issues irrespective of the wishes of the States concerned ... was an infringement of their sovereignty” and was therefore “totally unacceptable”, “[t]he Soviet Union could not accept such an obligation, and was convinced that agreement on sea boundaries could only be achieved by negotiation or other methods agreed by the parties.”¹⁸⁵

157. The expressions “concerning” and “relating to” under Article 298(1)(a)(i) mean “in connection with” and cover both immediate subjects and connected matters referred to therein. In this regard, it is useful to refer to the prior consideration of these terms by international courts and tribunals which confirm this interpretation.

158. In the case concerning the *Aegean Sea Continental Shelf*, the Court underlined, as regards the expression “disputes *relating to* the territorial status of Greece”, that

“The question is not, as Greece seems to assume, whether continental shelf rights are territorial rights or are comprised within the expression ‘territorial status’. The real question for decision is, whether the dispute is one which *relates* to the territorial status of Greece. ...

... continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State. It follows that the territorial regime – the territorial status – of a coastal State comprises, *ipso jure*, the rights of exploration and exploitation over the continental shelf to which it is entitled under international law. A dispute regarding those rights would, therefore, appear to be one which may be said to ‘relate’ to the territorial status of the coastal State.”¹⁸⁶

159. In the *Fisheries Jurisdiction* case, the ICJ rejected Spain’s contention that the dispute which it had brought before it fell outside the terms of Canada’s reservation to its jurisdiction by reason of its subject matter; it pointed out that

“[I]n excluding from its jurisdiction ‘*disputes arising out of or concerning*’ the conservation and management measures in question and their enforcement, the reservation does not reduce the criterion for exclusion to the ‘subject-matter’ of the dispute. *The language used in the English version – ‘disputes arising out of or concerning’ – brings out more clearly the broad and comprehensive character of the formula employed. The words of the reservation exclude not only disputes whose immediate ‘subject-matter’ is the measures in question and their enforcement, but also*

¹⁸⁵ Third United Nations Conference on the Law of the Sea, Ninth session, *Official Records*, Vol. XIII, 126th Plenary Meeting, 2 April 1980, A/CONF.62/SR.126, p. 18, para. 110 (RU-10).

¹⁸⁶ *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Judgment*, I.C.J. Reports 1978, p. 34, para. 81, and p. 36, para. 86 (emphasis in the original) (RUL-9).

those ‘concerning’ such measures and, more generally, those having their ‘origin’ in those measures (‘arising out of’) – that is to say, those disputes which, in the absence of such measures, would not have come into being. Thus the scope of the Canadian reservation appears even broader than that of the reservation which Greece attached to its accession to the General Act of 1928 (‘disputes relating to the territorial status of Greece’), which the Court was called upon to interpret in the case concerning the *Aegean Sea Continental Shelf* (*I.C.J. Reports 1978*, p. 34, para. 81, and p. 36, para. 86).¹⁸⁷

160. For its part, in the *M/V Louisa* case, the ITLOS held that

“the declaration of Saint Vincent and the Grenadines refers to disputes ‘concerning the arrest or detention’ of vessels. In the view of the Tribunal, *the use of the term ‘concerning’ in the declaration indicates that the declaration does not extend only to articles which expressly contain the word ‘arrest’ or ‘detention’ but to any provision of the Convention having a bearing on the arrest or detention of vessels.* This interpretation is reinforced by taking into account the intention of Saint Vincent and the Grenadines at the time it made the declaration, as evidenced by the submissions made in the Application. From these submissions, it becomes clear that the declaration of Saint Vincent and the Grenadines was meant to cover all claims connected with the arrest or detention of its vessels. On the basis of the foregoing, the Tribunal concludes that the narrow interpretation of the declaration of Saint Vincent and the Grenadines as advanced by Spain is not tenable.”¹⁸⁸

161. Accordingly, the exception under Article 298(1)(a)(i) excludes not only disputes whose immediate “subject-matter” is Articles 15, 74 or 83, but any dispute having a bearing on the delimitation of the territorial sea, EEZ and continental shelf. Similarly, the phrase “relating to sea boundary delimitations” covers not only disputes involving the determination of sea boundaries but all matters connected with the entire delimitation *process*, including issues of overlapping entitlements.

162. The law of the sea envisages delimitation not as an isolated and instantaneous operation but as an integral and systemic process. As noted by the ICJ, beyond determining the principles or methods of delimitation, “the task of delimitation” first and foremost “consists in resolving the overlapping claims”¹⁸⁹ taking into consideration all the special or relevant circumstances, and drawing the boundary. In short, any delimitation begins with identifying the basis, nature

¹⁸⁷ *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment*, *I.C.J. Reports 1998*, p. 458, para. 62 (emphasis added) (**RUL-22**).

¹⁸⁸ *M/V Louisa (Saint Vincent and the Grenadines v. Spain)*, *ITLOS Reports 2013*, p. 31, para. 83 (emphasis added) (**RUL-36**).

¹⁸⁹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment*, *I.C.J. Reports 2009*, p. 89, para. 77 (**UAL-2**); *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Judgment*, *I.C.J. Reports 2012*, p. 674, para. 141 (**RUL-33**).

and maximum extent of an entitlement, focuses on weighing the overlapping entitlements, and ends by granting them actual effect. Any decision regarding the entitlement of a coastal State is part of the delimitation process and will inevitably affect the result of delimitation.

163. As the ITLOS recalled:

“397. Delimitation presupposes an area of overlapping entitlements. Therefore, the first step in any delimitation is to determine whether there are entitlements and whether they overlap.

398. While entitlement and delimitation are two distinct concepts addressed respectively in articles 76 and 83 of the Convention, they are interrelated. ...”¹⁹⁰

164. Thus, disputes regarding overlapping entitlements generally fall within the delimitation process in application of Articles 15, 74 and 83. In the present case, were UNCLOS held to be applicable, the Tribunal would not be able to determine the Parties’ respective rights and obligations without first resolving their overlapping claims and delimiting the maritime areas concerned, a dispute which lies outside its jurisdiction by virtue of both Russia and Ukraine’s declarations under Article 298(1)(a)(i).

B. UKRAINE’S ALLEGED RIGHTS CANNOT BE DETERMINED WITHOUT PRIOR DELIMITATION OF THE MARITIME AREAS CONCERNED

165. Ostensibly, Ukraine is not requesting the Tribunal to delimit a maritime boundary but to adjudge that Russia has unlawfully interfered with the enjoyment and exercise of its allegedly sovereign rights in the Black Sea, Sea of Azov and Kerch Strait.

166. Such claims presuppose that Ukraine has entitlements therein and that they do not overlap with Russia’s. The very first sentence introducing the dispute in the Statement of Claim is particularly telling in this regard since it presents Ukraine “as the coastal State for purposes of determining maritime entitlements appertaining to the Crimean Peninsula.”¹⁹¹ Throughout its Memorial, Ukraine also (and firstly) seeks to affirm its general “entitlements” in the Black

¹⁹⁰ *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS Reports 2012, p. 105, paras. 397-398 (RUL-32). See also *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award, 11 April 2006, UNRIAA, Vol. XXVII, p. 211, para. 224 (RUL-28).

¹⁹¹ Statement of Claim, para. 3.

Sea, Sea of Azov and Kerch Strait, and repeatedly refers to specific rights it is allegedly “entitled to”.¹⁹²

167. Yet, in addition to the dispute between the Parties concerning their respective sovereignty over the relevant coastal territories, the question of Ukraine’s entitlements and related rights is not a settled issue since the delimitation of the territorial sea, the EEZ and the continental shelf between the Parties, has not been effected by agreement in accordance with Articles 15, 74, 83 of UNCLOS.

168. In essence, the Tribunal would have to identify and resolve the overlapping entitlements by delimiting the maritime zones belonging to each Party in order then to rule on Ukraine’s claims as to its rights relating to hydrocarbons, fisheries, and other natural resources, protection of the marine environment, and preservation of maritime archaeological objects and sites.¹⁹³ Such rights are inextricably linked to delimitation: on the one hand, delimitation rules are rooted in maritime rights (in particular, rights over resources have played a crucial role in the development of the modern law of the sea); on the other hand, sea boundary delimitations determine both the respective maritime areas of the Parties and their rights deriving from them.

169. The issues raised by Ukraine’s claims are, in many respects, similar to those of the Philippines in the *South China Sea Arbitration*. Most notably, Submission No. 5 “reflect[ed] a dispute concerning the sources of maritime entitlements in the South China Sea and whether a situation of overlapping entitlements to an exclusive economic zone or to a continental shelf exists in the area of Mischief Reef and Second Thomas Shoal”,¹⁹⁴ Submission No. 8 reflected a dispute concerning China’s alleged interferences with the enjoyment and exercise of the Philippines’ sovereign rights with respect to the living and non-living resources in what it claimed as its EEZ and continental shelf; Submission No. 9 reflected a dispute concerning Chinese fishing activities in what the Philippines claimed as its EEZ. Similarly, in the present

¹⁹² See e.g., UM, paras. 7, 11, 22, 23, 25, 28, 103, 144, 180, 183, 213 and Map 2.

¹⁹³ Statement of Claim, para. 2. See also UM, Chapter Four.

