

PCA Case No. 2017-06

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

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

**WRITTEN OBSERVATIONS AND SUBMISSIONS OF UKRAINE
ON JURISDICTION**

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

REGISTRY
The Permanent Court of Arbitration

27 November 2018

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Chapter One: Introduction

1. The Russian Federation is engaged in serious violations of the United Nations Convention on the Law of the Sea (“UNCLOS” or the “Convention”) by its actions in the Black Sea, the Sea of Azov, and the Kerch Strait. Russia is excluding Ukraine from enjoying the abundant hydrocarbon and fisheries resources within Ukraine’s own maritime areas in these waters. It is exploiting those valuable maritime resources for itself. It is usurping Ukraine’s rightful regulatory authority, purporting to extend application of its own laws and regulations to Ukrainian waters. And it is threatening both navigational rights and the marine environment — building a major bridge in the Kerch Strait without consultation, without due precautions, and without respecting the needs of navigation to Ukrainian ports. Even after Ukraine submitted its Memorial, Russia has escalated its unlawful activities, mounting a campaign of harassment against vessels en route to Ukrainian ports, including stopping ships just miles off Ukraine’s coast.

2. The Convention expressly authorizes Ukraine to bring such serious abridgements of the Convention to mandatory dispute settlement before this Tribunal. The Convention confers on tribunals such as this one the jurisdiction, subject only to limited and clearly defined exceptions, to resolve “any dispute concerning the interpretation or application of th[e] Convention.”¹ This “system for the settlement of disputes” is “an integral part and an essential element of the Convention.”² Yet Russia’s actions in the Black Sea, the Sea of Azov, and the Kerch Strait, disregard the comprehensive “legal order for the seas and oceans” created by the Convention.³ And by its actions in this arbitration, Russia would excise from the Convention the dispute settlement system which forms an integral part of it.

3. Russia’s strategy is founded on a series of objections to parts or all of Ukraine’s case. But while Russia professes to have identified a myriad of impediments to the Tribunal’s jurisdiction, many of its objections collapse into one another. Still others are contradictory. All of them are unfounded.

4. Central to Russia’s effort to escape its obligations under the Convention, as well as its consent to arbitrate disputes concerning the Convention, is an argument that the

¹ [UNCLOS, Art. 288](#) (emphasis added).

² *South China Sea Arbitration (Philippines v. China)*, UNCLOS/PCA Case No. 2013-19, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 225 (quoting Myron H. Nordquist, et al., *United Nations Convention on the Law of the Sea: A Commentary* (2014) (“Virginia Commentary”), Vol. V, ¶ XV.4) ([UAL-3](#)).

³ [UNCLOS, Preamble](#).

dispute before the Tribunal is not what Ukraine says it is. Russia makes the remarkable assertion that “the real dispute” before the Tribunal somehow does not concern the Convention.⁴ Yet the real dispute before the Tribunal is at the heart of the Convention: the nullification of Ukraine’s rights under the Convention, including in its territorial sea, exclusive economic zone, and continental shelf. As Ukraine’s Memorial extensively documents, Russia’s maritime actions breach Articles 2, 21, 33, 38, 44, 56, 58, 60-62, 73, 77, 92, 123, 192, 194, 198, 199, 204-206, 279, and 303. Russia’s breaches have taken place, and are continuing unabated, across an approximately 90,000 square kilometer area of sea. These breaches are of profound consequence for Ukraine: affecting its economy, its aspirations for energy independence, the viability of its ports, the livelihoods of its fishermen, the sanctity of the marine environment, and the underwater cultural heritage of mankind.

5. Russia attempts to reframe the dispute in this case based not on any claim Ukraine has made, but on one that Russia has unilaterally introduced into these proceedings: a claim that the status of Crimea — which the international community and Russia itself consistently recognized as part of Ukraine — was altered in 2014, so that Russia has thereby gained rights as a coastal State in the waters adjacent to it. Such a claim may not be entertained in this proceeding. The United Nations General Assembly, reflecting an overwhelming consensus of the international community, has called on States and international organizations “not to recognize any alteration of the status of” Crimea, and “to refrain from any action or dealing that might be interpreted as recognizing any such altered status.”⁵ This call was based on the well-settled principle of international law “that the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force.”⁶ Russia’s inadmissible claim that the status of Crimea has indeed been altered falls beyond the scope of this proceeding, and its brazen attempt to convert its own violation of international law to its advantage in this arbitration therefore fails.

6. Russia’s claim to have altered the legal status of Crimea is not only inadmissible, but manifestly implausible. Russia’s contention that Crimea seceded from Ukraine and joined the Russian Federation rests on a referendum that Russia concedes was held on Ukrainian territory in violation of Ukrainian law. That referendum was held in the

⁴ [Russia’s Objections](#), ¶ 7 (“[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 . . .”).

⁵ U.N. General Assembly Resolution 68/262, U.N. Doc. No. A/RES/68/262 (27 March 2014), ¶ 6 ([UA-129](#)).

⁶ *Id.*, Preamble.

aftermath of Russia's unlawful use of force in Ukraine. But even accepting *arguendo* the facts as alleged in Russia's pleadings, the referendum cannot provide a basis on which Russia may even arguably assert a change in the status of Crimea. Jurists have disagreed about whether and when the need to resolve serious competing claims of territorial sovereignty should prevent an UNCLOS tribunal from reaching the merits of an underlying law of the sea dispute. But the Convention nowhere authorizes a State to escape its consent to arbitrate a dispute concerning the Convention by unilaterally asserting a claim of territorial sovereignty that lacks plausibility.

7. Ukraine's response to Russia's principal objection, and to Russia's numerous other meritless objections, is set forth in these written observations and submissions. Ukraine's written observations are organized as follows:

8. **Chapter Two** responds to Russia's principal jurisdictional objection. It summarizes the dispute under UNCLOS that Ukraine has put before this Tribunal, and explains why Russia's introduction of a manifestly inadmissible and implausible claim to have annexed Crimea cannot deprive the Tribunal of jurisdiction over this case.

9. In **Chapter Three**, Ukraine demonstrates that Russia's attempt to carve the Sea of Azov and Kerch Strait out of the scope of UNCLOS has no basis in law or fact. Far from being "common internal waters" held jointly by Russia and Ukraine, as Russia contends, the Sea of Azov is a semi-enclosed sea comprised of the territorial seas and exclusive economic zones of Ukraine and Russia and the Kerch Strait is an international strait subject to the regime of transit passage.

10. **Chapter Four** addresses Russia's attempts to excise parts or all of this case under the narrow exclusions from jurisdiction under Articles 297 and 298. Several of Russia's objections rest on the same failed premise as its principal jurisdictional objection — *i.e.*, that the status of Crimea as a part of Ukraine has been altered. The remainder — including, notably, Russia's suggestion that the military activities exception in Article 298(1)(b) somehow applies to *any* dispute having a causal relationship with historical military conduct — also suffer from fatal defects, and fundamentally rest on novel, unsupported, and overbroad interpretations of the Convention's text.

11. Finally, **Chapter Five** explains why there is no basis in either the Convention or two other treaties (which Russia has materially breached, but nonetheless chooses to rely on here) to refer this dispute to other unspecified dispute resolution processes, or to artificially sub-divide it between this Tribunal and one or more Annex VIII tribunals, as Russia has proposed.

12. Russia's long list of objections is not credible and should not obscure this fundamental reality: Russia is daily breaching the Convention in vast areas of Ukrainian waters and, to date, has encountered no legal consequence for doing so. In **Chapter Six**, Ukraine reaffirms its prior submissions and requests for relief, asks this Tribunal to dismiss Russia's objections, and requests that Russia be ordered to pay Ukraine's costs for this phase of the proceedings.



Map 1 (Ukraine's Memorial)



Map 2 (Ukraine's Memorial)

Chapter Two: The Dispute Before the Tribunal Concerns the Interpretation or Application of UNCLOS

13. Article 286 of the Convention provides that “any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.”⁷ Article 288 further 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.”⁸

14. The broad scope of the Tribunal’s jurisdiction under these provisions is clear from the use of the phrase “any dispute,”⁹ together with the presence of specific and narrowly crafted exceptions — each carefully circumscribed, and none the basis for Russia’s principal objection in this case.¹⁰ The decision to broadly mandate dispute resolution reflects the Convention’s object and purpose: to establish a legal order capable of “settling] . . . all issues relating to the law of the sea.”¹¹ Essential to achieving this purpose was the creation of a dispute resolution system designed to ensure that “no significant problem of interpretation could long remain without a final and authoritative ruling.”¹² Mandatory dispute resolution was considered “integral” to the Convention itself, and the “pivot upon which the delicate equilibrium of the compromise [of the Convention] must be balanced.”¹³ The broad jurisdictional grant of Articles 286 and 288 safeguards that equilibrium and ensures that each State’s rights under the Convention are respected.

15. Far from being respected, however, Ukraine’s rights under the Convention are being daily violated by another State Party, the Russian Federation. Ukraine has thus brought before the Tribunal its claims concerning a course of conduct by the Russian Federation in the Black Sea, the Sea of Azov, and the Kerch Strait that violates numerous

⁷ UNCLOS, Art. 286.

⁸ UNCLOS, Art. 288.

⁹ UNCLOS, Art. 286 (emphasis added).

¹⁰ See UNCLOS, Arts. 297-298.

¹¹ UNCLOS, Preamble (emphasis added).

¹² Myron H. Nordquist, et al., United Nations Convention on the Law of the Sea: A Commentary (2014) (“Virginia Commentary”), p. 92 (UAL-35).

¹³ *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 225 (quoting Virginia Commentary, Vol. V, ¶ XV.4 and Third United Nations Conference on the Law of the Sea, *Memorandum by the President of the Conference on Document A/CONF.62/WP.9*, U.N. Doc. No. A/CONF.62/WP.9/ADD.1 (31 March 1976), p. 122, ¶ 6) (UAL-3).

provisions of the Convention. Those claims plainly relate to a “dispute concerning the interpretation or application of th[e] Convention” over which this Tribunal has jurisdiction.

16. Russia, however, seeks not only to evade its substantive obligations under the Convention, but also its agreement to arbitrate disputes arising thereunder. Disregarding the extensive evidence of UNCLOS violations that Ukraine has presented, Russia asserts that the dispute is about something else: Russia’s claim that the legal status of Crimea has been altered. That is *not* the dispute presented in Ukraine’s Memorial. But in Russia’s view, it can divest the Tribunal of jurisdiction by unilaterally recasting the dispute between the Parties as a completely different case, disconnected from the substantive UNCLOS claims Ukraine has presented. On that basis, Russia asks the Tribunal to conclude that the “real” dispute before it concerns territorial sovereignty in Crimea, and not the interpretation or application of the Convention.

17. Russia is incorrect. Section I of this Chapter affirms what is plain from Ukraine’s Memorial: the dispute before the Tribunal is one that concerns the interpretation or application of UNCLOS. Ukraine’s claim is that, through a campaign of exclusion, exploitation, and usurpation across the Black Sea, the Sea of Azov, and the Kerch Strait, Russia has violated rights guaranteed to Ukraine under the Convention. Ukraine’s case focuses exclusively on Russia’s serious and extensive violations of the law of the sea.