¹⁹⁴ *Philippines v. China*, Award on Jurisdiction and Admissibility, para. 402. Submission No. 5 related to a dispute over whether “Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines” (*ibid.*, para. 101) (UAL-3).

case, Ukraine alleges that Russia has violated its rights to hydrocarbon and living resources in what it claims as its territorial sea, EEZ and continental shelf.¹⁹⁵

170. In the *South China Sea Arbitration*, the Arbitral Tribunal considered that, although

“a dispute concerning the existence of an entitlement to maritime zones is distinct from a dispute concerning the delimitation of those zones in an area where the entitlements of parties overlap. ... China correctly notes in its Position Paper that certain of the Philippines’ Submissions (Submissions No. 5, 8 and 9) request the Tribunal to declare that specific maritime features ‘are part of the exclusive economic zone and continental shelf of the Philippines’ or that certain Chinese activities interfered with the Philippines’ sovereign rights in its exclusive economic zone. Because the Tribunal has not been requested to – and will not – delimit a maritime boundary between the Parties, the Tribunal will be able [to] address those of the Philippines’ Submissions based on the premise that certain areas of the South China Sea form part of the Philippines’ exclusive economic zone or continental shelf *only if the Tribunal determines that China could not possess any potentially overlapping entitlement in that area. ...*”¹⁹⁶

171. In its conclusions on its jurisdiction, the Tribunal underlined again that, with regard to Submissions No. 5, 8 and 9, the premise of the Philippines’ submission was that no overlapping entitlements existed because only the Philippines possesses an entitlement to an EEZ in the relevant areas.¹⁹⁷ The Tribunal added that if, however, another maritime feature claimed by China within 200 nautical miles of these areas were to be an “island” for the purposes of Article 121, paragraph 2, capable of generating an entitlement to an EEZ and continental shelf, “the resulting overlap and the exclusion of boundary delimitation from the Tribunal’s jurisdiction by Article 298 would prevent the Tribunal from addressing the Philippines’ Submissions”.¹⁹⁸

172. The formulation adopted by the Tribunal at the merits stage with regard to Submission No. 8 is also worth noting:

“the effect of China’s objection to compulsory dispute settlement for maritime delimitation is that the Tribunal could only address this Submission if the respective maritime entitlements of the Parties could be established and if no overlap requiring delimitation were found to exist. Jurisdiction has been established *only* because the allocation of rights under the Convention is *unequivocal*. ... The relevant areas can *only* constitute the exclusive economic zone and continental shelf of the Philippines.

¹⁹⁵ UM, Chapter Four, Sections I and II.

¹⁹⁶ *Philippines v. China*, Award on Jurisdiction and Admissibility, paras. 156-157 (emphasis added) (UAL-3).

¹⁹⁷ *Ibid.*, paras. 402, 405 and 406.

¹⁹⁸ *Ibid.*

Accordingly, the Philippines – and not China – possesses sovereign rights with respect to resources in these areas.”¹⁹⁹

173. In the present case, the “premise” relied upon by the Tribunal in the *South China Sea Arbitration*, is not applicable since the relevant areas cannot “only constitute” the EEZ and continental shelf of Ukraine. Contrary to China, which mainland lies about 550 nautical miles from the outer limits of the so-called “nine-dash-line” and which could not claim any maritime feature within 200 nautical miles of the relevant areas capable of generating an entitlement to an EEZ and continental shelf, Russia does possess entitlements in the Black Sea overlapping with those of Ukraine. The same objection would apply to the Sea of Azov if the Tribunal were to consider that its long-established and well-recognised status as internal waters²⁰⁰ had been altered (*quod non*). As rightly put by Ukraine, “[n]either the Black Sea nor the Sea of Azov contain areas of high seas, all points within them being within 200 nautical miles of the coast of at least one of the littoral States.”²⁰¹ Accordingly, Ukraine does not claim that Russia has engaged in any allegedly illegal activities beyond 200 nautical miles. The determination of the Parties’ respective rights and obligations is thus anything but “unequivocal”. It would involve, as an indispensable prerequisite, the delimitation of their maritime boundary.

174. This is true with regard to Ukraine’s claims over hydrocarbon and living resources, as well as archaeological and historical objects, but also concerning freedom of navigation or the right of passage which is “a theme that runs through the Convention, taking different forms in different maritime zones.”²⁰² To determine the content and potential violations of navigational rights, the Tribunal would also first have to define, and thus delimit, the maritime zones at stake.

175. It results from the above that, as a consequence of the Parties’ declarations under Article 298(1)(a)(i) of UNCLOS, the Tribunal cannot exercise jurisdiction over the submissions of Ukraine referring to its territorial sea, EEZ and continental shelf²⁰³ and alleged sovereign rights

¹⁹⁹ *Philippines v. China*, Award, 12 July 2016, para. 697 (emphasis added) (UAL-11).

²⁰⁰ See above, Chapter 3.

²⁰¹ UM, para. 4.

²⁰² M. Nordquist (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. III, Nijhoff, 1995, p. 81, para. 87.9(c) (RUL-15).

²⁰³ UM, para. 265(a)-(i), (q)-(r).

therein since it could not address the merits of Ukraine’s claims without first delimiting the sea boundary between the Parties.

III. The Tribunal has no jurisdiction over historic bays or titles

176. As explained above in Chapter 3, disputes relating to the Sea of Azov and the Kerch Strait are disputes concerning internal waters and consequently not “disputes concerning the interpretation or application” of UNCLOS. In any event, the Parties availed themselves of the optional exception to compulsory jurisdiction with respect to disputes “involving historic bays or titles”.²⁰⁴

177. As shown above,²⁰⁵ the Sea of Azov/Kerch Strait should be considered a “historic bay”. The independence of Ukraine did not change this status and simply meant the historic bay become common to the two States. Russia and Ukraine have acquired “historic title” over these maritime areas.²⁰⁶

178. Further, while the declarations of both Parties made upon signature on 10 December 1982 did not mention disputes involving historic bays or titles, this optional exception to binding settlement was introduced in the declarations made upon ratification in 1997 by Russia and in 1999 by Ukraine. There would be no point for Ukraine, which has no other historic bay, to exclude such disputes unless it considered that the Sea of Azov and Kerch Strait had that status.

179. Therefore, as a consequence of the Parties’ declarations under Article 298(1)(a)(i) of UNCLOS, the Tribunal cannot exercise jurisdiction over the submissions of Ukraine relating to the Sea of Azov and Kerch Strait.

²⁰⁴ For the text of the declarations see above, para. 8.

²⁰⁵ See above, Chapter 3, Section I, sub-section B.

²⁰⁶ See above, Chapter 3, Section I, sub-section B (5).

page intentionally left blank

CHAPTER 5

THE TRIBUNAL HAS NO JURISDICTION OVER FISHERIES CLAIMS IN LIGHT OF ARTICLE 297(3)(A) OF UNCLOS

180. If the Tribunal were to hold that there were a dispute as to the interpretation or application of UNCLOS within Article 288(1) (*quod non*) it would also be faced with the automatic limitation set out in Article 297(3)(a), which provides that

“3. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of *any* dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.”²⁰⁷

181. **Section I** of this Chapter considers the scope of the limitation. **Section II** then identifies the claims made by Ukraine which are excluded from the Tribunal’s jurisdiction pursuant to it.

I. Scope of the automatic limitation to a binding settlement in Article 297(3)(a) of UNCLOS

182. Disputes concerning living resources within 200 nautical miles are specifically and automatically excluded from binding compulsory dispute settlement by Article 297(3)(a). As underlined by the Annex VII Tribunal in the *Southern Bluefin Tuna* case,

“61. ... Under paragraph 3 of Article 297, section 2 procedures are applicable to disputes concerning fisheries but, and this is an important ‘but’, the coastal State is not obliged to submit to such procedures where the dispute relates to its sovereign rights or their exercise with respect to the living resources in its EEZ

62. It thus appears to the Tribunal that UNCLOS falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions. ...”²⁰⁸

²⁰⁷ Emphasis added.

²⁰⁸ *Southern Bluefin Tuna (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, *UNRIIAA*, Vol. XXIII, p. 45, paras. 61-62 (**RUL-24**).

183. During the negotiations of UNCLOS, disputes over fisheries were deliberately excluded from binding compulsory dispute settlement in the interest of reaching agreement at the Third United Nations Conference on the Law of the Sea.²⁰⁹ In her book on *Dispute Settlement in the UN Convention on the Law of the Sea*, Professor Natalie Klein concludes that “Article 297 largely insulates the coastal State from review when it comes to fisheries”.²¹⁰

184. In an attempt to delimit the scope of Article 297(3)(a), the Arbitral Tribunal in the *South China Sea Arbitration* held that

“Because the areas of the South China Sea at issue for Submission No. 8 can *only* constitute the exclusive economic zone of the Philippines, the Tribunal ... considers that Article 297(3)(a) and the law enforcement exception in Article 298(1)(b) of the Convention pose no obstacle to its jurisdiction. These provisions serve to limit compulsory dispute settlement where a claim is brought against a State’s exercise of its sovereign rights in respect of living resources in its own exclusive economic zone. These provisions do not apply where a State is alleged to have violated the Convention in respect of the exclusive economic zone of another State.”²¹¹

185. Such a straightforward answer is not possible in the present case since the areas at issue cannot “only” constitute the EEZ of Ukraine.²¹² On the contrary, it is submitted that they appertain to Russia who is thus the coastal State. Fishing activities engaged in, authorized and regulated therein accordingly represent an exercise by Russia of its sovereign rights and jurisdiction with respect to the living resources in its EEZ.

186. In any event, a dispute can be said to “relate to” sovereign rights when there is a connection between the dispute and the existence, scope, or exercise of the sovereign rights in question.²¹³ In the present case, Ukraine is challenging both Russia’s entitlement to sovereign rights over living resources in the Black Sea and the Sea of Azov and its exercise of those rights.²¹⁴ The present dispute exists because Russia’s conception of its sovereign rights

²⁰⁹ M. Nordquist (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. V, Nijhoff, 1989, pp. 87-94, 105 (RUL-14); N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge University Press, 2005, pp. 175-188 (RUL-27).

²¹⁰ N. Klein, *ibid.*, pp. 175-176 (RUL-27).

²¹¹ *Philippines v. China*, Award, 12 July 2016, para. 695 (emphasis added) (UAL-11).

²¹² See above, para. 173.

²¹³ See above, para. 158, quoting *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, p. 36, para. 86 (RUL-9).

²¹⁴ For instance, Chapter Four, Section II.B.3 of the Memorial is entitled: “Russia Has Usurped Ukraine’s Exclusive Right to Sustainably Manage and Regulate Its Coastal Fisheries”.

conflicts with the Ukraine's understanding of its own rights. The two are intertwined and are excluded from compulsory settlement. This is supported by the *Chagos* case in which

“the Tribunal [did] not accept Mauritius’ argument that a distinction can be made between disputes regarding the sovereign rights of the coastal State with respect to living resources, and disputes regarding the rights of other States in the exclusive economic zone (with only the former excluded from compulsory settlement). In nearly any imaginable situation, a dispute will exist precisely because the coastal State’s conception of its sovereign rights conflicts with the other party’s understanding of its own rights. In short, the two are intertwined, and a dispute regarding Mauritius’ claimed fishing rights in the exclusive economic zone cannot be separated from the exercise of the United Kingdom’s sovereign rights with respect to living resources.”²¹⁵

187. In *Barbados v. Trinidad & Tobago*, the Annex VII Tribunal further noted that

“Taking fishing activity into account in order to determine the course of the boundary is ... not at all the same thing as considering fishing activity in order to *rule upon the rights and duties of the Parties in relation to fisheries within waters that fall*, as a result of the drawing of that boundary, *into the EEZ of one or other Party*. Disputes over such rights and duties *fall outside the jurisdiction of this Tribunal* because Article 297(3)(a) stipulates that a coastal State is not obliged to submit to the jurisdiction of an Annex VII Tribunal ‘any dispute relating to [the coastal State’s] sovereign rights with respect to the living resources in the exclusive economic zone’, and Trinidad and Tobago has made plain that it does not consent to the decision of such a dispute by this Tribunal.”²¹⁶

188. This squarely applies to the present case: Ukraine is actually requesting the Tribunal to rule upon the rights and duties of the Parties in relation to living resources;²¹⁷ disputes over such rights and duties fall outside the jurisdiction of this Tribunal.

II. Article 297(3)(a) and Ukraine’s claims relating to fisheries

189. In particular, Ukraine requests the Tribunal to adjudge and declare that

“The Russian Federation has violated Articles 56, 58, 61, 62, 73, and 92 of the Convention by excluding Ukraine from accessing fisheries within its exclusive economic zone, by exploiting such fisheries, and by usurping Ukraine’s exclusive jurisdiction over the living resources of its exclusive economic zone.”²¹⁸

²¹⁵ *Mauritius v. UK*, para. 297 (UAL-18).

²¹⁶ *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award, 11 April 2006, UNRIAA, Vol. XXVII, p. 224, para. 276 (emphasis added) (RUL-28).

²¹⁷ See Statement of Claim, Title B, paras. 14-19 and 50(c)-(e); UM, Chapter Four, Section II.

²¹⁸ UM, para. 265(g).

190. The provisions invoked by Ukraine provide for the sovereign rights of the coastal State with respect to the living resources in the EEZ:

(a) in Article 56(1)(a), generally “for the purpose of exploring and exploiting, conserving and managing” the living resources;

(b) in Article 58(3), as regards the other States’ obligation to have “due regard to the rights and duties of the coastal State” and to “comply with the laws and regulations adopted by the coastal State”;

(c) in Article 61(1), regarding the determination of the allowable catch;

(d) in Article 62, concerning the harvesting capacity and the allocation of surpluses to other States.

191. All these rights are precisely the rights expressly excluded from compulsory jurisdiction by Article 297(3)(a).

192. As to the alleged violation of Article 73 relating to enforcement of laws and regulations of the coastal State, Ukraine’s allegations fall both within the law enforcement exception under Article 298(1)(b),²¹⁹ and within Article 297(3)(a) which covers “the terms and conditions established [by the coastal State] in its conservation and management laws and regulations”, including the determination of sanctions in cases of non-compliance. This notably excludes the Tribunal’s jurisdiction as regards Russia’s extension of its laws and regulations on fisheries to the maritime areas around Crimea and their enforcement in said zones.²²⁰

193. The same is true of the alleged violation of Article 92.

194. Ukraine further submits that

“The Russian Federation has violated Articles 2 and 21 of the Convention by excluding Ukraine from accessing fisheries within 12 miles of the Ukrainian coastline, by exploiting such fisheries, and by usurping Ukraine’s exclusive jurisdiction over the living resources of its territorial sea.”²²¹

²¹⁹ See above, Chapter 4, Section I, sub-section B.

²²⁰ Statement of Claim, para. 50(e); UM, para. 174.

²²¹ UM, para. 265(f).

195. While Article 297(3)(a) expressly only excludes the jurisdiction of the Tribunal over claims with respect to living resources in the EEZ, Ukraine's similar claim as regards the territorial sea must equally be rejected. As underlined by Professor Oxman

“The absence of a specific reference to the territorial sea ... and to the continental shelf in paragraph 3, presumably reflects the absence of relevant duties in the Convention regarding coastal State regulation of [fishing] in those areas. In procedural terms, therefore, the appropriate objection might be to admissibility of the claim rather than to jurisdiction, but the expected outcome ordinarily would be the same.”²²²

196. Further, UNCLOS reaffirms the sovereignty of the coastal State over the internal waters and the territorial sea, and by implication its absolute right to control fishing therein. Finally, there would have been little point in negotiating a complex and balanced fisheries regime for the EEZ, with specific rules as to jurisdiction, if that regime could then be undermined from within via claims to fish in the internal waters and the territorial sea.

197. It results from the above that the Tribunal has no jurisdiction to decide on the submissions of Ukraine concerning the alleged violation of UNCLOS as a result of the exercise by Russia of its sovereign rights with respect to the living resources in the Black Sea. The same objection would apply to the Sea of Azov if the Tribunal were to consider that its long-established and well-recognised status as internal waters²²³ had been altered (*quod non*).

²²² B. Oxman, “Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals”, in D. Rothwell et al. (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford University Press, 2015, p. 405 (RUL-38).

²²³ See above, Chapter 3.

page intentionally left blank

CHAPTER 6

THE TRIBUNAL HAS NO JURISDICTION OVER FISHERIES, PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT, AND NAVIGATION IN LIGHT OF ANNEX VIII

198. Even if there were a dispute as to the interpretation or application of UNCLOS within Article 288(1) and if jurisdiction were not rejected pursuant to the Parties' declarations under Article 298(1) and/or the automatic limitation under Article 297(3)(a) (*quod non*), the Tribunal could not rule on Ukraine's claims related to fisheries, protection and preservation of the marine environment or navigation since such claims belong to the jurisdictional domain of Annex VIII tribunals (**Section III**). Such definitive allocation flows not only from the choice of means for dispute settlement made by the Parties pursuant to Article 287 (**Section I**) but also from the interpretation of the said Article and the principle of *lex specialis* (**Section II**).

199. The present Chapter is without prejudice to Russia's right to raise objections with respect to jurisdiction of any Annex VIII tribunal.

I. The choice of means for dispute settlement made by the Parties

200. Article 287(1) provides that

“When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

(a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;

(b) the International Court of Justice;

(c) an arbitral tribunal constituted in accordance with Annex VII;

(d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.”

201. The Union of Soviet Socialist Republics' Declaration made upon signature on 10 December 1982 provides that

“under article 287 of the United Nations Convention on the Law of the Sea, it chooses an arbitral tribunal constituted in accordance with Annex VII as the basic means for the settlement of disputes concerning the interpretation or application of the Convention. It opts for a special arbitral tribunal constituted in accordance with Annex VIII for the consideration of matters relating to fisheries, the protection and preservation of the marine environment, marine scientific research, and navigation, including pollution from vessels and dumping. It recognizes the competence of the International Tribunal for the Law of the Sea, as provided for in article 292, in matters relating to the prompt release of detained vessels and crews.”

This declaration remains in force and applies to the present case.

202. Ukraine similarly declared on 26 July 1999 upon ratification that

“in accordance with article 287 of the United Nations Convention on the Law of the Sea of 1982, it chooses as the principal means for the settlement of disputes concerning the interpretation or application of this Convention an arbitral tribunal constituted in accordance with Annex VII. For the consideration of disputes concerning the interpretation or application of the Convention in respect of questions relating to fisheries, protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels and by dumping, Ukraine chooses a special arbitral tribunal constituted in accordance with Annex VIII.”

203. Thus, Russia and Ukraine have both chosen as the “basic”²²⁴ or “principal”²²⁵ means for the settlement of disputes concerning the interpretation or application of UNCLOS an Annex VII tribunal. However, they have also both opted for a *special* arbitral tribunal constituted in accordance with Annex VIII for the consideration of specific categories of disputes.²²⁶

204. Only eleven States have so far opted for this procedure in their declarations²²⁷ and none of them has yet availed itself of Annex VIII arbitration. The present dispute is the first one where the declarations of both States parties to the dispute coincide in this regard.

²²⁴ Declaration of the USSR upon signature of UNCLOS, 10 December 1982, para. 1 (**RU-11**).

²²⁵ Declaration of the Ukrainian SSR upon signature of UNCLOS, 10 December 1982, para. 1 (**RU-11**); Declaration of Ukraine upon ratification, 26 July 1999, para. 1.

²²⁶ Declaration of USSR upon signature of UNCLOS, 10 December 1982, para. 1 (**RU-11**); Declaration of the Ukrainian SSR upon signature of UNCLOS, 10 December 1982, para. 1 (**RU-11**); Declaration of Ukraine upon ratification, 26 July 1999, para. 1.

²²⁷ See the declarations of Argentina; Austria; Belarus; Chile; Ecuador; Hungary; Mexico; Portugal; Russia; Timor-Leste; Ukraine, available at http://www.un.org/depts/los/convention_agreements/convention_declarations.htm, last consulted on 25 April 2018.

205. While four States have given an order of preference to their chosen means of settling disputes,²²⁸ no order of preference has explicitly been given by either Russia or Ukraine.²²⁹ Their declarations are not framed in terms of a hierarchical list of dispute settlement bodies but as choices of separate procedures for separate types of disputes. The general procedure provided for in Annex VII will apply only to disputes that do not fall under the jurisdiction of Annex VIII tribunals.