18. Section II of this Chapter explains why Russia cannot avoid the Tribunal’s jurisdiction over that dispute by unilaterally proposing that the true matter in dispute is its claim concerning the legal status of Crimea. In the first instance, Russia’s claim is inadmissible and cannot be entertained. The international community has reached a consensus that the status of Crimea has not changed. And, applying the well-established rule of international law that the territory of another State may not be acquired by force, the U.N. General Assembly has repeatedly called on States and international organizations not to recognize any alteration in the status of Crimea as an unquestioned part of Ukraine. The Tribunal should follow the international consensus and the General Assembly’s call for non-recognition, and decline to entertain an objection based on a Russian claim that cannot be reconciled with international law.

19. Second, even if Russia’s claim were admissible, it is not plausible, and for that further reason it can have no effect on the Tribunal’s jurisdiction. Jurists have disagreed over how an UNCLOS tribunal should address a maritime dispute that coincides with serious and longstanding competing claims of territorial sovereignty. But under any proper interpretation of the Convention, a respondent State’s mere *assertion* of a claim to land

territory cannot automatically divest a tribunal of jurisdiction to resolve a maritime dispute. To even potentially have such an effect, the respondent State's claim would have to be plausible. Here, it is not. The sole basis Russia provides for its claim is a referendum held in Crimea on a date when Russia concedes Crimea was under Ukrainian sovereignty. A referendum held on Ukrainian territory, in violation of Ukrainian law, does not give rise to a plausible claim that the legal status of a part of the territory of Ukraine has changed. Such an implausible claim cannot be accepted as the true matter in dispute in this arbitration, and thus cannot preclude the Tribunal from resolving the significant maritime dispute that is genuinely at issue.

20. Finally, Russia misconstrues decisions by Annex VII tribunals in the *Chagos Marine Protected Area* and *South China Sea* arbitrations. Unlike this case, those cases involved serious and longstanding sovereignty disputes, implicating competing claims to sovereignty that no State had suggested were implausible or inadmissible. Yet even in those circumstances, it was not excluded that questions of territorial sovereignty could be resolved in the course of resolving a genuine dispute concerning the interpretation or application of the Convention, depending on the relative weight of the dispute and the actual objectives of the claimant State. Here, contrary to Russia's suggestions, Ukraine's objective is only to resolve its rights under the law of the sea.

I. The Dispute Before the Tribunal, Which Concerns Russia's Violations of Ukraine's UNCLOS Rights in the Black Sea, the Sea of Azov, and Kerch Strait, Falls Squarely Within the Jurisdiction Conferred by Articles 286 and 288

21. Ukraine's Memorial presents twenty submissions that concern the legal consequences under UNCLOS of Russia's actions across a large and important maritime area. Russia's actions in breach of the Convention are summarized in the introduction to Ukraine's Memorial:

Russia has prevented Ukraine from exercising its sovereign right under UNCLOS to explore and exploit the living and non-living resources of [Ukraine's territorial sea, exclusive economic zone, and continental shelf] . . . [T]he Russian Federation has itself explored and exploited the natural resources of Ukraine's maritime areas . . . [including by] taking hydrocarbons that under the Convention are the sovereign resources of Ukraine . . . [and] encourag[ing] and facilitat[ing] vessels under its own flag to fish in Ukrainian waters around Crimea . . . [And] the Russian Federation has . . . purported to invalidate Ukrainian hydrocarbon exploration and exploitation licenses . . . [and] regulate fisheries and navigation in Ukraine's maritime areas . . . [Further,] the Russian Federation has ignored its environmental, navigational, and

cultural obligations . . . [and has] threaten[ed] the [Kerch] Strait's longstanding use as a thoroughfare for the goods and commodities of Ukraine's east¹⁴

22. The Memorial further explains Ukraine's claim that Russia's conduct in the Black Sea, the Sea of Azov, and the Kerch Strait violates Ukraine's rights as a coastal State, a flag State, and a littoral State to two semi-enclosed seas and an international strait.

23. Every one of Ukraine's submissions expressly, and exclusively, seeks a ruling interpreting or applying one or more provisions of the Convention.¹⁵ Ukraine's objective is to defend and vindicate its Convention rights in areas of sea that are of critical economic, environmental, and cultural importance to the Ukrainian people.¹⁶ Its submissions reflect the breadth and gravity of Russia's violations of the Convention, which implicate:

- Parts II, V and VI of the Convention, including in connection with Russia's violations of Ukraine's rights under Articles 2, 56, and 77 to fisheries and hydrocarbons in its territorial sea, exclusive economic zone, and continental shelf; Russia's interference with Ukraine's Article 33 jurisdiction in its contiguous zone; and Russia's intrusions into Ukraine's exclusive jurisdiction as a flag State pursuant to Articles 58 and 92;
- Part III of the Convention, in connection with Russia's interference with the free navigation of Ukrainian and international shipping through the Kerch Strait in violation of Articles 38 and 44;
- Parts IX and XII of the Convention, including in connection with the environmental dangers posed by Russia's construction activities in the Kerch Strait and Russia's failure to appropriately respond to an oil spill off the coast of Sevastopol, which each implicate multiple provisions of those parts; and
- Part XVI of the Convention, in connection with Russia's interference with Ukraine's attempts to preserve underwater cultural heritage pursuant to Article 303.¹⁷

24. Article 288 expressly accords this Tribunal the competence to interpret and apply the provisions of the Convention invoked by Ukraine. By acceding to UNCLOS, and pursuant to its Article 287 declaration,¹⁸ Russia has thereby consented to arbitrate this dispute before an Annex VII tribunal.¹⁹

¹⁴ Ukraine's Memorial, ¶¶ 9-12.

¹⁵ *Id.* ¶ 265.

¹⁶ See *id.* ¶¶ 5, 13.

¹⁷ See *id.* ¶ 17

¹⁸ Declaration of the Union of Soviet Socialist Republics Upon Signature of the Convention (10 December 1982) (UA-8).

¹⁹ See Virginia Commentary, p. 38 ("Once a State ratifies or otherwise expresses its consent to be bound by the Law of the Sea Convention, by that very action it expresses also its consent to the applicability to disputes to which it is a party of the procedures specified in section 2 of Part XV.") (UAL-35); see also *Ambatielos (Greece v. United Kingdom)*, ICJ Judgment on Preliminary Objections of 1 July 1952, sep. op. of Judge Spiropoulos, p. 56 ("[I]t is necessary to bear in mind that,

II. Russia Cannot Avoid the Tribunal’s Jurisdiction over the Parties’ Maritime Dispute by Introducing an Inadmissible and Implausible Claim that the Legal Status of Crimea Has Been Altered

25. Russia attempts to escape its obligations under the Convention, and its consent to arbitrate disputes concerning its interpretation or application, by referring to matters that have nothing to do with the law of the sea, and which form no part of Ukraine’s claims. Without addressing the above-mentioned matters, which plainly do concern interpretation or application of the Convention, Russia insists that this is instead a dispute concerning its claim to have altered the legal status of the land territory of Crimea.²⁰ The claim that Russia has introduced cannot prevent the Tribunal from reaching the significant law of the sea matters before it. Russia’s claim is first of all inadmissible, and in any event implausible. Such a claim interposed by the respondent State cannot stand in the way of the Tribunal’s express jurisdiction to adjudicate “any” dispute concerning the interpretation or application of the Convention.

A. Russia’s Claim that the Status of Crimea as Part of Ukraine Has Been Altered Is Inadmissible and Should Not Be Entertained

26. It has long been settled — and accepted by Russia — that Crimea is part of Ukraine. Russia recognized “Crimea as a part of the Ukrainian territory *de facto* and *de jure*,” up until 17 March 2014.²¹ Russia now claims, however, that this settled status has been changed, and that Russia has acquired sovereignty over Crimea. Such a claim cannot be given any force in this proceeding.

27. The United Nations General Assembly, embodying a consensus of the international community, has on three separate occasions reaffirmed the settled status of Crimea as part of Ukraine, and it has rejected the referendum and annexation by Russia as

when a State has bound itself by a compulsory arbitration clause . . . that State cannot, in principle, have any ground for refusing an offer of recourse to arbitration”) (in the original French: “on doit prendre en considération que, lorsqu’un Etat s’est lié par une clause d’arbitrage obligatoire . . . il n’existe pour cet Etat, en principe, aucun moyen de décliner une offre de recourir à l’arbitrage”) (UAL-36).

²⁰ See [Russia’s Objections](#), ¶¶ 7, 24, 41-42 (arguing that the Tribunal should decline jurisdiction to avoid ruling on the “key disputed issue” of which State is sovereign over Crimea).

²¹ See Address by the President of the Russian Federation (18 March 2014) (UA-462); [Russia’s Objections](#), ¶ 11; see also, e.g., Memorandum on Security Assurances in Connection with Ukraine’s Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, U.N. Doc. No. A/49/765 and S/1994/1399 (19 December 1994), ¶ 1 (reflecting the commitments of the Russian Federation, the United Kingdom, and the United States to respect the “independence and sovereignty and the existing borders of Ukraine”) (UA-463).

invalid. The General Assembly's first action on Crimea was the passage of Resolution 68/262 on 27 March 2014. That Resolution recalled multiple specific commitments made by the Russian Federation to respect the territorial integrity of Ukraine in its existing borders, including Crimea.²² It recalled the obligations of all States to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State."²³ It "reaffirm[ed] the principles . . . that the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force, and that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter."²⁴ And it noted that the referendum of 16 March 2014 was not authorized by Ukraine, "underscor[ing]" that the purported referendum has "no validity" and "cannot form the basis of any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol."²⁵ The General Assembly then specifically "call[ed] upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol . . . and to refrain from any action or dealing that might be interpreted as recognizing any such altered status."²⁶ Following Resolution 68/262, the General Assembly has twice "reaffirm[ed] the non-recognition of [Russia's] annexation," in Resolutions 71/205 and 72/190.²⁷

28. In their emphatic affirmation that the legal status of Crimea remains unchanged, the General Assembly's three resolutions on Crimea reflect the overwhelming consensus of the international community.²⁸ One hundred States voted in favor of

²² U.N. General Assembly Resolution 68/262, U.N. Doc. No. A/RES/68/262 (27 March 2014) (recalling "the Final Act of the Conference on Security and Cooperation in Europe, signed in Helsinki on 1 August 1975, the Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons (Budapest Memorandum) of 5 December 1994, the Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation of 31 May 1997, and the Alma-Ata Declaration of 21 December 1991") ([UA-129](#)).

²³ *Id.*, Preamble.

²⁴ *Id.*

²⁵ *Id.* ¶ 5.

²⁶ *Id.* ¶ 6.

²⁷ See U.N. General Assembly Resolution 71/205, U.N. Doc. No. A/RES/71/205 (19 December 2016) ([UA-464](#)); U.N. General Assembly Resolution 72/190, U.N. Doc. No. A/RES/72/190 (19 December 2017) ([UA-465](#)).

²⁸ Unlike the General Assembly, the U.N. Security Council could not address Russia's illegal assertion of sovereignty over Crimea because of Russia's veto. Nevertheless, the Security Council's

Resolution 68/262, and only eleven — ten, excluding Russia — voted against.²⁹ Resolutions 71/205 and 72/190 also passed with overwhelming support.³⁰

29. The General Assembly's call for non-recognition has been echoed elsewhere by a wide range of States and international organizations. The diverse group of States and organizations that have refused to recognize Russia's claim includes: the European Union and various individual EU member States,³¹ Latin American States,³² Asian and Pacific States,³³ African and Middle Eastern States,³⁴ North American States,³⁵ States that were

consideration of the matter further illustrates the clear view of the international community. Thirteen of the fifteen members of the Security Council voted on 15 March 2014 in support of a draft resolution urging member States not to recognize any alteration of the status of Crimea. The fourteenth member, China, abstained but reaffirmed its respect for "the sovereignty and territorial integrity of all States" and condemned "foreign interference" in Ukraine. See United Nations, Meetings Coverage, SC/11319 (15 March 2014), pp. 3-4 (UA-466). Only Russia opposed the draft resolution. *Id.* p. 2.