II. Article 287 and the principle of *lex specialis*

206. Article 287 creates what can be described as a “menu” of dispute settlement options from which States can choose the forum that they consider most appropriate. For general issues of interpretation or application of UNCLOS, arbitration under Annex VII is only one of the options available (which also include recognising the jurisdiction of the ITLOS or the ICJ) and constitutes under Article 287(5), a residual procedure. For certain categories of disputes – those mentioned in Article 1 of Annex VIII (referred to in Article 287(1)(d) of UNCLOS), arbitration under Annex VIII must however be resorted to when both States concerned have chosen such means without explicitly favouring the general procedures. This flows from the express terms of Article 287(4) according to which “[i]f the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted *only* to that procedure, unless the parties otherwise agree.”²³⁰ Since both Russia and Ukraine have chosen an Annex VIII tribunal for the consideration of matters relating to fisheries, the protection and preservation of

²²⁸ See the declarations of Argentina, Austria, Chile and Hungary which use the expression “in order of preference” or “in the following order” before listing their chosen means. For instance, the declaration of Austria upon ratification of UNCLOS (14 July 1995, **RU-14**) provides:

“With regard to article 287 of the Convention of the Law of the Sea, Austria declares the following:

In the absence of any other peaceful means to which it would give preference, the Government of the Republic of Austria hereby chooses one of the following means for the settlement of disputes concerning the interpretation or application of the two Conventions in accordance with article 287 of the Convention on the Law of the Sea, in the following order:

1. The International Tribunal for the Law of the Sea established in accordance with Annex VI;
2. A special arbitral tribunal constituted in accordance with Annex VIII;
3. The International Court of Justice.

Also in the absence of any other peaceful means, the Government of the Republic of Austria hereby recognizes as of today the validity of special arbitration for any dispute concerning the interpretation or application of the Convention on the Law of the Sea relating to fisheries, protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels and by dumping.”

²²⁹ See http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm.

²³⁰ Emphasis added.

the marine environment, marine scientific research, and navigation, those categories of disputes *must* be submitted to an Annex VIII tribunal.

207. States have adopted special procedures for good reasons. As shown by the *travaux préparatoires* of UNCLOS, several delegations shared the view that the widely differing range and character of disputes likely to arise under the Convention could not all be accommodated satisfactorily by only one mode of settlement, and that a tribunal composed only of lawyers “would not be appropriate”²³¹ for certain categories of disputes. They advocated “a more functional approach”²³² with regard to fisheries, marine pollution, scientific research and navigation which include highly technical matters. In these fields, it was deemed that “recourse to qualified experts provided the best chance of ensuring objective consideration of cases ... [and avoiding] the risk of decisions motivated by considerations extraneous to the subject-matter of the dispute”.²³³

208. In particular, Mr Riphagen, the Dutch representative speaking also on behalf of the delegations of Belgium and Luxembourg, underlined that

“3. ... The choice between the various possible methods of dispute settlement must ... correspond to the specific character of the applicable rules and to the subject-matter of the particular dispute. Different procedures should therefore be envisaged, while seeking to avoid creating problems of positive or negative conflicts of competence between those procedures. ...

6. For disputes to which no special procedures applied, a general procedure of compulsory judicial settlement should be provided for. The choice was between the International Court of Justice, a new permanent tribunal or arbitration.”²³⁴

209. As underlined by Professor Noyes,

“The Soviet Union and the Socialist states of Eastern Europe [also] favored special arbitral tribunals composed of legal, scientific, and technical experts in particular fields in which disputes arose, and they eventually accepted a system that incorporated

²³¹ M. Nordquist (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. V, Nijhoff, 1989, p. 42 (RUL-14).

²³² *Ibid.*

²³³ Third United Nations Conference on the Law of the Sea, Fourth session, *Official Records*, Vol. V, 59th Plenary Meeting, 5 April 1976, A/CONF.62/SR.59, p. 13, para. 5 (France) (RU-7). See also, e.g., 60th meeting, 6 April 1976, A/CONF.62/SR.60, p. 27, para. 58 (Japan) (RU-8); *ibid.*, p. 29, para. 76 (Bulgaria); 61st meeting, 6 April 1976, A/CONF.62/SR.61, p. 32, para. 30 (Poland) (RU-9).

²³⁴ Third United Nations Conference on the Law of the Sea, Fourth session, *Official Records*, Vol. V, 60th meeting, 6 April 1976, A/CONF.62/SR.60, pp. 21-22 (RU-8).

compulsory references to regular binding arbitration when all the parties to a dispute did not agree on special arbitration.”²³⁵

210. This confirms that, when both parties to a dispute over fisheries, marine pollution, scientific research and/or navigation have opted for a special arbitral tribunal constituted in accordance with Annex VIII, such procedure must be resorted to.

211. The precedence which must be given to special tribunals constituted in accordance with Annex VIII over the general jurisdiction conferred upon Annex VII tribunals is further supported by the principle of *lex specialis* as applied by international courts and tribunals. Most notably, the Permanent Court of International Justice held in the *Mavrommatis* case that

“In so far as the Protocol establishes in Article 5 a special jurisdiction for the assessment of indemnities, this special jurisdiction – provided that it operates under the conditions laid down – excludes as regards these matters the general jurisdiction given to the Court in disputes concerning the interpretation and application of the Mandate.”²³⁶

212. In effect, Ukraine is depriving Russia of its right to have a tribunal constituted pursuant to the procedure as agreed with respect to the matters in dispute. The complexity of the technical issues underlying the respective claims of Ukraine and the relevance of special expertise is shown in particular by the expert report of Professor Ahmet Kideys prepared at the request of Ukraine and submitted together with its Memorial. While Russia reiterates that the claims that Ukraine seeks to corroborate with this report fall outside the jurisdiction of *any* UNCLOS dispute settlement mechanism, special knowledge may be required in these fields, for examples, to assess the alleged adverse environmental impact of the construction of the bridge in the Kerch Strait on the marine environment or to rule on Ukraine’s claims with regard to Russia’s exploitation of living resources and the alleged adverse impact of the construction of the Kerch Bridge on the environment and navigation in the Kerch Strait.²³⁷

²³⁵ J. Noyes, “Compulsory Third-Party Adjudication and the 1982 United Nations Convention on the Law of the Sea”, *Connecticut Journal of International Law*, 1989, Vol. 4, p. 682 (RUL-16).

²³⁶ *Mavrommatis Palestine Concessions*, P.C.I.J. Series A, No. 2, p. 32 (RUL-2).

²³⁷ See e.g., UM, paras. 208-209.

III. Ukraine's claims relating to fisheries, protection and preservation of the marine environment, and navigation are covered by Annex VIII

213. It results from the above that Ukraine's claims concerning fisheries resources,²³⁸ navigation²³⁹ as well as the protection and preservation of the marine environment²⁴⁰ are excluded from the general jurisdiction of the present Tribunal. In particular, the Tribunal cannot decide on the 'submissions according to which:

f. The Russian Federation has violated Articles 2 and 21 of the Convention by excluding Ukraine from accessing fisheries within 12 miles of the Ukrainian coastline, by exploiting such fisheries, and by usurping Ukraine's exclusive jurisdiction over the living resources of its territorial sea.

g. The Russian Federation has violated Articles 56, 58, 61, 62, 73, and 92 of the Convention by excluding Ukraine from accessing fisheries within its exclusive economic zone, by exploiting such fisheries, and by usurping Ukraine's exclusive jurisdiction over the living resources of its exclusive economic zone.

...

m. The Russian Federation has violated Articles 38 and 44 of the Convention by impeding transit passage through the Kerch Strait as a result of the Kerch Strait bridge.

n. The Russian Federation has violated Articles 43 and 44 of the Convention by failing to share information with Ukraine concerning the risks and impediments to navigation presented by the Kerch Strait bridge.

o. The Russian Federation has violated Articles 123, 192, 194, 204, 205, and 206 of the Convention by failing to cooperate and share information with Ukraine concerning the environmental impact of the Kerch Strait bridge.

p. The Russian Federation has violated Articles 123, 192, 194, 198, 199, 204, 205, and 206 of the Convention by failing to cooperate with Ukraine concerning the May 2016 oil spill off the coast of Sevastopol."

214. Given the respective declarations made by Russia and Ukraine under Article 287(1), the present Tribunal, constituted under Annex VII, has no jurisdiction to decide on Ukraine's claims set out in the previous paragraph.

²³⁸ Statement of Claim, Title B, paras. 14-19, 50(c)-(e); UM, Chapter Four, Section II.

²³⁹ Statement of Claim, paras. 22, 50(f)-(h); UM, Chapter Four, Section III.

²⁴⁰ Statement of Claim, Title D, paras. 29-33, 50(i); UM, Chapter Four, Sections III and IV.

CHAPTER 7
THE TRIBUNAL HAS NO JURISDICTION PURSUANT TO
ARTICLE 281 OF UNCLOS

215. Even leaving to one side all the other objections that Russia has raised, the Tribunal would still lack jurisdiction with respect to the greater part of Ukraine’s claims as a result of Article 281.

216. Article 281 of UNCLOS provides:

“If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.”

217. The relevant agreement of the Parties is contained in the State Border Treaty and the Azov/Kerch Cooperation Treaty. There Ukraine and Russia have agreed that any disputes concerning “adjacent sea areas”, including the Sea of Azov and relevant sea areas in the Black Sea, and those “relating to the Kerch Strait” shall be resolved by mutual agreement, hence recourse to negotiations is mandatory. Ukraine failed to engage in genuine negotiations with Russia concerning any relevant dispute (**Section I**). Furthermore, the relevant provisions of these Treaties exclude recourse to further procedures, including arbitration under UNCLOS (**Section II**). The majority of Ukraine’s claims in this arbitration concern “adjacent sea areas”, including the Sea of Azov and Black Sea, or relate to the Kerch Strait, therefore the Tribunal does not have jurisdiction to resolve them (**Section III**).

218. This objection is made without prejudice to Russia’s other jurisdictional objections including its position that UNCLOS does not apply to the Sea of Azov and the Kerch Strait, as they constitute internal waters.²⁴¹

²⁴¹ See above, Chapter 3.

I. Agreement reflected in the bilateral treaties between Russia and Ukraine requires recourse to negotiations, and Ukraine failed to satisfy this condition

219. Article 281 of UNCLOS imposes conditions to, and limitations on, the jurisdiction of Annex VII tribunals where parties have agreed to resolve disputes by recourse to other means of peaceful dispute settlement. In this case the relevant agreements between Russia and Ukraine are contained in the State Border Treaty and the Azov/Kerch Cooperation Treaty.

A. PURSUANT TO ARTICLE 281 OF UNCLOS STATES MAY EXCLUDE OR CONDITION JURISDICTION OF AN ANNEX VII TRIBUNAL

220. Article 281 makes clear that an agreement between States to resolve disputes by peaceful means other than those provided by Section 2 of Part XV of UNCLOS excludes *inter alia* the jurisdiction of Annex VII tribunals or makes it at least conditional on prior unsuccessful recourse to agreed peaceful means. Indeed, while there is some disagreement in the relevant case-law as to how clearly such an opt-out must be formulated, all such cases have recognized that parties' agreement to other means of dispute settlement may have such an effect.²⁴²

221. Article 281 applies where the States have agreed to settle any dispute by negotiations, a method of settlement that may not lead to an eventual resolution of the dispute. Indeed, Article 281 itself envisages that the dispute settlement mechanism under UNCLOS applies "where no settlement has been reached by recourse to such means [as those agreed by the States]".

B. IN THE STATE BORDER TREATY AND THE AZOV/KERCH COOPERATION TREATY THE PARTIES AGREED TO SETTLE THEIR DISPUTES BY NEGOTIATIONS

222. Article 5 of the State Border Treaty provides that

*"Settlement of questions relating to the adjacent sea areas shall be effected by agreement between the Contracting Parties in accordance with international law. Nothing in this Treaty shall prejudice the positions of the Russian Federation and Ukraine with respect to the status of the Sea of Azov and the Kerch Strait as internal waters of the two States."*²⁴³

²⁴² *Southern Bluefin Tuna (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, *UNRIAA*, Vol. XXIII, p. 43, para. 57, dissenting opinion of Judge Keith, *ibid.*, p. 51, para. 10 (**RUL-24**); *Philippines v. China*, Award on Jurisdiction and Admissibility, para. 224 (**UAL-3**).

²⁴³ State Border Treaty, Article 5 (emphasis added) (**RU-19**).

223. Article 1 of the Azov/Kerch Cooperation Treaty provides that

“Sea of Azov shall be divided by the state border line in accordance with an agreement of the Parties. *Settlement of questions relating to the Kerch Strait area shall be effected by agreement between the Parties.*”²⁴⁴

224. The agreement reflected in those provisions covers all disputes relating to the Sea of Azov, the Kerch Strait and adjacent water areas of the Black Sea respectively (**sub-section 1**) and it requires such disputes to be settled by agreement of the Parties, in particular, through negotiations (**sub-section 2**).

1. *The agreement covers all disputes relating to the Sea of Azov and the Kerch Strait and adjacent sea areas in the Black Sea*

225. The agreement reflected in Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty defines very broadly the scope of “questions” that shall be settled by agreement of the Parties. Specifically, Article 5 applies to disputes “relating to the adjacent sea areas”, which includes the Sea of Azov and adjacent sea areas of the Black Sea, and Article 1 applies to “questions relating to the Kerch Strait”. The wording of the relevant clauses encompasses any disputes concerning, for example, navigation or exploitation of living and non-living resources in the Sea of Azov and the Kerch Strait, including any disputes that could have fallen under UNCLOS were it applicable (*quod non*). This is for two reasons.

226. First, neither Article 5 of the State Border Treaty, nor Article 1 of the Azov/Kerch Cooperation Treaty restrict the scope of questions they encompass to questions under the specific treaty. In this respect, the relevant provisions differ from Article 32 of the OSPAR Convention, interpreted by the ITLOS in the *Mox Plant* case. There, the provision applied to disputes concerning application of the OSPAR Convention,²⁴⁵ leading the ITLOS to conclude that the provision does not cover disputes under UNCLOS.²⁴⁶ To the contrary, Article 5 of the State Border Treaty places no restrictions or qualifications on the type of questions “relating to” “adjacent sea areas” that must be resolved by agreement of the Parties. The same holds true

²⁴⁴ Emphasis added.

²⁴⁵ 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic, Article 32 (**RUL-20**).

²⁴⁶ *Mox Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 106, paras. 48-52 (**UAL-17**).

with respect to Article 1 of the Azov/Kerch Cooperation Treaty that applies to questions “relating to” the Kerch Strait without restriction.

227. Secondly, though both provisions refer to ‘questions’ rather than ‘disputes’, the term used is broader than and encompasses disputes. In Russian and in English “questions” («вопросы») is a broader notion than dispute that encompasses not only matters that have already given rise to a ‘dispute’ – a disagreement between the parties – but other matters where the parties have not yet formulated opposing positions so as to constitute a dispute, but which they may need to resolve.²⁴⁷

228. In summary, the procedures for settlement of disputes provided in the State Border Treaty and the Azov/Kerch Cooperation Treaty encompass disputes under UNCLOS, if UNCLOS applies (*quod non*), relating to the respective maritime areas, including the Sea of Azov, the Kerch Strait and the adjacent sea areas in the Black Sea.

2. *The obligation to have “settlement of questions ... effected by agreement of the Parties” includes an obligation to engage in negotiations to settle disputes*

229. Where a dispute between States is to be resolved by agreement the natural consequence is that the States should engage in negotiations to resolve the dispute.

230. Indeed, this is the only good faith interpretation of the relevant provisions. A different interpretation of the provisions of the State Border Treaty and the Azov/Kerch Cooperation Treaty – i.e., as merely specifying that Parties may agree on settlement of a particular question by agreement - would render those provisions without effect, contrary to the principle of *effet utile*.²⁴⁸ States may at any time reach an agreement on anything; the treaties cannot be interpreted as just a restatement of this fact.

²⁴⁷ See e.g., Oxford Dictionary (“A matter requiring resolution or discussion”) (<https://en.oxforddictionaries.com/definition/question>), Meriam-Webster Dictionary (“A subject or aspect in dispute or requiring discussion”) (<https://www.merriam-webster.com/dictionary/question>); Ozhegov S.I., *Tolkovyi slovar’ russkogo jazyka*, 28-e izd. (Moskva, 2018) [Ozhegov S.I., Dictionary of the Russian Language, 28th ed. (Moscow, 2018)] (“A situation or circumstance to be examined or assessed, a task that needs to be completed, a problem”) (RU-48).

²⁴⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011* (hereinafter *Georgia v. Russia*), pp. 125-126, para. 133 (RUL-31).

231. Such an interpretation is consistent with the uniformly accepted interpretation of other provisions which require States to resolve certain matters by agreement. Those provisions have been interpreted as encompassing an obligation to engage in good faith negotiations to settle the dispute.²⁴⁹

C. UKRAINE FAILED TO ENGAGE IN GOOD FAITH NEGOTIATIONS
TO SETTLE THE DISPUTES

232. Where a State is obliged to attempt to resolve a dispute by negotiations it cannot fulfil this obligation by merely protesting against the actions of the other State.²⁵⁰ Rather it must “enter into negotiations ... [and] pursue them as far as possible, with a view to concluding agreements”²⁵¹ until they become “futile or deadlocked”.²⁵²

233. Ukraine failed to engage in genuine negotiations with Russia regarding the alleged dispute under UNCLOS. In the various *Notes Verbales* and statements in international *fora* Ukraine protested against the actions of Russia and required their cessation, but did not solicit Russia’s views or seek to engage it in negotiations concerning the respective maritime areas. In the Memorial Ukraine relies on 4 documents that (one would assume) it considers as best illustrating Ukraine’s attempts to settle the dispute under UNCLOS (if one existed).²⁵³ However, they do not.

234. All 4 documents Ukraine relies on are consistent with the real dispute between the Parties concerning sovereignty over Crimea and alleged illegality of Russia’s conduct in connection with the unification of Crimea with Russia, not the law of the sea.

²⁴⁹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 242, para. 244 (**RUL-25**); *Barbados v. Trinidad and Tobago*, Award, 11 April 2006, paras. 194-197 (**RUL-28**);

²⁵⁰ *Georgia v. Russia*, p. 133, para. 160 (**RUL-31**).

²⁵¹ *Railway Traffic between Lithuania and Poland, Advisory Opinion, P.C.I.J. Series A/B, No. 42*, p. 116 (**RUL-3**).

²⁵² *Georgia v. Russia*, p. 133, para. 159 (**RUL-31**).

²⁵³ *Note Verbale* of the Ministry of Foreign Affairs of Ukraine No. 72/22-620-518, 10 March 2015 (**UA-9**); *Note Verbale* of the Ministry of Foreign Affairs of Ukraine No. 72/22-620-2276, 9 October 2015 (**UA-10**); Statement by Mr Oleksiy Shapoval, Legal Adviser of the Permanent Mission of Ukraine to the United Nations, at the Plenary Meeting of the General Assembly on Oceans and the Law of the Sea, 8 December 2015 (**UA-11**); Report on the Twenty-Fifth Meeting of the States Parties to the United Nations Convention on the Law of the Sea, doc. SPLOS/287, 13 July 2015, para. 94 (**UA-12**).

235. For example, at the 25th Meeting of the States Parties to UNCLOS Ukrainian representative's remarks were limited to stating that

“Russia’s taking over Ukraine’s responsibility for the international shipping issues... in maritime areas adjacent to Crimea, which are an integral part of the territory of Ukraine constitutes an internationally wrongful act”.²⁵⁴

236. Similarly, at the Plenary Meeting of the General Assembly on 8 December 2015 a Ukrainian representative asserted that

“... Russia’s attempted ‘taking over’ Ukraine’s legitimate responsibility for the international shipping matters ... constitutes an internationally wrongful act”.²⁵⁵

237. Ukraine’s *Notes Verbales* also rely primarily on Ukraine’s “sovereign rights” as the coastal State in Crimea.²⁵⁶

238. Where Ukraine’s statements can be interpreted as referring to a law of the sea issue (not necessarily governed by UNCLOS) they were made in completely generic terms making it impossible for Russia to investigate and respond to these allegations.