²⁹ See Discussion of Draft Resolution A/68/L.39, U.N. Doc. No. A/68/PV.80 (27 March 2014), p. 17 (UA-467). Seven of the States that voted against the General Assembly resolution issued a statement explaining their vote. With the sole exception of the Democratic People's Republic of Korea, not one State expressed the view that the legal status of Crimea had been altered. See *id.* pp. 4-27.

³⁰ See Discussion of U.N. General Assembly Resolution 71/205, U.N. Doc. No. A/71/PV.65 (19 December 2016), pp. 40-41 (passed with 70 States in favor and 26 against) (UA-468); Discussion of U.N. General Assembly Resolution 72/190, U.N. Doc. No. A/72/PV.73 (19 December 2017), p. 29 (passed with 70 States in favor and 26 against) (UA-469).

³¹ See, e.g., Statement of Mr. Mayr-Harting On Behalf of the European Union, its Member States, Montenegro, Albania, Norway and Georgia With Respect to Draft Resolution A/68/L.39., U.N. Doc. No. A/68/PV.80 (27 March 2014), pp. 4-5 (UA-467); European Union Statement, Russia's Ongoing Aggression Against Ukraine and Illegal Occupation of Crimea (11 July 2016) (UA-471); UK Foreign Secretary William Hague, Oral Statement to Parliament on Russia's Actions in Crimea (18 March 2014) (UA-472); France Diplomatie, Ukraine - Annexion Illégale de la Crimée (21 March 2017) (UA-473).

³² See, e.g., United Nations, Meetings Coverage, SC/11319 (15 March 2014) (reflecting the statements of Argentina and Chile in support of a Security Council resolution condemning Russia's actions) (UA-466).

³³ See, e.g., Ministry of Foreign Affairs of Japan, Statement by the Minister for Foreign Affairs of Japan on the Sanctions Against Russia over the Situation in Ukraine (29 April 2014) (UA-474); Indonesia Respects Ukraine's Sovereignty Concerning Crimea Issue, *Antara News Agency* (21 March 2014) (UA-475); Statement of Mr. Raja Zaib Shah of Malaysia With Respect to Draft Resolution A/68/L.39., U.N. Doc. No. A/68/PV.80 (27 March 2014), p. 23 (UA-467); Daniel Hurst, Australia Imposes Sanctions on Russia after it 'Steals' Crimea from Ukraine, *The Guardian* (19 March 2014) (UA-476); Republic of Korea, MOFA Spokesperson's Statement on the Situation in Ukraine (19 March 2014) (UA-478).

³⁴ See, e.g., Nigeria Backs West on Crimea, Condemns Russia's Support for Referendum, *Premium Times* (15 March 2014) (UA-479); United Nations, Meetings Coverage, SC/11319 (15 March 2014), p. 4 (reflecting the statement of Jordan) (UA-466).

³⁵ Government of Canada, Statement by the Prime Minister of Canada Marking Important Anniversary in Ukraine's Struggle for Democracy (27 February 2015) (UA-480); Ministry of Foreign Affairs, Mexico Expresses its Deep Concern at the Deteriorating Situation in Ukraine (8 March 2014)

formerly part of the Soviet Union,³⁶ the Caribbean Community,³⁷ the Council of Europe,³⁸ the Group of Seven,³⁹ the Organization for Security and Cooperation in Europe,⁴⁰ the North Atlantic Treaty Organization,⁴¹ the Nordic-Baltic Eight,⁴² and the Visegrád Group of Central European States.⁴³

30. This international consensus reflects the binding principle of non-recognition under international law.⁴⁴ Indeed, as noted, the General Assembly based its call for non-

([UA-481](#)); United States Department of State, Press Statement, Reaffirming U.S. Commitment to a Sovereign and Whole Ukraine on the Third Anniversary of Russia's Crimean "Referendum" (16 March 2017) ([UA-482](#)); United States Department of State, Press Statement of Michael R. Pompeo, Crimea Declaration (25 July 2018) ("As we did in the Welles Declaration in 1940, the United States reaffirms as policy its refusal to recognize the Kremlin's claims of sovereignty over territory seized by force in contravention of international law.") ([UA-483](#)).

³⁶ See, e.g., United Nations, Meetings Coverage, GA/11493 (27 March 2014) (reflecting the statements of Azerbaijan, Georgia, and Moldova; Moldova explained that "the Crimea referendum was not legal because it contravened Ukraine's Constitution as well as international law"; and Georgia noted that "the situation in mainland Ukraine was reminiscent of the Russian Federation's seizure of Georgia's Abkhazia and Tskhinvali regions in 2008") ([UA-484](#)); Communications Directorate of the Ministry of Foreign Affairs of Latvia, Latvia's Position on the Illegally Annexed Crimea (16 March 2018) ([UA-485](#)); Estonian Public Broadcasting (ERR News), Estonia Welcomes US Declaration of Non-Recognition of Crimea Annexation (26 July 2018) ([UA-487](#)); Press Service of the Ministry of Foreign Affairs of the Republic of Uzbekistan, The Position of the Republic of Uzbekistan on the Situation in Ukraine and the Crimean Issue (25 March 2014) ([UA-488](#)).

³⁷ CARICOM Expresses Concern over Ukraine Situation, *The Guyana Chronicle* (5 March 2014), ([UA-489](#)).

³⁸ Parliamentary Assembly of the Council of Europe, Political Consequences of the Russian Aggression in Ukraine, Resolution 2132 (12 October 2016), ¶ 4 ([UA-490](#)); Parliamentary Assembly of the Council of Europe, Reconsideration on Substantive Grounds of the Previously Ratified Credentials of the Russian Delegation, Resolution 1990 (10 April 2014) ([UA-491](#)).

³⁹ G7, The Hague Declaration Following the G7 Meeting on 24 March (24 March 2014) ([UA-492](#)).

⁴⁰ OSCE Press Release, OSCE Chair Says Crimean Referendum in its Current Form Is Illegal and Calls for Alternative Ways to Address the Crimean Issue (11 March 2014) ([UA-493](#)); Baku Declaration and Resolutions Adopted by the OSCE Parliamentary Assembly at the Twenty-Third Annual Session (28 June to 2 July 2014), pp. 6, 17-19 ([UA-494](#)).

⁴¹ NATO Press Release, Statement by the North Atlantic Council on the So-Called Referendum in Crimea (17 March 2014) ([UA-495](#)).

⁴² Press Release, In the Framework of Nordic-Baltic (NB8) and Visegrad (V4) Cooperation, the Ministers of Foreign Affairs of the NB8 and V4 Countries Met in Narva on 6-7 March and Issued the Following Joint Statement (7 March 2014) ([UA-497](#)).

⁴³ *Id.*

⁴⁴ See Gaetano Arangio-Ruiz, Fifth Report on State Responsibility, UN Doc. No. A/CN.4/453 and Add.1-3 (12 and 28 May and 8 and 24 June 1993), p. 41, ¶ 158 (discussing the obligation of non-recognition as precluding the acts of the wrongdoing State from "producing legal effects at the international level") ([UAL-37](#)); International Law Commission, Draft Articles on Responsibility of

recognition on the settled norm that “the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force.”⁴⁵

31. Members of the international community have backed up their statements of non-recognition with concrete actions. The European Union, for example, has imposed sanctions reflecting its determination to “not recognise” the “illegal annexation” of Crimea, which it considers to be based on a “violation of Ukrainian sovereignty and territorial integrity.”⁴⁶ Japan has imposed “restrictive measures with regard to imports from Crimea and Sevastapol,” which are likewise “based on Japan’s position that annexation of Crimea by Russia will never be recognized.”⁴⁷ The United States, Canada, Australia, and other States have all joined in enforcing the norm of non-recognition through sanctions.⁴⁸

32. Notwithstanding this overwhelming international consensus, Russia asks the Tribunal to take cognizance of a Russian claim to sovereignty over Crimea. That position flatly disregards the General Assembly’s call for “all States, international organizations and specialized agencies” not to recognize, or take any action that might be interpreted as

States for Internationally Wrongful Acts, with Commentaries (2008), [Art. 41 & cmt. ¶ 7](#) (discussing international practice that treats unlawful annexations as null and void) ([UAL-33](#)).

⁴⁵ U.N. General Assembly Resolution 68/262, U.N. Doc. No. A/RES/68/262 (27 March 2014), Preamble ([UA-129](#)).

⁴⁶ See, e.g., Council of the European Union, Council Decision 2014/386/CFSP Concerning Restrictions on Goods Originating in Crimea or Sevastopol, in Response to the Illegal Annexation of Crimea and Sevastopol (23 June 2014) ([UA-498](#)).

⁴⁷ Ministry of Foreign Affairs, Statement by the Minister for Foreign Affairs of Japan on the Additional Measures over the Situation in Ukraine (28 July 2014) ([UA-499](#)).

⁴⁸ See United States Department of State, Ukraine and Russia Sanctions (accessed 26 November 2018) ([UA-500](#)); Government of Canada, Canada Sanctions Related to Russia (7 May 2018) ([UA-501](#)); Australian Government Department of Foreign Affairs and Trade, Sanctions Regimes: Russia (accessed 26 November 2018) ([UA-502](#)); European Union, Declaration by the High Representative on Behalf of the European Union on the Alignment of Certain Third Countries with the Council Decision 2014/145/CFSP Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine (11 April 2014) (noting that Montenegro, Iceland, Albania, and Norway have “aligned themselves” with the European Union’s sanctions against Russia) ([UA-503](#)); see also The Federal Council, Situation in Ukraine: Federal Council Decides on Further Measures to Prevent the Circumvention of International Sanctions (27 August 2014) (explaining Switzerland’s policy “to take all the measures required to ensure that the most recent sanctions imposed by the European Union cannot be circumvented via Swiss territory”) ([UA-504](#)); United States Department of State, Press Statement of Michael R. Pompeo, Crimea Declaration (25 July 2018) (refusing “to recognize [Russia’s] claims of sovereignty over territory seized by force in contravention of international law”) ([UA-483](#)).

recognizing, any alteration in the status of Crimea.⁴⁹ The very premise of Russia’s objection would require the Tribunal to accept that the legal status of Crimea *has* changed — from one of unquestioned Ukrainian sovereignty prior to 17 March 2014,⁵⁰ to one of competing claims and a legitimate dispute over sovereignty thereafter. For this Tribunal to treat Russia’s claim as a legitimate one, capable of having a legal effect with respect to this Tribunal’s jurisdiction, would obviously “be interpreted as recognizing an[] . . . altered status” for Crimea.”⁵¹ And it would impermissibly accord Russia a concrete benefit (dismissal of this case) on the basis of a recognized violation of international law.⁵²

33. Without precedent or reason, Russia has asked this Tribunal to ignore the General Assembly, to ignore the international community’s determination that the international law principle of non-recognition applies, and to treat a settled part of Ukrainian territory as being subject to legitimate, competing legal claims. This Tribunal has the inherent power and duty to ensure the integrity of these arbitral proceedings.⁵³ It should not exercise its authority to do the opposite of what the General Assembly has called for, and to treat as legitimate a claim that has been found to lack any effect in international law. Russia’s claim that the legal status of Crimea has been altered, and the objection that is premised on that claim, should be considered inadmissible in this proceeding.

B. Russia’s Claim Is Not Plausible, and Cannot Defeat the Tribunal’s Jurisdiction over this Dispute Concerning the Interpretation or Application of UNCLOS

34. As set forth above, Russia’s claim to have annexed Crimea should not be entertained at all. But even if such a claim could be admitted, it is not legally plausible, even according to the facts alleged by Russia in its pleadings. A respondent State’s mere assertion of an *implausible* claim to territorial sovereignty cannot defeat the Tribunal’s jurisdiction over an UNCLOS dispute.

⁴⁹ U.N. General Assembly Resolution 68/262, U.N. Doc. No. A/RES/68/262 (27 March 2014), ¶ 6 (UAL-129).

⁵⁰ See *supra* ¶ 26; see also *Russia’s Objections*, ¶ 11.

⁵¹ U.N. General Assembly Resolution 68/262, U.N. Doc. No. A/RES/68/262 (27 March 2014), ¶ 6 (UAL-129).

⁵² See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion of 9 July 2004, sep. op. of Judge Elaraby, p. 122 (“The general principle that an illegal act cannot produce legal rights — *ex injuria jus non oritur* — is well recognized in international law.”) (UAL-38).

⁵³ See *Northern Cameroons (Cameroon v. U.K.)*, ICJ Judgment of 2 December 1963, p. 29 (UAL-39); *Legality of Use of Force (Serbia and Montenegro v. Portugal)*, ICJ Judgment on Preliminary Objections of 15 December 2004, sep. op. of Judge Higgins, ¶ 17 (UAL-40).

35. The logic of Russia’s objection is as follows: it has a claim to sovereignty over Crimea, Ukraine’s coastal State rights under UNCLOS depend on the validity of Russia’s sovereignty claim, so that sovereignty claim would have to be decided before Ukraine’s UNCLOS claims could be resolved. By framing its objection in this way, Russia seeks to connect this case to a pre-existing debate over how an UNCLOS tribunal should proceed when a law of the sea dispute intersects with a dispute over territorial sovereignty.

36. The closely divided decision in the *Chagos* arbitration reflects that debate. Judges Wolfrum and Kateka noted that the Convention contains no exception for law of the sea disputes that raise questions of territorial sovereignty. In their view, so long as the underlying dispute concerns the interpretation or application of the Convention, it is permissible for an UNCLOS tribunal to resolve a sovereignty question if necessary to resolve the UNCLOS dispute.⁵⁴ Professor Shearer, Judge Greenwood, and Judge Hoffmann, by contrast, adopted a case-specific approach. They agreed that, “where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it,” including on matters of territorial sovereignty.⁵⁵ But in such cases, these three arbitrators considered it appropriate to exercise jurisdiction only if the dispute was “primarily” about the law of the sea claims, rather than the territorial sovereignty claim.⁵⁶

37. This case, however, does not present the question that divided the *Chagos* tribunal: how to proceed when a *serious and longstanding* claim to territorial sovereignty would have to be decided as a predicate to addressing an UNCLOS dispute. Whatever the correct approach to that question, an UNCLOS tribunal’s power to decide the merits of an UNCLOS dispute cannot be defeated by the mere assertion of an *implausible* claim to land territory. Russia’s objection must therefore fail.

⁵⁴ See *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, UNCLOS/PCA Case No. 2011-03, Award of 18 March 2015, dissenting and concurring op. of Judges James Kateka and Rüdiger Wolfrum, ¶¶ 44-45 ([UAL-41](#)).

⁵⁵ *Chagos Marine Protected Area Arbitration*, Award of 18 March 2015, ¶¶ 220-21 ([UAL-18](#)).

⁵⁶ *Id.* ¶ 211.

1. A Dispute Concerning the Interpretation or Application of the Convention Does Not Lose that Character Simply Because the Respondent State Asserts an Implausible Claim to Land Territory

38. Articles 286 and 288 of UNCLOS confer on this Tribunal broad jurisdiction over “any dispute concerning the interpretation or application of [the] Convention.” As explained in Section I of this Chapter, Ukraine’s Memorial clearly establishes that this case concerns such a dispute.

39. Russia cannot escape its consent to arbitrate without, at a minimum, objectively demonstrating that this is not in fact a dispute “concerning the interpretation or application of [the] Convention” within the meaning of Articles 286 and 288, but rather a different kind of dispute.⁵⁷ It is not enough to make a bare assertion that Crimea has lost its settled status as part of Ukraine, that Crimea now is legitimately the subject of competing claims, and that these claims are the real subject of the dispute before the Tribunal. To allow Russia to escape its consent to arbitrate based on such an assertion alone would be inconsistent with Articles 286 and 288, read in context, in good faith, and in light of the object and purpose of the Convention.

40. As noted at the beginning of this Chapter, the mandatory jurisdiction granted under these provisions is broad (“any dispute”), and is subject only to narrow and express exceptions — none of which is the basis for Russia’s principal objection. The drafters of UNCLOS specifically sought to guard against the risk that dispute resolution would be undermined by turning the Convention’s limited and heavily negotiated jurisdictional exemptions into a “wide loop-hole.”⁵⁸ If even an implausible claim that the identity of the coastal State has been altered could defeat the Convention’s compulsory dispute resolution mechanism, Articles 286 and 288 would contain a loop-hole so wide as to render the consent to arbitrate illusory.

41. By way of example, Russia’s argument here would have permitted China to easily change the result of the *South China Sea* arbitration, simply by asserting an invented sovereignty claim to islands in the Philippine archipelago. That case arose in the context of a longstanding sovereignty dispute over certain maritime features in the South China Sea,⁵⁹ in

⁵⁷ See *Fisheries Jurisdiction (Spain v. Canada)*, ICJ Judgment on Jurisdiction of 4 December 1998, ¶¶ 30-31 (“The Court will itself determine the real dispute that has been submitted to it.”) (UAL-42).

⁵⁸ See Virginia Commentary, pp. 91-94 (UAL-35).

⁵⁹ That dispute, in its modern form, dates back to at least the mid-1970s.

which the plausibility of both sides' claims was not in question.⁶⁰ The Tribunal concluded that the Philippines' case did not require it to resolve any sovereignty dispute, because China lacked the necessary maritime entitlements to support its actions even if all sovereignty claims were assumed in its favor.⁶¹ But, in Russia's view, China could have abruptly asserted an implausible claim to Luzon, Palawan, or another Philippine island, creating a "dispute" over territorial sovereignty, and thus creating competing claims of entitlement to the maritime areas at issue in the arbitration. Similarly, in any future case concerning violations of a coastal State's rights, the respondent State accused of breaching UNCLOS could easily nullify its consent to compulsory dispute resolution by asserting a baseless territorial claim, and thereby manufacturing a territorial dispute. Good faith, the language and context of Article 286 and 288, and the object and purpose of the Convention do not allow States to unilaterally avoid mandatory dispute resolution in such a manner.⁶²

42. Such a result would also be inconsistent with the practice of the International Court of Justice, on whose decisions Russia relies. Russia places great weight on the *Fisheries Jurisdiction* case, in which the Court articulated its authority to determine whether the parties have accurately characterized the nature of their dispute.⁶³ But *Fisheries Jurisdiction* itself requires "particular attention to the formulation of the dispute chosen by the [claimant]," which will only be rebutted through objective support for a contrary formulation.⁶⁴ Here, therefore, to support its formulation of the dispute as concerning the territory of Crimea, Russia must in the first place establish the plausibility of its claim that the settled status of Crimea as part of Ukraine has been altered.

43. The standard of plausibility, and related standards, are commonly used by the International Court of Justice for the purpose of characterizing claims and disputes as falling within (or outside of) particular treaties or bodies of law.⁶⁵ The standard of plausibility has

⁶⁰ See *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 152 (explaining that the "Philippines concedes" the existence of a dispute concerning sovereignty over a number of features in the South China Sea) (UAL-3).

⁶¹ *Id.* ¶ 153.

⁶² See Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 ("VCLT"), Art. 31 (UAL-43).

⁶³ See *Fisheries Jurisdiction*, ICJ Judgment on Jurisdiction of 4 December 1998, ¶¶ 30-31 (UAL-42); see also *Russia's Objections*, ¶ 5 & n. 4.

⁶⁴ *Fisheries Jurisdiction*, ICJ Judgment on Jurisdiction of 4 December 1998, ¶¶ 30-31 (UAL-42).

⁶⁵ While the International Court of Justice has applied a variety of standards in determining how to characterize a claim for jurisdictional purposes, one frequent theme has been to identify "a reasonable or relevant connection . . . or sufficiently plausible juridical basis for the claim under the treaty

also been used for this purpose in the UNCLOS context. In *The M/V Saiga (No. 1)*, for example, the International Tribunal for the Law of the Sea employed the plausibility standard to choose between two different characterizations of the dispute before it — one advanced by St. Vincent and the Grenadines, the applicant, and the other by Guinea, the respondent.⁶⁶ Because an assessment of the plausibility of a claim is a limited inquiry, the plausibility standard can properly be used in circumstances where it would not be appropriate for a court or tribunal to make binding determinations on the merits of a claim.⁶⁷

44. In his Separate Opinion in the International Court of Justice's *Oil Platforms* case, Judge Ranjeva described the role the plausibility standard can play at the jurisdictional stage in the following terms:

“That the Parties put forward conflicting propositions is not in itself sufficient to establish the existence of a dispute; the Court must not limit itself to a passive interpretation of its judicial function, contenting itself with taking note of the divergence of views as such. It must establish the plausibility of each of them in relation to the benchmark provisions which are the text of the Treaty and its Articles [I]t is not a matter, at the preliminary objections stage, of stating that the propositions are true or false from the legal standpoint, but of analysing them to ensure there is nothing absurd about them, or nothing contrary to the legal norm of positive law.”⁶⁸

invoked.” Peter H.F. Bekker, *Oil Platforms (Iran v. U.S.)*, Preliminary Objection, Judgment, 91 A.J.I.L. 518 (1997), p. 521 (citing *Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Judgment on Preliminary Objections of 12 December 1996, sep. op. of Judge Higgins) (UAL-45); see also, e.g., *Ambatielos (Greece v. United Kingdom)*, ICJ Judgment of 19 May 1953, p. 18 (UAL-46); *Interhandel (Switzerland v. United States)*, ICJ Judgment on Preliminary Objections of 21 March 1959, p. 24 (UAL-47).

⁶⁶ See *The M/V Saiga (No. 1) (St. Vincent and the Grenadines v. Guinea)*, ITLOS Case No. 1, Prompt Release Judgment of 4 December 1997, ¶¶ 59, 61 (UAL-48).

⁶⁷ *Ambatielos*, ICJ Judgment of 19 May 1953, p. 18 (noting that the Court was “without jurisdiction” to determine that a treaty interpretation advanced by Greece is “the correct one,” but that it was still required to determine whether the interpretation was “of a sufficiently plausible character to warrant a conclusion that the [Greek] claim is based on the Treaty”) (UAL-46); see also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, ICJ Order on Provisional Measures of 8 March 2011, ¶ 85 (an order finding a claim plausible and issuing provisional measures “in no way prejudices” the merits of the claim or other issues not (or not yet) properly before the Court) (UAL-50).