239. In its *Note Verbale* dated 9 October 2015 Ukraine asserted, without any particulars, that

“The Russian Side is engaging in unlawful activity in the waters of the Black Sea and Sea of Azov adjacent to the Crimean peninsula, resulting in substantial damage to the marine ecosystem in the territorial sea and/or exclusive economic zone of Ukraine.”²⁵⁷

240. In the same *Note Verbale* it made a claim (one Ukraine apparently abandoned by the time of instituting this arbitration) that

“The Russian Side has barred transit through the Kerch Strait and fishing in the Sea of Azov to Ukrainian fishing vessels”.²⁵⁸

²⁵⁴ Report on the Twenty-Fifth Meeting of the States Parties to the United Nations Convention on the Law of the Sea, doc. SPLOS/287, 13 July 2015, para. 94 (UA-12).

²⁵⁵ Statement by Mr Oleksiy Shapoval, Legal Adviser of the Permanent Mission of Ukraine to the United Nations, at the Plenary Meeting of the General Assembly on Oceans and the Law of the Sea, 8 December 2015 (UA-11).

²⁵⁶ *Note Verbale* of the Ministry of Foreign Affairs of Ukraine No. 72/22-620-518, 10 March 2015 (UA-9); *Note Verbale* of the Ministry of Foreign Affairs of Ukraine No. 72/22-620-2276, 9 October 2015 (UA-10).

²⁵⁷ *Note Verbale* of the Ministry of Foreign Affairs of Ukraine No. 72/22-620-2276, 9 October 2015 (UA-10).

²⁵⁸ *Ibid.*

241. Against this background Ukraine now criticizes Russia for failing to provide a “meaningful reply” to “a *detailed* list of Ukrainian concerns”.²⁵⁹ In the response Ukraine refers to, Russia proposed to hold a meeting to discuss “protection of the marine environment” and “utilization of bioresources” (that is fishing), precisely the issues Ukraine had raised, though in very general terms, and other law of the sea issues. When a State is faced with abstract allegations that some activities are causing environmental damage, it is entirely reasonable to suggest a meeting to discuss the matter. The same applies to allegations of Ukrainian fishing vessels being “barred” from transit through the Kerch Strait or fishing in the Sea of Azov.

242. On 11 August 2016 the Parties finally had an opportunity to discuss the protests Ukraine made and to consult on the application of UNCLOS, as Russia suggested.²⁶⁰ Ukraine chose not to use this opportunity. For the reasons set out below, this meeting does not evidence that Ukraine engaged in good faith negotiations, let alone that it “pursue[d] them as far as possible”.

243. As a preliminary point, Ukraine chose to annex to its Memorial only a short extract from what appears to be a 30+ pages Ukraine-prepared transcript (as evidenced by the reference to “[Page 30]” at the top of the page with translation).²⁶¹ Even the extract Ukraine exhibited shows that Ukraine mischaracterizes what happened. Ukraine relies on the extract to claim that “Russia was unable to even articulate a position on “whether or not a dispute exists”.²⁶² However the statement Ukraine quotes is a response to Ukraine’s categorical assertion that the alleged dispute under UNCLOS “must be resolved via the mandatory procedures”. The Russian delegation explains that Ukraine just provided “information ... [which] is ... very comprehensive, extensive and detailed, but will require very thorough analysis” before Russia can formulate a view on whether any dispute exists and whether any such dispute falls under UNCLOS. Far from an unreasonable failure to articulate a position, Russia’s statement evidences an entirely reasonable response, having heard for the first time numerous new facts and allegations from the other party.

²⁵⁹ UM, para. 19 and fn. 33 (emphasis added).

²⁶⁰ *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in the Russian Federation No. 1599/2dsng, 16 February 2016 (**UA-13**); *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-194/510-1654, 14 July 2016 (**RU-40**).

²⁶¹ Exhibit **UA-14**, Translation.

²⁶² UM, para. 21.

244. Russia produced its own transcript of this meeting and provides it in full to the Tribunal.²⁶³ The record shows that Russia was prepared to discuss and address Ukraine's concerns relating to the Sea of Azov, the Kerch Strait and the Black Sea and it was Ukraine that terminated the meeting and refused to continue the discussions further.

245. For the greater part of the consultations on 11 August 2016, the members of Ukrainian delegation read out prepared statements containing a multitude of new claims and technical details that had never before been communicated to Russia.²⁶⁴ Examples include allegations that construction works at the Kerch Bridge may cause acoustic shock to cetaceans²⁶⁵ or release of heavy metals from the seabed²⁶⁶ (claims Ukraine apparently abandoned as it does not pursue them in this arbitration). Requests to clarify the position of Ukraine were dismissed by Ukraine,²⁶⁷ and requests to schedule another meeting were ignored.²⁶⁸

246. Ukraine must have understood that Russia would be unable to immediately respond to all the issues Ukraine raised for the first time, but it was not interested in what Russia had to say, let alone in negotiating with Russia. This is reflected in a statement by Ms. Zerkal, the leader of Ukraine's delegation, made after the delegation finished reading out the statements: "We propose to the Russian Party to express its position on the essence of the stated claims *or we may proceed to the next issue [on the agenda]*".²⁶⁹

247. At the meeting Ukraine failed to engage in good faith negotiations, while Russia repeatedly communicated its willingness to continue negotiating.²⁷⁰

248. The difference in approach of Russia and Ukraine after the meeting also confirms that, while Russia sought to engage in genuine negotiations, Ukraine saw the meeting as an item on a checklist.

²⁶³ Transcript of the Russian-Ukrainian Consultations on the United Nations Convention on the Law of the Sea, 11 August 2016, Minsk (**RU-41**). Unfortunately, for technical reasons it proved impossible to produce a complete transcript as some members of the Ukrainian delegations spoke incoherently or too softly at various points.

²⁶⁴ *Ibid.*, pp. 4-17.

²⁶⁵ *Ibid.*, pp. 11.

²⁶⁶ *Ibid.*, p. 10.

²⁶⁷ *Ibid.*, p. 20.

²⁶⁸ *Ibid.*, pp. 18, 22.

²⁶⁹ *Ibid.*, p. 17 (emphasis added).

²⁷⁰ *Ibid.*, pp. 20-21, 23.

249. At the meeting, Russia requested copies of statements that members of the Ukrainian delegation read out, so that it could review Ukraine’s claims and the information they were based and formulate a response.²⁷¹ In the following weeks, Russia repeatedly but unsuccessfully communicated with Ukraine in order to obtain this information.²⁷²

250. In contrast, just a few hours after the meeting, Ukraine’s Minister of Foreign Affairs, Mr Klimkin declared on Twitter (translation from Ukrainian)

“Flash from Minsk: UA delegation just completed pre-court consultations with RF concerning sovereign rights in the waters around Crimea. Next – arbitration #UNCLOS.”²⁷³

251. Ukraine accordingly made clear that it did not intend to engage in negotiations with Russia.

252. In summary, Ukraine never undertook a genuine attempt to resolve the alleged dispute with Russia by negotiations as required by Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty. As a consequence, pursuant to Article 281 of UNCLOS the Tribunal does not have jurisdiction over the majority of Ukraine’s claims as set out in paragraph 262 below.

II. The agreement reflected in the State Border Treaty and the Azov/Kerch Cooperation Treaty excludes recourse to Part XV procedures

253. Article 281 of UNCLOS provides that recourse to Part XV procedures is possible if “the agreement between the parties does not exclude any further procedure” As held by the Arbitral Tribunal in the *Southern Bluefin Tuna* case, the agreement between the Parties does not need expressly to exclude such recourse.²⁷⁴ Rather, the intention of the States should be established by interpreting the provisions of the relevant treaty or treaties.

²⁷¹ *Ibid*, pp. 18-19.

²⁷² See e.g., *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine No. 10949/2dsng, 5 September 2016 (**RU-43**).

²⁷³ Available at <https://twitter.com/PavloKlimkin/status/763724030943821824> (**RU-42**).

²⁷⁴ *Southern Bluefin Tuna (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, *UNRIIAA*, Vol. XXIII, p. 43, para. 57 (**RUL-24**).

254. The agreement reflected in the State Border Treaty and the Azov/Kerch Cooperation Treaty does not provide in explicit terms that recourse to the dispute settlement mechanism under UNCLOS is excluded. This is not surprising, given that neither Russia nor Ukraine considered that UNCLOS applies to the Sea of Azov or the Kerch Strait, the most important “adjacent sea areas” at the time.

255. There are two main reasons why the agreement in the State Border Treaty and the Azov/Kerch Cooperation Treaty reflects the Parties’ intent to exclude recourse to further procedures, particularly compulsory dispute settlement under UNCLOS.

256. First, the provisions of both the State Border Treaty and the Azov/Kerch Cooperation Treaty make clear that any disputes between the Parties relating to the Kerch Strait or the “adjacent sea areas”, including the Sea of Azov and the adjacent sea areas of the Black Sea, are to be settled by agreement. It stands to reason that a dispute is not settled ‘by agreement’ if a solution is imposed on the Parties by a compulsory dispute settlement mechanism, hence recourse to such mechanisms is excluded.

257. Article 74 of UNCLOS provides a useful comparison: it makes delimitation of the EEZ subject to agreement of the relevant States, and then expressly provides that a State may have resort to the Part XV procedures if no agreement can be reached within a reasonable period of time. The *rationale* for Article 74(2) is simple: if a dispute should be settled by agreement of the Parties, it follows naturally that a dispute settlement body cannot settle it, unless the parties agree otherwise. Unlike Article 74 UNCLOS, the agreement reflected in Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty does not provide for recourse to the dispute settlement procedures in the event the Parties fail to reach an agreement. In this way, the intent of the provisions is to exclude recourse to further procedures of compulsory dispute settlement.