⁶⁸ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Judgment on Preliminary Objections of 12 December 1996, sep. op. of Judge Ranjeva, p. 844 (In the original French: “Il ne suffit pas que les parties soutiennent des propositions contraires pour qu'un différend soit établi; en effet il appartient à la Cour non pas de se limiter à une interprétation passive de sa fonction judiciaire en se contentant de prendre acte des divergences des thèses en soi. Elle doit établir le caractère

45. To similar effect, Judge Shahabuddeen observed that “as a general matter, there is no dispute within the meaning of the law where the claim lacks any reasonably arguable legal basis or where it is manifestly frivolous or unsupported.”⁶⁹

46. The Tribunal should undertake a similar analysis here and decide whether or not Russia’s claim that the status of Crimea as part of Ukraine has been altered is plausible. The plausibility requirement strikes an appropriate balance in the application of Articles 286 and 288, allowing the Tribunal to objectively test the seriousness of the claim that underlies Russia’s jurisdictional objection, without purporting to bind the Parties in relation to that claim. If Russia’s claim is not even plausible, there can be no serious argument that, as Russia maintains, “sovereignty over land territory is central, is the real dispute, is where the relative weight of the dispute lies (and overwhelmingly so),” and is “the actual objective of Ukraine’s claims.”⁷⁰

2. Russia’s Claim to Have Acquired Sovereignty over Crimea Is Not Plausible and thus Cannot Be the Real Issue in Dispute

47. Russia’s claim to have validly altered the settled legal status of Crimea is manifestly not plausible for two reasons. First, as described in Section II.A of this Chapter, Russia’s claim has been decisively rejected by a consensus of the international community. The General Assembly has determined that Russia’s claim is invalid and grounded in a violation of international law.⁷¹ Even if Russia’s claim were said to be admissible, the fact that it has repeatedly been condemned and rejected as contrary to international law renders it not plausible.

48. Second, the implausibility of Russia’s claim is apparent even on its own terms. The only factual allegations Russia offers to ground its claim are in paragraphs 10 through 12 of its objections. The description in those paragraphs is materially incomplete, but even

plausible de chacune d’elles par rapport aux dispositions de référence qu’est le texte du traité et de ses articles En d’autres termes il ne s’agit pas, au stade des exceptions préliminaires, de dire que les propositions sont vraies ou fausses au regard du droit mais de les analyser pour s’assurer qu’elles n’ont rien d’absurde ni de contraire à la norme juridique de droit positif.” (UAL-51).

⁶⁹ *Oil Platforms*, ICJ Judgment on Preliminary Objections of 12 December 1996, sep. op. of Judge Shahabuddeen, p. 832 (UAL-52); see also *Nuclear Tests (Australia v. France)*, ICJ Judgment of 20 December 1974, joint dis. op. of Judges Onyeama, Dillard, Jiménez de Aréchaga, and Sir Humphrey Waldock, p. 364, ¶ 107 (recognizing that where a contention is “dress[ed] up as a legal claim” but does not have a “reasonably arguable” legal basis, there may be an “objection contesting the legal character of the dispute”) (UAL-54).

⁷⁰ *Russia’s Objections*, ¶¶ 25, 42.

⁷¹ See *supra* Chapter Two, Section II.A.

accepting, *arguendo*, the truth of those allegations, Russia's claim still would be legally baseless. In those three paragraphs, Russia acknowledges that Crimea was part of the sovereign territory of Ukraine until 17 March 2014.⁷² Russia's sole basis for claiming that this status has somehow changed is its assertion that the population of Crimea voted to secede from Ukraine, and accede to the Russian Federation, in a referendum held on 16 March 2014 — a date on which Russia admits that Crimea was part of Ukraine.⁷³

49. Thus, even crediting Russia's own presentation of the facts (which omits mention that the referendum was preceded by a use of force and conducted in the presence of Russian forces), the referendum occurred on Ukrainian territory on 16 March 2014, when all agree that Ukrainian law was still in force. That referendum was indisputably invalid under applicable Ukrainian laws.⁷⁴ And there is no basis in international law for recognition of a referendum held in violation of the law of the State in which it takes place.⁷⁵ Thus, Russia's own account of the facts provides no reasonably arguable legal basis for claiming that the settled status of Crimea as part of Ukraine has been altered. Even if the Tribunal were to take Russia's submissions at face value, the circumstances described by Russia in its preliminary objections still would not produce a legally plausible claim to have acquired sovereignty over Crimea. This confirms that the dispute before the Tribunal is, as Ukraine's Memorial reflects, one concerning the interpretation or application of the Convention, and not one concerning competing legitimate claims to territorial sovereignty.

50. The implausibility of Russia's claim that the referendum resulted in an alteration of status may be established without recourse to any further authority. But both the U.N. General Assembly and the Venice Commission of the Council of Europe are in accord. As noted above, the General Assembly's 2014 resolution on Crimea explained that the referendum "was not authorized by Ukraine" and thus "ha[s] no validity."⁷⁶ Both

⁷² [Russia's Objections](#), ¶ 11.

⁷³ *Id.*

⁷⁴ See, e.g., Council of Europe, European Commission for Democracy Through Law (Venice Commission), Opinion No. 762/2014 (21 March 2014), ¶¶ 27-28 ([UA-505](#)); see Constitution of Ukraine, Art. 2 ("The territory of Ukraine within its present border is indivisible and inviolable.") ([UA-506](#)); *id.* Art. 73 ("Issues of altering the territory of Ukraine are resolved exclusively by an All-Ukrainian referendum.").

⁷⁵ See *Re Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada*, 115 ILR 536 (1998), pp. 594-95 ([UAL-55](#)).

⁷⁶ U.N. General Assembly Resolution 68/262, U.N. Doc. No. A/RES/68/262 (27 March 2014) ([UA-129](#)).

Ukraine and Russia are members of the Council of Europe, and that body's Venice Commission has similarly determined that the referendum was illegal under governing Ukrainian law, and further that "circumstances in Crimea did not allow the holding of a referendum in line with European democratic standards."⁷⁷ Even if these determinations were not considered dispositive, they confirm the implausibility of Russia's claim.

C. Russia Misreads *Chagos* and *South China Sea*, and Misconstrues the Statements it Views as Indicative of Ukraine's "Actual Objectives"

51. Russia's heavy reliance on decisions in the *Chagos* and *South China Sea* arbitrations is misconceived. Both of those cases involved longstanding and acknowledged sovereignty disputes, with no question as to the plausibility of the sovereignty claims on each side, and no resolution of the General Assembly addressing the inadmissibility of one set of claims. Since Russia's claim is neither admissible nor plausible, this case does not similarly require the Tribunal to resolve a serious and longstanding dispute over territorial sovereignty in order to reach the disputed matters under the Convention.⁷⁸ The test articulated by the majority of the tribunal in *Chagos* is thus inapplicable.

52. But even if that test were to be considered, Russia misapplies it. The *Chagos* tribunal asked "where the relative weight of the dispute lies," indicating that it could not exercise jurisdiction over a dispute that "primarily concern[ed] [land] sovereignty," but that it could rule on a dispute "primarily [concerning] a matter of the interpretation and application of the term 'coastal State', with the issue of [land] sovereignty forming one aspect of a larger question."⁷⁹ To decide which type of dispute was before it, the tribunal considered

⁷⁷ Council of Europe, European Commission for Democracy Through Law (Venice Commission), Opinion No. 762/2014 (21 March 2014), ¶¶ 27-28 ([UA-505](#)).

⁷⁸ In light of this stark difference, Russia is simply incorrect that "the consequences of accepting Ukraine's claim would be that wherever a State invoked . . . the term 'coastal State,' there would be jurisdiction under Part XV to resolve all or any disputes over sovereignty . . ." [Russia's Objections](#), ¶ 60.

⁷⁹ *Chagos Marine Protected Area Arbitration*, Award of 18 March 2015, ¶ 211 ([UAL-18](#)); cf. *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 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. For the reasons set out in this paragraph, the Tribunal does not accept the objection set out in China's Position Paper that the disputes presented by the Philippines concern sovereignty over maritime features.") ([UAL-3](#)).

the “object” of the claims that Mauritius, the applicant, had brought.⁸⁰ In this connection, it relied on Mauritius’s express statement that it sought, through its UNCLOS case, to compel “[t]he British [to] leave” the land territory of the Chagos Islands, so that “[t]he former residents of the Chagos Archipelago who wish to return finally will be free to do so and their exile will come to an end.”⁸¹

53. The inquiry undertaken by the *Chagos* tribunal into the relative weight of the dispute is unnecessary here, where Crimea’s status as a part of Ukraine is settled — with no alteration — and Russia has failed in its burden to demonstrate the existence of a competing plausible claim. The *Chagos* tribunal only undertook its inquiry after considering dozens of pages of argument and substantial factual appendices submitted by the United Kingdom to support the proposition that there was a genuine and longstanding dispute concerning sovereignty over the Chagos Islands. Russia, in contrast, has offered three thinly-supported paragraphs to support its assertion of a change in the legal status of Crimea, which, even if they were to be taken on their own terms without considering the substantial evidence against them, do not amount to a plausible legal claim.⁸²

54. But if inquiry into Ukraine’s objectives were necessary, Ukraine’s “actual objective” is to defend the extensive and valuable maritime rights that are being violated, as recounted above in Section I. Ukraine has vital interests in the maritime areas concerned, and it should not be lightly inferred that a State seeking to vindicate such important interests does so as a mere pretext.

55. To justify its reliance on *Chagos*, Russia first points to Ukraine’s references in its Statement of Claim and Memorial to “coastal State” rights, and its use of the words “sovereignty,” “sovereign rights,” and “jurisdiction.”⁸³ Ukraine has used these words simply because they appear in the articles of the Convention defining the maritime rights that Russia has violated. Article 2 of the Convention, for example, specifies that the “coastal State” holds “sovereignty” in its territorial sea. Ukraine can hardly be faulted for formulating its claims using the language of the Convention — if anything, Ukraine’s use of such terms merely confirms that this dispute concerns the interpretation or application of UNCLOS. Moreover, the mere fact that Ukraine has invoked its “coastal State” rights does not lend

⁸⁰ *Chagos Marine Protected Area Arbitration*, Award of 18 March 2015, ¶¶ 210-211 ([UAL-18](#)); see [Russia’s Objections](#), ¶ 25.

⁸¹ *Chagos Marine Protected Area Arbitration*, Award of 18 March 2015, ¶ 211 ([UAL-18](#)).

⁸² See [supra](#) ¶ 48.

⁸³ See, e.g., [Russia’s Objections](#), ¶¶ 28, 29, 39, 40.

support to Russia’s argument that one of the key issues in this case is the identity of the coastal State.⁸⁴ While, in a different case, an UNCLOS tribunal would be free to interpret and apply the term coastal State,⁸⁵ here, Ukraine is undeniably the coastal State and Russia has not advanced — and cannot advance — an admissible or plausible legal argument justifying any different interpretation.

56. Second, Russia takes issue with statements of the Ukrainian government expressing a desire to end Russia’s armed aggression against Ukraine and its occupation of Crimea, which it links to statements in which Ukrainian officials declare their intention to “vindicate [Ukraine’s] rights as the coastal State” and “facilitate the restoration of full control over the maritime area of Ukraine”⁸⁶ No one disputes that Ukraine wants Russia to cease its aggression against Ukraine and its illegal occupation of Ukrainian territory. But the only point in discussion before the Tribunal is that Ukraine *also* wants Russia, *inter alia*, to stop stealing its living and non-living maritime resources, to stop disturbing its underwater cultural heritage, and to end its harassment of vessels *en route* to Ukrainian ports.⁸⁷ As it is entitled to do,⁸⁸ Ukraine has brought the second, but not the first, set of issues before the Tribunal, which has jurisdiction over such claims.⁸⁹

⁸⁴ *Id.* ¶¶ 30, 41.

⁸⁵ See *Chagos Marine Protected Area Arbitration*, Award of 18 March 2015, ¶ 211 (UAL-18).

⁸⁶ See, e.g., *Russia’s Objections*, ¶¶ 31-36.

⁸⁷ The fact that both objectives — ending Russian aggression and Russia’s occupation of Crimea, and vindicating Ukraine’s UNCLOS rights — have at times both been mentioned in a single speech or political statement is entirely unsurprising and of no relevance to this Tribunal’s jurisdiction.

⁸⁸ *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 152 (quoting *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, ICJ Judgment of 24 May 1980, pp. 19-20, ¶ 36) (“[I]t is entirely ordinary and expected that two States with . . . [an] extensive and multifaceted [relationship] . . . would have disputes in respect of several distinct matters” and “there are no grounds to ‘decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important.’”) (UAL-3).

⁸⁹ Notably, certain of the statements Russia relies upon expressly reflect that Ukraine is pursuing other disputes with Russia, including some with a connection to Crimea, before different international courts and organs, rather than seeking to shoehorn them into its UNCLOS case. This is the case, for example, with the statements block-quoted by Russia in paragraphs 34 and 35 of its Objections. See Website of the President of Ukraine, President Instructed Foreign Ministry to File a Lawsuit Against Russia to International Arbitration (14 September 2016) (describing this arbitration as “one of many steps,” and noting that “documents are being elaborated on the basis of various international documents and conventions in order to file suits to other international courts”) (RU-45); 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) (referring to the UNCLOS case, as well as proceedings at the International Court of Justice and before other forums) (RU-49).

57. Third, Russia alleges that Ukraine’s Memorial draws a causal connection between Russia’s invasion of the Crimean Peninsula and Russia’s violations of the Convention.⁹⁰ Russia’s invasion of Crimea is simply a matter of background and context, not part of Ukraine’s legal claims. Ukraine is permitted to put forward general context without changing the nature of the dispute that is before the Tribunal.⁹¹ And invasion can never be the basis for the acquisition of sovereignty over another State’s territory,⁹² so explaining that Russia has invaded Crimea does not suddenly create a “sovereignty dispute.”

58. Most importantly, however, the Tribunal should consider the broader context to Ukraine’s statements. The objective reality is that there has been no change in the status of Crimea as an unquestioned part of Ukraine. That reality has been confirmed by the General Assembly, is accepted internationally, and pursuant to fundamental norms of international law cannot be questioned. Even an express ruling by this Tribunal re-affirming that Crimea is part of Ukraine — something Ukraine expressly does *not* seek — would not materially improve Ukraine’s legal position on that settled matter. The sole actual objective of Ukraine’s claims is the interpretation and application of the Convention in relation to Russia’s actions in the Black Sea, the Sea of Azov, and the Kerch Strait, not any ruling on land territory, whether express or implicit.

* * *

59. This Tribunal has pending before it Ukraine’s claims of profound and continuing violations of over a dozen provisions of the Convention. These claims have been elaborated, both legally and factually, over more than 120 pages of written submissions, two expert reports, six witness statements, and hundreds of documentary, photographic, and videographic exhibits. These claims form a dispute that plainly concerns the interpretation or application of the Convention.

60. Ukraine’s detailed and weighty claims under the Convention cannot be displaced by an assertion — rejected by the U.N. General Assembly and the international community, and not legally plausible on its own terms — that, after Russia has long recognized that Crimea is part of Ukraine, that status has now been altered. Such a claim is

⁹⁰ [Russia’s Objections](#), ¶ 41.

⁹¹ *Fisheries Jurisdiction*, ICJ Judgment on Jurisdiction of 4 December 1998, ¶ 32 (quoting *Nuclear Tests (Australia v. France)*, ICJ Judgment of 20 December 1974, p. 262, ¶ 29) ([UAL-42](#)).

⁹² See, e.g., Charter of the United Nations, Art. 2(4) ([UAL-1](#)); Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, principle 1, Annex to U.N. General Assembly Resolution 25/2625, U.N. Doc. No. A/RES/25/2625 (24 October 1970) ([UAL-53](#)).

neither admissible nor plausible. It cannot be the basis for a declination of jurisdiction that would permit Russia to violate UNCLOS while escaping its consent to arbitrate, while also grievously weakening the framework for dispute resolution established under the Convention.

Chapter Three: Russia's Actions in the Sea of Azov and Kerch Strait Are Subject to UNCLOS

61. The Tribunal should reject the Russian Federation's second preliminary objection — that disputes concerning activities in the Sea of Azov and the Kerch Strait are outside the scope of the Tribunal's jurisdiction because those waters "are common internal waters of Russia and Ukraine."⁹³ Under the Convention, the Sea of Azov is an enclosed or semi-enclosed sea containing a territorial sea and exclusive economic zone, and the Kerch Strait is an international strait. They are not "common internal waters." Neither body of water shares key characteristics with the rare cases in which tribunals not applying UNCLOS have recognized pluri-State internal waters. Since the Sea of Azov and Kerch Strait are governed by the Convention and do not qualify as internal waters (whether for historical reasons or otherwise) the Tribunal should also reject Russia's objection under the historic title clause of Article 298(a).

62. The Russian Federation's position on the Sea of Azov and Kerch Strait is without legal basis and should be rejected now. But Russia's objections also lack a preliminary character. Instead, Russia's objections reflect a merits dispute concerning the classification of the Sea of Azov and Kerch Strait under the terms of the Convention. Accordingly, it would also be appropriate for the Tribunal to decline to decide Russia's objections at this phase of the proceedings.

I. Russia's Claim that the Sea of Azov and Kerch Strait Are Beyond the Reach of UNCLOS Is Incorrect

63. The Sea of Azov, bordered by Ukraine and Russia and connected to the Black Sea via the Kerch Strait, is an "enclosed or semi-enclosed sea" within the meaning of Article 122 of UNCLOS. Such seas contain territorial seas and exclusive economic zones. Nothing in the Convention permits such areas to be claimed as internal waters. Without analysis of the Convention, Russia points to rare examples where non-UNCLOS tribunals have recognized bodies of water many times smaller than the Sea of Azov and Kerch Strait as pluri-State internal waters. Assuming this Tribunal could, consistent with the Convention, recognize such an exception at all, the conditions for pluri-State internal waters set out in Russia's authorities have not been met here.

⁹³ [Russia's Objections](#), ¶ 67.

A. Under the Convention, the Sea of Azov and Kerch Strait Are Respectively an Enclosed or Semi-Enclosed Sea and an International Strait, Not Areas of Internal Waters

64. As was explained in Ukraine’s Memorial, prior to 1991, the Soviet Union claimed the Sea of Azov and Kerch Strait as internal waters on the basis that those waters were entirely surrounded by a single State.⁹⁴ Since the dissolution of the Soviet Union, however, these maritime spaces have been bordered by two States, and can no longer qualify as internal waters.

65. Applying the terms of the Convention, the Sea of Azov is now an “enclosed or semi-enclosed sea” within the meaning of Article 122.⁹⁵ Article 122 defines an enclosed or semi-enclosed sea as “a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.”⁹⁶ As depicted in Map 1, above, the Sea of Azov, a large basin or sea bordered by Ukraine and Russia, is connected to “another sea” (the Black Sea) via “a narrow outlet” (the Kerch Strait).

66. The Convention distinguishes between enclosed and semi-enclosed seas surrounded by two or more States, which are addressed in Article 122, and “bays the coasts of which belong to a single State,” which are addressed in Article 10.⁹⁷ Under Article 10 of the Convention, only single-State bays may qualify as internal waters, whereas enclosed and semi-enclosed seas remain subject to the normal regime of the territorial sea, the exclusive economic zone, and the continental shelf. In particular, the Convention specifically describes internal waters as waters falling “on the landward side of the baseline of the territorial sea” of the coastal State,⁹⁸ and it only permits baselines to be drawn across the entrance to a bay where “the coasts of [the bay] belong to a single State.”⁹⁹

67. Applying Articles 8, 10, and 122 of the Convention, the Sea of Azov, which has a maximum length of approximately 224 miles, and a maximum width of 109 miles,¹⁰⁰ thus comprises the territorial seas and exclusive economic zones of Ukraine and the Russian

⁹⁴ [Memorial of Ukraine, ¶ 26.](#)

⁹⁵ *Id.* ¶ 3.

⁹⁶ [UNCLOS, Art. 122.](#)

⁹⁷ [UNCLOS, Art. 10.](#)

⁹⁸ [UNCLOS, Art. 8.](#)

⁹⁹ [UNCLOS, Art. 10.](#)

¹⁰⁰ See State Hydrographic Service of Ukraine, *Oceanographic Atlas of the Black Sea and the Sea of Azov*, No. 601, p. 31 ([UA-1](#)).

Federation. Further applying the terms of the Convention, since the Sea of Azov is an “enclosed or semi-enclosed sea” comprised of territorial seas and exclusive economic zones, the Kerch Strait is an international strait within the meaning of Article 37. It connects “one part of . . . an exclusive economic zone” in the Sea of Azov to “an exclusive economic zone” in the Black Sea.¹⁰¹

68. In treating areas like the Sea of Azov as enclosed or semi-enclosed seas subject to the normal regime of the territorial sea, exclusive economic zone, and continental shelf, the Convention reflects the strong and long-standing norm that a sea surrounded by more than one State generally cannot be claimed as internal waters. As explained in the 1960s by Professor Yehuda Blum, a delegate to the Third U.N. Conference on the Law of the Sea, “[w]ater areas surrounded by the territory of a single coastal State, and thus having the status of ‘closed seas,’ which subsequently, because of political changes resulting in the establishment of more than one state on their shores, become multinational in character, generally have come to be regarded as essentially parts of the high seas”¹⁰² There is no support in the Convention for treating the Sea of Azov as anything other than what it appears to be as a matter of geography: an enclosed or semi-enclosed sea, surrounded by more than one State, and comprised of territorial seas and exclusive economic zones.

B. Pluri-State Internal Waters Have Been Recognized Only in Narrow and Exceptional Cases, Under Conditions Not Met Here

69. Russia places disproportionate weight on a few rare instances where tribunals have recognized narrow exceptions to the strong norm against pluri-State internal waters. But these exceptional cases can have no application here. The *Gulf of Fonseca* case, for instance, pre-dates the entry into force of UNCLOS. And neither the International Court of

¹⁰¹ UNCLOS, Art. 37.

¹⁰² Yehuda Z. Blum, *Historic Titles in International Law* (1965), p. 279 (quoting Charles B. Selak, Jr., *A Consideration of the Legal Status of the Gulf of Aqaba*, 52 AJIL 660 (1958), p. 693) (UAL-56); see also Sir Gerald Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea: Part I—The Territorial Sea and Contiguous Zone and Related Topics*, 8 Int’l & Comp. L.Q. 73 (1959), pp. 82-83 (“It is not, in general, open to the coastal States of the bay (even by agreement *inter se*) to draw a closing line and, by claiming the waters of the bay as internal waters, to divide these up amongst themselves.”) (UAL-57). Russia suggests an opposite rule under which single State bays would be presumed to retain an internal waters status following State dissolution and the emergence of multiple States. But Russia identifies no basis for such a rule in the law of the sea; rather, it invokes the general and irrelevant point that “waivers or renunciations of claims of rights must be either express or unequivocally implied from the conduct of the State alleged to have waived or renounced its rights,” a principle that Russia finds in cases concerning waiver of a counter-claim. [Russia’s Objections](#), ¶ 85.