258. Secondly, the Parties’ agreement that the Sea of Azov and the Kerch Strait constitute internal waters (reflected in both treaties²⁷⁵) supports this interpretation. As explained above, it is widely accepted that UNCLOS does not apply in internal waters.²⁷⁶ An express agreement

²⁷⁵ State Border Treaty, Article 5 (RU-19); Azov/Kerch Cooperation Treaty, Article 1 (RU-20).

²⁷⁶ See above, Chapter 3, Section II, sub-section A.

on this point, which has not been controversial in the earlier negotiations between the Parties,²⁷⁷ demonstrates an intention to preclude application of UNCLOS, including the UNCLOS dispute settlement mechanism.

259. Russia is aware of the *South China Sea Award*, where the Arbitral Tribunal found that a reference to settlement of a dispute by negotiations contained in a non-binding declaration, was insufficient to exclude recourse to Part XV procedures for compulsory dispute settlement.²⁷⁸ The present case is fundamentally different. First, the relevant agreements in the present case are legally binding. Secondly, unlike the provisions of the declaration in the *South China Sea*, the two treaties containing the agreement do not include any reference to UNCLOS and resolution of disputes in accordance with UNCLOS.²⁷⁹ The State Border Treaty and the Azov/Kerch Cooperation Treaty provide that disputes shall be settled “by agreement” which expresses the intent to exclude recourse to other modes of dispute settlement.

260. Two further important points are noted.

261. First, Article 281 does not provide that States must expressly exclude such recourse. The word “express” and its derivatives are used a number of times in UNCLOS demonstrating that the drafters distinguished between a statement or agreement and an *express* statement or agreement. For example, Article 92(1) of UNCLOS provides that “[s]hips ..., save *in exceptional circumstances expressly provided for* in international treaties or in this Convention, shall be subject to [flag State]’s jurisdiction on the high seas” (emphasis added); Article 20(2) of Annex VI (Statute of the Tribunal) provides that “[t]he Tribunal shall be open to entities other than States Parties *in any case expressly provided for* in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to the case” (emphasis added).

262. Secondly, the UNCLOS Parties’ intent to create a comprehensive system of mandatory dispute settlement²⁸⁰ does not require use of any particular formula to exclude recourse to this mechanism. First, Article 281 itself recognizes that certain agreements between the Parties

²⁷⁷ See above, paras. 95-98.

²⁷⁸ *Philippines v. China*, Award on Jurisdiction and Admissibility, paras. 219 and 226-228 (UAL-3).

²⁷⁹ See *ibid.*, para. 228.

²⁸⁰ *Ibid.*, para. 225.

exclude recourse to Part XV.²⁸¹ States are not free to pick and choose obligations and rights from UNCLOS, save where permitted by UNCLOS,²⁸² and Article 281 provides such a permission. Secondly, other provisions of Part XV, such as Article 282 and Article 283, permit Parties to choose a dispute settlement mechanism different from the one envisaged by UNCLOS. Thirdly, as stressed by the *Southern Bluefin Tuna* Arbitral Tribunal:

“[A] significant number of international agreements with maritime elements, entered into after the adoption of UNCLOS, exclude with varying degrees of explicitness unilateral reference of a dispute to compulsory adjudicative or arbitral procedures. Many of these agreements effect such exclusion by expressly requiring disputes to be resolved by mutually agreed procedures ... Other agreements preclude unilateral submission of a dispute to compulsory binding adjudication or arbitration, not only by explicitly requiring disputes to be settled by mutually agreed procedures ... To hold that disputes implicating obligations under ... UNCLOS ... must be brought within the reach of section 2 of Part XV of UNCLOS would be effectively to deprive of substantial effect the dispute settlement provisions of those implementing agreements which prescribe dispute resolution by means of the parties’ choice.”²⁸³

263. In conclusion, the State Border Treaty and the Azov/Kerch Cooperation Treaty exclude recourse to further procedures and therefore the Tribunal does not have jurisdiction over any claims relating to the Sea of Azov, the Kerch Strait or any other adjacent sea areas of Russia and Ukraine.

III. The State Border Treaty and the Azov/Kerch Cooperation Treaty provisions on dispute settlement exclude jurisdiction of this Tribunal over claims relating to the Sea of Azov, the Kerch Strait and other adjacent sea areas

264. Pursuant to Article 281 of UNCLOS Russia objects to the jurisdiction of the Tribunal over any claims relating to the Sea of Azov, the Kerch Strait or any other adjacent sea areas in the Black Sea or any activities or events in these areas. Given the very general terms Ukraine uses to characterize its claims it is not always possible to identify with precision the marine areas they relate to. Some examples of claims relating to the Sea of Azov, the Kerch Strait or any activities or events in these areas are those concerning construction and navigation in the

²⁸¹ *Southern Bluefin Tuna (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, *UNRIAA*, Vol. XXIII, p. 45, para. 62 (**RUL-24**).

²⁸² *Philippines v. China*, Award on Jurisdiction and Admissibility, para. 225 (referring to the statement of Ambassador Koh during the conference) (**UAL-3**).

²⁸³ *Southern Bluefin Tuna (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, *UNRIAA*, Vol. XXIII, pp. 45-46, para. 63 (**RUL-24**).

Kerch Strait²⁸⁴ as well as most of the other Ukraine's claims, including claims concerning navigation, exploitation of living and non-living resources and underwater cultural heritage, insofar as they relate to the events or activities in the Sea of Azov, the Kerch Strait or the adjacent sea areas in the Black Sea.²⁸⁵

²⁸⁴ UM, submissions para. 265 (j)-(o).

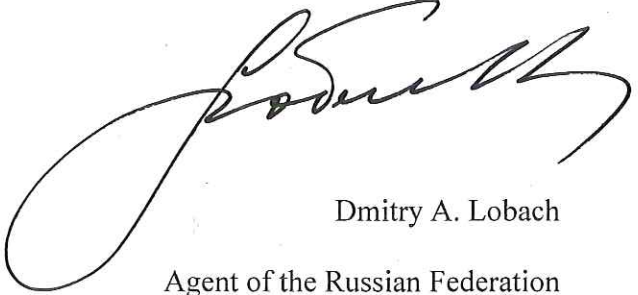
²⁸⁵ UM, submissions para. 265 (a)-(o), (q)-(t).

page intentionally left blank

CHAPTER 8
SUBMISSION

265. For the reasons set out in these Preliminary Objections the Russian Federation requests the Tribunal to adjudge and declare that it is without jurisdiction in respect of the dispute submitted to this Tribunal by Ukraine.

Moscow, 19 May 2018



Dmitry A. Lobach
Agent of the Russian Federation

EXHIBITS

INDEX

- RU-1** Constitution of the Union of the Soviet Socialist Republics, 21 January 1924 (excerpt)
- RU-2** General Instructions for interaction of the USSR authorities with foreign military and merchant ships at peacetime, approved by Order of the Revolutionary Military Council of the USSR No. 641, 22 June 1925, Article 2 (excerpts)
- RU-3** Act No. 431 concerning the use of radio equipment for foreign vessels within the territorial waters of the Union, 24 July 1928, Articles 1 and 3, *UN Legislative Series, Laws and Regulations on the Regime of the High Seas*, Vol. I, United Nations, 1951, p. 121
- RU-4** Order of the Council of People's Commissars, No. 2157, for the regulation of fishing and the conservation of fisheries resources, 25 September 1935, Article 2 and Schedule I, *UN Legislative Series, Laws and Regulations on the Regime of the High Seas*, Vol. I, United Nations, 1951, p. 124
- RU-5** *Historic Bays: Memorandum by the Secretariat of the United Nations*, doc. A/CONF.13/1, extract from the *Official Records of the United Nations Conference on the Law of the Sea*, Vol. I (Preparatory Documents), 30 September 1957 (excerpts)
- RU-6** Statute on the Protection of the State Border of the Union of SSR, approved by the Presidium of the Supreme Soviet of the USSR on 5 August 1960, Article 4
- RU-7** Third United Nations Conference on the Law of the Sea, Fourth session, *Official Records*, Vol. V, 59th Plenary Meeting, 5 April 1976, A/CONF.62/SR.59 (excerpts)
- RU-8** Third United Nations Conference on the Law of the Sea, Fourth session, *Official Records*, Vol. V, 60th meeting, 6 April 1976, A/CONF.62/SR.60 (excerpts)
- RU-9** Third United Nations Conference on the Law of the Sea, Fourth session, *Official Records*, Vol. V, 61st meeting, 6 April 1976, A/CONF.62/SR.61 (excerpts)
- RU-10** Third United Nations Conference on the Law of the Sea, Ninth session, *Official Records*, Vol. XIII, 126th Plenary Meeting, 2 April 1980, A/CONF.62/SR.126 (excerpts)
- RU-11** Declarations of the USSR and of the Ukrainian SSR upon signature of UNCLOS, 10 December 1982, *Law of the Sea Bulletin*, 1985, Vol. 5, p. 23
- RU-12** Declaration of the USSR 4450 containing list of geographical coordinates defining the position of the baselines, 25 January 1985 (excerpts)