Justice in that case, nor the *ad hoc* arbitral tribunal in the *Croatia/Slovenia* case, were subject to the Article 293 rule giving priority to the Convention.¹⁰³

70. Even assuming, however, that Russia's non-UNCLOS authorities have some relevance, they do not support Russia's position that the Sea of Azov has acquired the status of "common internal waters" of two States. The exceptional status of pluri-State internal waters has been recognized only when three conditions are present: (1) the body of water is small, and not large enough to contain an exclusive economic zone, (2) there is a clear agreement between all bordering States to establish a pluri-State internal waters regime, and (3) third States are not prejudiced by the claim. As explained below, none of these conditions is met in the case of the Sea of Azov.

71. These three conditions are reflected in Russia's principal authority: the *Gulf of Fonseca* case.¹⁰⁴ There, the International Court of Justice held that a small, 1,800 square kilometer gulf bordered by Honduras, El Salvador, and Nicaragua, was comprised of pluri-State internal waters based on hundreds of years of consistent practice following independence from Spain, demonstrating clear agreement among the relevant States as to that regime, plus the acquiescence of third States and navigational protections for those States.¹⁰⁵ Even in these exceptional circumstances, the claim to pluri-State internal waters status in *Gulf of Fonseca* was controversial. Judge Shigeru Oda dissented and maintained that "there did not and still does not (or, even, cannot) exist any such legal concept as a 'pluri-State bay' the waters of which are internal waters."¹⁰⁶

72. The situation in the Sea of Azov is starkly different from that in the Gulf of Fonseca. First, at nearly 40,000 square kilometers, the Sea of Azov is large enough to contain an exclusive economic zone, and is therefore much too large to be claimed as pluri-State internal waters.¹⁰⁷ Second, while Ukraine was willing to negotiate toward the goal of *delimited* internal waters, no such agreement was reached, and Ukraine never consented to treat the Sea of Azov and Kerch Strait as the "common internal waters of Russia and

¹⁰³ UNCLOS, Art. 293(1) (other rules of international law may be applied only when "not incompatible with th[e] Convention"). The *Croatia/Slovenia ad hoc* arbitral tribunal was not an UNCLOS tribunal, and therefore not bound to apply this rule.

¹⁰⁴ See [Russia's Objections](#), ¶ 88.

¹⁰⁵ See *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, ICJ Judgment of 11 September 1992, ¶¶ 401, 405, 412 [hereinafter "*Gulf of Fonseca*"] (UAL-58); Britannica Online Encyclopedia, *Gulf of Fonseca* (2017) (UA-507).

¹⁰⁶ *Gulf of Fonseca*, dis. op. of Judge Oda, ¶ 24 (UAL-59).

¹⁰⁷ Britannica Online Encyclopedia, *Sea of Azov* (2009) (UA-508).

Ukraine,” as Russia now claims. Third, Russia’s claim would be prejudicial to the rights and interests of third States. In light of these facts, there is no basis for any proposed extension of the *Gulf of Fonseca* decision to recognize pluri-State internal waters in the Sea of Azov.

1. The Sea of Azov Is Too Large to be Claimed as Pluri-State Internal Waters

73. It is generally accepted that pluri-State internal waters may at most be claimed only in bodies of water that are not large enough to contain an exclusive economic zone or high seas.¹⁰⁸ Consistent with this principle, pluri-State internal waters have been recognized only in bodies covering substantially smaller geographical areas than the Sea of Azov. The Gulf of Fonseca is 21 times smaller than the Sea of Azov.¹⁰⁹ The Bay of Piran bordering Croatia and Slovenia, the other main example raised by Russia,¹¹⁰ is 2,000 times smaller.¹¹¹ Both of these bodies, unlike the Sea of Azov, are much too small to contain an exclusive economic zone or high seas.¹¹² See Figure 1.

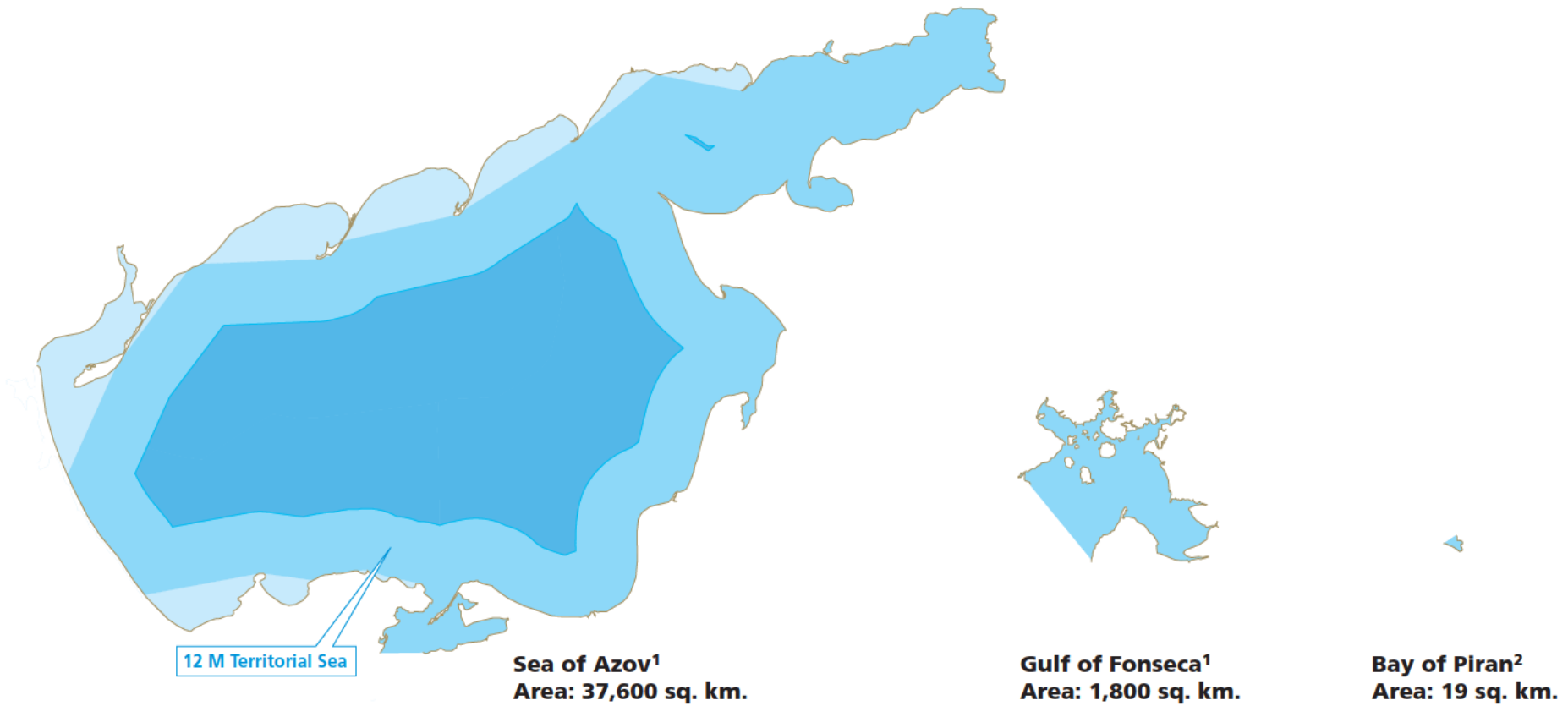
¹⁰⁸ Even scholars who support the concept of pluri-State internal waters recognize this limit. See Tullio Scovazzi, *Problems Relating to the Drawing of Baselines to Close Shared Maritime Waters* in Clive R. Symmons (ed.), *Selected Contemporary Issues in the Law of the Sea* (2011), p. 29 (pluri-State internal waters may be claimed only where “they do not include waters that have the status of an exclusive economic zone or high seas”) (UAL-60).

¹⁰⁹ Britannica Online Encyclopedia, *Gulf of Fonseca* (2017) (UA-507); Britannica Online Encyclopedia, *Sea of Azov* (2009) (UA-508); see also *Gulf of Fonseca*, dis. op. of Judge Oda, ¶ 48 (“[T]he Gulf of Fonseca must now be deemed to be totally covered by the territorial seas of the three riparian States [Accordingly] . . . the waters within the Gulf of Fonseca now consist of the territorial seas of three riparian States, without leaving any maritime space beyond the 12-mile distance from any part of the coasts.”) (UAL-59).

¹¹⁰ See *Russia’s Objections*, ¶ 90.

¹¹¹ *In the Matter of an Arbitration Under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, Signed on 4 November 2009 (Croatia v. Slovenia)*, PCA Case No. 2012-04, Final Award of 29 June 2017, ¶ 872 (describing its area as approximately 18.2 square kilometers) [hereinafter “*Croatia v. Slovenia*”] (UAL-61).

¹¹² The third example Russia gives — the 1988 Agreement between Mozambique and Tanzania to close the Rovuma Bay — fits this rule as well. See *Russia’s Objections*, ¶ 89. It is small enough that it would be entirely covered by the territorial seas of the littoral States. Moreover, this internal waters claim has not been judicially recognized, and has been called “controversial” by commentators. R. Churchill and A. Lowe, *The Law of the Sea* (3d ed., 1999), p. 46 (UAL-62).



Sources for areas:
¹Encyclopedia Britannica (Online ed. 2018)
²Croatia v. Slovenia, Final Award of 29 June 2017

Figure 1

74. More relevant here are cases involving larger seas that historically had the status of internal waters of a single State. Repeatedly, that status has been lost following the breakup of the surrounding State. For example, the Soviet Union claimed the 18,000 square kilometer Gulf of Riga as its internal waters prior to 1991.¹¹³ After the break-up of the Soviet Union, the Gulf was acknowledged to comprise the territorial sea and exclusive economic zones of Latvia and Estonia.¹¹⁴ Similarly, in the 1950s, the Arab States bordering the Gulf of Aqaba — Egypt, Jordan, and Saudi Arabia — claimed that its waters were Arab internal waters.¹¹⁵ Many States objected to this claim, including France, which observed that “the Gulf of Aqaba, by reason *partly of its breadth* and partly of the fact that its shores belong to four different States, constitutes international waters.”¹¹⁶

75. Russia has not identified any claim to pluri-State internal waters in a sea large enough to contain an exclusive economic zone or high seas, such as the Sea of Azov. It would be inappropriate to treat a sea of this size, surrounded by more than one State, as internal waters not subject to UNCLOS.

2. Ukraine and Russia Never Reached Agreement on an Internal Waters Regime to Govern the Sea of Azov and Kerch Strait

76. Russia’s claim to a pluri-State “common internal waters” regime for the Sea of Azov also fails for the independent reason that there was no agreement between Russia and Ukraine to hold these waters in common.

¹¹³ International Law Commission, Memorandum on the Soviet Doctrine and Practice with Respect to the Regime of the High Seas, U.N. Doc. No. A/CN.4/38 (21 November 1950), p. 8 (UA-509).

¹¹⁴ United Nations Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, Law of the Sea Bulletin No. 39 (1999), p. 28 (circulating a treaty between Estonia and Latvia that establishes the “maritime boundary with respect to the territorial seas, the exclusive economic zones, the continental shelf and any other maritime zones” in the Gulf of Riga “in accordance with the provisions of the 1982 United Nations Convention on the Law of the Sea and principles of international law”) (UA-510).