- RU-13** Agreement between the Government of the United Republic of Tanzania and the Government of the People's Republic of Mozambique regarding the Tanzania/Mozambique Boundary, Maputo, 28 December 1988
- RU-14** Declaration of Austria upon ratification of UNCLOS, 14 July 1995, *Law of the Sea Bulletin*, 1995, Vol. 29, p. 6
- RU-15** Draft Treaty between Ukraine and the Russian Federation on the Legal Status of the Sea of Azov and Navigation in its Water Area, Annex to *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 12/42-994, 19 October 1995
- RU-16** Working Minutes of the Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, No. 426/2dsng, 14 August 1996
- RU-17** Minutes of the Second Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, 6 May 1997
- RU-18** Order of the Ministry of Transport of Ukraine No. 721, Rules of Navigation by Ships through the Kerch-Enikalskiy Channel and the Approach Channels to It, 9 October 2002 (excerpts)
- RU-19** Treaty between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, 28 January 2003 (without Annexes)
- RU-20** Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, 24 December 2003
- RU-21** Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch, 24 December 2003, *Law of the Sea Bulletin*, 2004, Vol. 54, p. 131
- RU-22** United Nations General Assembly, Sixty-first session, 68th Plenary Meeting, 7 December 2006, A/61/PV.68 (excerpts)
- RU-23** United Nations General Assembly, Sixty-third session, 62nd Plenary Meeting, 4 December 2007, A/63/PV.62 (excerpts)
- RU-24** United Nations General Assembly, Sixty-second session, 65th Plenary Meeting, 10 December 2007, A/62/PV.65 (excerpts)
- RU-25** "Ukraine protests are no longer just about Europe", *The Guardian*, 22 January 2014
- RU-26** "Exclusive: Leader of Far-Right Ukrainian Militant Group Talks Revolution with Time", *Time.com*, 4 February 2014
- RU-27** "Right-Wing Thugs Are Hijacking Ukraine's Liberal Uprising", *Time.com*, 28 January 2014
- RU-28** Speech by the Russian Foreign Minister, Sergey Lavrov, during the high-level segment of the 25th session of the United Nations Human Rights Council, Geneva, Ministry of Foreign Affairs of Russia official website (<http://www.mid.ru/en>), 3 March 2014

- RU-29** “Far-right party jeopardises Ukraine’s path to democracy”, *The Conversation*, 7 March 2014
- RU-30** Statement by the Russian Ministry of Foreign Affairs regarding the adoption of the Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol, Ministry of Foreign Affairs of Russia official website (<http://www.mid.ru/en>), 11 March 2014
- RU-31** Comment by the Russian Ministry of Foreign Affairs regarding statements by the OSCE Chair-in-Office, Ministry of Foreign Affairs of Russia official website (<http://www.mid.ru/en>), 14 March 2014
- RU-32** “All-Russia People’s Front: High voter turnout points to legitimacy of Crimea referendum”, *Tass Russian News Agency*, 17 March 2014
- RU-33** Resolution “On the Independence of the Crimea” taken at an extraordinary plenary session of the Supreme Soviet of the Autonomous Republic of Crimea on 17 March 2014
- RU-34** “Agreement on the accession of the Republic of Crimea to the Russian Federation signed”, President of Russia official website (<http://en.kremlin.ru>), 18 March 2014
- RU-35** Speech by Russia’s Permanent Representative to the United Nations, Vitaly Churkin, at the session of the UN General Assembly, New York, Ministry of Foreign Affairs of Russia official website (<http://www.mid.ru/en>), 27 March 2014
- RU-36** Communication from the Government of the Russian Federation, circulated by IMO Circular Letter No. 3471, 7 July 2014
- RU-37** Notices to Mariners No. 43/2014, 25 October 2014 (excerpts)
- RU-38** “President: We will do everything to return Crimea via international legal mechanisms”, President of Ukraine official website (<http://www.president.gov.ua/en>) 6 December 2015
- RU-39** *Maritime Claims Reference Manual*, issued by the U.S. Department of Defense Representative for Ocean Policy Affairs (excerpts)
- RU-40** *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-194/510-1654, 14 July 2016
- RU-41** Transcript of the Russian-Ukrainian Consultations on the United Nations Convention on the Law of the Sea, Minsk, 11 August 2016
- RU-42** Minister of Foreign Affairs of Ukraine’s official twitter account (<https://twitter.com/PavloKlimkin/status/763724030943821824>), 11 August 2016
- RU-43** *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine No. 10949/2dsng, 5 September 2016
- RU-44** “Statement of the Ministry of Foreign Affairs of Ukraine on the Initiation of Arbitration against the Russian Federation under the United Nations Convention on

- the Law of the Sea”, Ministry of Foreign Affairs of Ukraine official website (<http://mfa.gov.ua/en>), 14 September 2016
- RU-45** “President instructed Foreign Ministry to file a lawsuit against Russia to international arbitration”, President of Ukraine official website (<http://www.president.gov.ua/en>), 14 September 2016
- RU-46** President of Ukraine’s Facebook page (<https://www.facebook.com/petroporoshenko/>), 23 December 2016
- RU-47** Certificate of registration No. 67410 of the Treaty between Ukraine and the Russian Federation of the Ukrainian-Russian State Border of 28 January 2003, Secretariat of the United Nations, 26 January 2017
- RU-48** Ozhegov S.I., *Tolkovyi slovar’ russkogo jazyka*, 28-e izd. (Moskva, 2018) [Ozhegov S.I., *Dictionary of the Russian Language*, 28th ed. (Moscow, 2018)] (excerpt)
- RU-49** Statement of the Delegation of Ukraine at the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, Permanent Mission of Ukraine to the United Nations in New York official website (<http://ukraineun.org/en>), 20 February 2018
- RU-50** Note from the Office of Legal Affairs of the United Nations to the Permanent Mission of the Russian Federation to the United Nations, 28 March 2018

LEGAL AUTHORITIES

(in electronic form only)

INDEX

- RUL-1** Baron Ferdinand De Cussy, *Phases et causes célèbres du droit maritime des Nations*, Vol. I, F.A. Brockhaus, 1856, pp. 97-98
- RUL-2** *Mavrommatis Palestine Concessions*, P.C.I.J. Series A, No. 2, p. 32
- RUL-3** *Railway Traffic between Lithuania and Poland*, Advisory Opinion, P.C.I.J. Series A/B, No. 42, p. 116
- RUL-4** G. Gidel, *Le Droit international public de la mer*, Vol. III, Mellottée, 1934, p. 663
- RUL-5** V.N. Durdenevskiy, S.B. Krylov (eds.), *Mezhdunarodnoye pravo* [International Law], Institut prava Akademii Nauk SSSR, Jurizdat Minjusta SSSR, 1947, pp. 247-248
- RUL-6** A.D. Keilin, *Sovetskoye Morskoye Pravo* [Soviet Maritime Law], Gosudarstvennoye Izdatelstvo Vodnogo Transporta, 1954, p. 91
- RUL-7** *Kurs mezhdunarodnogo prava v 6 tomakh* [Course of International Law in 6 volumes], Vol.III, Izdatelstvo “Nauka”, 1967, p. 132
- RUL-8** *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 3
- RUL-9** *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, p. 3
- RUL-10** *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18
- RUL-11** L. Caflisch, “Les zones maritimes sous juridiction nationale, leurs limites et leur délimitation”, in D. Bardonnnet and M. Virally (eds.) *Le nouveau droit international de la mer*, Pedone, 1983, pp. 40-41
- RUL-12** *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 246
- RUL-13** S.V. Molodtsov, *Mezhdunarodnoye morskoye pravo* [International Maritime Law], Mezhdunarodnye otnoshenia, 1987, p. 51
- RUL-14** M. Nordquist (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. V, Nijhoff, 1989, pp.41-43, 87-94, 105-106, 109-110
- RUL-15** M. Nordquist (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. III, Nijhoff, 1995, p. 81

- RUL-16** J. Noyes, “Compulsory Third-Party Adjudication and the 1982 United Nations Convention on the Law of the Sea”, *Connecticut Journal of International Law*, 1989, Vol. 4, p. 675
- RUL-17** A. Gioia, *Titoli storici e linee di base del mare territoriale*, CEDAM, 1990, pp. 569-570
- RUL-18** Sir R. Jennings and Sir A. Watts (eds.), *Oppenheim’s International Law*, Vol. I, Peace, Longman, 1992, pp. 632-633
- RUL-19** *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, Judgment, *I.C.J. Reports 1992*, p. 351
- RUL-20** Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), 22 September 1992 (without Annexes)
- RUL-21** Y. Tanaka, *The International Law of the Sea*, 2nd ed., Cambridge University Press, 1995, pp. 106-109
- RUL-22** *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, *I.C.J. Reports 1998*, p. 432
- RUL-23** R.R. Churchill and V. Lowe, *The Law of the Sea*, 3rd ed., Manchester University Press, 1999, pp. 60-61
- RUL-24** *Southern Bluefin Tuna (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, *UNRIAA*, Vol. XXIII, pp. 1-57
- RUL-25** *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, *I.C.J. Reports 2001*, p. 40
- RUL-26** *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, p.303
- RUL-27** N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge University Press, 2005, pp. 175-188
- RUL-28** *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Award, 11 April 2006, *UNRIAA*, Vol. XXVII, pp. 147-251
- RUL-29** B. Vukas, “Sea Boundary Delimitation and Internal Waters”, in T. M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes, Liber Amicorum Judge Thomas A. Mensah*, Nijhoff, 2007, pp. 553-559
- RUL-30** *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007*, p. 659
- RUL-31** *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) Preliminary Objections*, Judgment, *I.C.J. Reports 2011*, p. 70

- RUL-32** *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS Reports 2012, p. 4
- RUL-33** *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, p. 624
- RUL-34** “*Ara Libertad*” (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012, Separate Opinion of Judges Cot and Wolfrum*, ITLOS Reports 2012, p. 332
- RUL-35** K. Bangert, “Internal Waters”, in *Max Planck Encyclopedia of Public International Law* (Oxford online edition last updated August 2013)
- RUL-36** *M/V Louisa (Saint Vincent and the Grenadines v. Spain)*, ITLOS Reports 2013, p. 4
- RUL-37** *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on Jurisdiction, 26 November 2014
- RUL-38** B. Oxman, “Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals”, in D. Rothwell et al. (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford University Press, 2015, p. 394-415
- RUL-39** D. R. Rothwell and T. Stephens, *The International Law of the Sea*, 2nd ed., Hart Publishing, 2016, pp. 54-55
- RUL-40** K. Trümpler, “Article 8, Internal Waters”, in A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary*, Beck, Hart, Nomos, 2017, pp. 89-90
- RUL-41** *Arbitration between the Republic of Croatia and the Republic of Slovenia*, Final Award, 29 June 2017