¹¹⁵ UNGAOR, 12th Sess., 697th Plenary Meeting, U.N. Doc. No. A/PV.697 (2 October 1957), ¶¶ 92-93 (Saudi Arabian representative) (“The Gulf of Aqaba is a national inland waterway, subject to absolute Arab sovereignty The Gulf is the historical route to the holy places in Mecca. Pilgrims from different Muslim countries have been streaming through the Gulf, year after year, for fourteen centuries. Ever since, the Gulf has been an exclusively Arab route under Arab sovereignty.”) (UA-511).

¹¹⁶ UNGAOR, 11th Sess., 666th Plenary Meeting, U.N. Doc. No. A/PV.666 (1 March 1957), ¶ 58 (emphasis added) (UA-512); see also Yehuda Z. Blum, *Historic Titles in International Law* (1965), p. 280 (“[E]ver since the dissolution of the Ottoman Empire and the emergence of more than one littoral State on the shores of the gulf, [the Gulf of Aqaba] has become an international waterway”) (UAL-56).

77. The creation of a *sui generis* common internal waters regime to govern an area as significant as the Sea of Azov and Kerch Strait, if it is allowed at all, is “a matter of grave importance and agreement is not easily to be presumed.”¹¹⁷ Particularly given the anomalous nature of pluri-State internal waters, the presumption must be that, if a single State bordering a body comprised of internal waters dissolves, those waters are no longer internal. All interested States wishing to preserve an internal waters regime following a State’s dissolution must manifest an express, clear, and consistent agreement on the communal nature of the regime they wish to create. As noted above, the International Court of Justice in the *Gulf of Fonseca* case emphasized a centuries-long record of post-independence practice demonstrating an agreement among the bordering States concerning the legal regime for the bay, as well as the longstanding ratification of that regime by the Central American Court of Justice in a 1917 judgment.¹¹⁸ The record of practice in the Sea of Azov following the dissolution of the Soviet Union is significantly different.

78. In the *Gulf of Fonseca* case, “the existence of a community was evidenced by continued and peaceful use of the waters by all the riparian States after independence” from Spain.¹¹⁹ Here, by contrast, immediately following the dissolution of the Soviet Union and Ukraine’s establishment as an independent State, Ukraine made clear its position that the Sea of Azov was subject to the normal rules of the international law of the sea, by depositing “baselines for measuring the width of the territorial sea, exclusive economic zone, and continental shelf of Ukraine in the Black Sea and the Sea of Azov.”¹²⁰ Ukraine made this

¹¹⁷ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar)*, ITLOS Case No. 16, Judgment of 14 March 2012, ¶ 95 (quoting *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, ¶ 253) (UAL-63). The International Tribunal for the Law of the Sea and the International Court of Justice have adopted this presumption against recognizing an agreement in the context of “[t]he establishment of a permanent maritime boundary.” *Id.* The principle applies with at least as much force in the sensitive context of purporting to withdraw a body of water from the international law of the sea and create an internal waters regime.

¹¹⁸ See *Gulf of Fonseca*, Judgment of 11 September 1992, ¶¶ 401, 405 (UAL-58). In the *Croatia/Slovenia* case, the parties’ arbitration agreement specifically disallowed the tribunal from considering practice following the dissolution of Yugoslavia, so the tribunal was unable to apply in full the principles followed in *Gulf of Fonseca*. See *Croatia v. Slovenia*, Final Award of 29 June 2017, Annex, Arbitration Agreement Between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, Art. 5 (UAL-61).

¹¹⁹ *Gulf of Fonseca*, Judgment of 11 September 1992, ¶ 401 (UAL-58).

¹²⁰ *Note Verbale* of the Permanent Mission of Ukraine to the United Nations to the Secretary-General of the United Nations, No. 633 (11 November 1992) (UA-3); United Nations Division for Oceans and the Law of the Sea, Office of Legal Affairs, *Law of the Sea Bulletin* No. 36 (1998), pp. 49-52 (UA-4).

deposit in response to an invitation from the UN Secretary-General seeking such deposits in anticipation of the imminent entry into force of UNCLOS.¹²¹ Russia attempts to minimize this formal declaration as “isolated,” and it suggests that it was not on notice of Ukraine’s deposit.¹²² That is factually incorrect. Russia had ample and repeated notice that Ukraine was claiming a territorial sea and exclusive economic zone in the Sea of Azov.¹²³ And in addition to formally communicating these claims to Russia, Ukraine has historically invoked the transit passage regime of UNCLOS in protesting Russian actions in the Kerch Strait.¹²⁴

79. Ukraine and Russia never reached agreement on a different legal regime to govern the Sea of Azov and Kerch Strait, because Russia never satisfied Ukraine’s critical condition for agreeing to such a regime. Russia did argue that UNCLOS should not apply, wanting then, as now, to escape the normal operation of the law of the sea. But Russia’s position led only to a long and unresolved period of negotiation. In these negotiations, Russia took the view that the Sea of Azov and Kerch Strait should be “common” internal waters. In contrast, for Ukraine to compromise on its initial position that UNCLOS should continue to apply, it was imperative that the concept of an internal waters status be tied to

¹²¹ *Note Verbale* from the Under-Secretary General for Legal Affairs of the United Nations, Ref. No. LOS/CGC/1992/1 (24 June 1992) (UA-2).

¹²² [Russia’s Objections](#), ¶¶ 114-115.

¹²³ Ukraine’s deposit was circulated to all UNCLOS members in the 1998 UN Law of the Sea Bulletin. See United Nations Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, Law of the Sea Bulletin No. 36 (1998), pp. 49-52 (UA-4). In 2002, Ukraine directly communicated its baselines to Russia, including in a negotiating session on the status of the Sea of Azov and Kerch Strait. See *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-446-1375 (25 June 2002) (UA-513); Minutes of the Fifteenth Meeting of the Delegations of Ukraine and the Russian Federation on the Issues of *Delimitation* (the position of the Ukrainian Side) and *Determination of Legal Status* (the Position of the Russian Side) of the Sea of Azov and the Kerch Strait (16-17 December 2002) (UA-514). Thus, Russia’s contention that “there was no reason to attach any significance to” Ukraine’s baselines because, by the point it had learned of them, “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,” has no basis in the facts. [Russia’s Objections](#), ¶ 115. Russia also cites a 2018 *note verbale*, stating that UNCLOS had not yet come into force when the deposit was made. See [Russia’s Objections](#), ¶ 115. Ukraine’s deposit was, however, made in response to an invitation from the Under-Secretary for Legal Affairs stating that it was “desirable” for States to deposit copies of coordinates for their baselines in anticipation of the coming into force of UNCLOS. *Note Verbale* from the Under-Secretary General for Legal Affairs of the United Nations, Ref. No. LOS/CGC/1992/1 (24 June 1992) (UA-2).

¹²⁴ See, e.g., *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 21/20-410-747 (24 May 2001) (arguing that Russia’s unilateral actions in channels no. 50 and 52 in the Kerch Strait violated “Paragraphs 4 and 5 of Article 41 of the United Nations Convention on the Law of the Sea of 1982”) (UA-515); *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-446-2110 (15 September 2002) (same) (UA-516).

delimitation between the States. In the first negotiating session in October 1996 in which a possible internal waters status for the Sea of Azov was discussed, Ukraine announced its position that it “believes it appropriate to delimit the state border between Ukraine and the Russian Federation in the Sea of Azov and the Kerch Strait in accordance with international law.”¹²⁵ In subsequent negotiating sessions involving discussion of an internal waters status, Ukraine frequently reiterated its insistence on delimitation.¹²⁶ Ukraine never agreed to Russia’s vision of “common internal waters” with no border between Russian and Ukrainian waters.

80. The 2003 Sea of Azov Treaty did not bridge the gap between Russia’s position seeking an internal waters status, and Ukraine’s insistence on delimitation. The Sea of Azov Treaty was concluded against a background of tensions over Russia’s unilateral construction in the Kerch Strait of a dam in an attempt to connect Tuzla Island – part of Ukraine’s territory – to Russia’s Taman peninsula.¹²⁷ In the Treaty, the parties recounted in the same

¹²⁵ Minutes of the Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Continental Shelf and the Exclusive (Maritime) Economic Zone in the Black Sea (16-17 October 1996), p. 1 (UA-517); *see also*, e.g., Minutes of the Fifteenth Meeting of the Delegations of Ukraine and the Russian Federation on the Issues of *Delimitation* (the position of the Ukrainian Side) and *Determination of Legal Status* (the Position of the Russian Side) of the Sea of Azov and the Kerch Strait (16-17 December 2002), p. 1 (“The sides discussed the status of issues regarding *delimitation* (the position of the Ukrainian side) and *determination of legal status* (the position of the Russian side) of the Sea of Azov and the Kerch Strait”) (UA-514).

¹²⁶ Minutes of the 3rd Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Spaces in the Black Sea (27 April 1998), pp. 2-3 (“The Ukrainian side has reaffirmed the position previously expressed in the Draft Agreement between Ukraine and the Russian Federation on the legal status of the Sea of Azov and on navigation in its waters regarding the delimitation of the state border in the Sea of Azov proceeding from the principle of legal succession of the states with respect to the territory and the 1982 United Nations Convention on the Law of the Sea The Ukrainian side regrets to note the absence of convergence between the positions of the parties on the need to delimit the internal waters of Ukraine and the Russian Federation in the Sea of Azov and the Kerch Strait and, considering the substantial damage caused to the environment and fish resources in the Sea of Azov and the rule of law in the Azov-Kerch region, will be forced to consider taking steps to protect the Ukrainian sector of the Sea of Azov and the Kerch Strait under the provisions of international legislation and Ukrainian laws.”) (UA-520); Minutes of the 4th Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Spaces in the Black Sea (23 September 1998), p. 1 (“The Ukrainian side reaffirmed its position expressed in the course of the preliminary meetings regarding the need to delimit the state border in the Sea of Azov”) (UA-521); *see also* Minutes of the 5th Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Spaces in the Black Sea (26 March 1999) (UA-522).

¹²⁷ *See, e.g., Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-401/-3661 (30 September 2003) (UA-523); *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-

Article that the Sea of Azov and Kerch Strait “*historically* constitute internal waters of the Russian Federation and Ukraine,” that “[t]he Sea of Azov *shall be delimited*,” and that “[i]ssues concerning the water area of the Kerch Strait *shall be resolved* by agreement between the Parties.”¹²⁸

81. The language of the Sea of Azov Treaty demonstrates that the parties had not reached a final agreement on the current status of the Sea of Azov and Kerch Strait, and that any such final agreement was to be contingent on delimitation. This is reflected first and foremost by the Treaty’s express provision for future agreements on delimitation and to resolve issues concerning the Kerch Strait. But the nature of the agreement is further confirmed by the specification that the Sea of Azov and Kerch Strait “historically” (not currently) constitute internal waters of the Russian Federation and Ukraine. The agreement’s use of the term “historically” — *i.e.*, “according to history; in the past; formerly; traditionally”¹²⁹ — identifies a historical fact: in the past, these waters were the internal waters of the Russian Federation and Ukraine as republics of the Soviet Union. Professor Alexander Skaridov, Dean of the Maritime Law Faculty at the Russian State Marine Transportation University in St. Petersburg, has accordingly commented that “[t]his provision is more declarative than legal,” and that the treaty’s reference to “internal” waters “may be explained as inland waters from a geographical, economical, historical or any other perspectives, but not legal.”¹³⁰

410-3743 (4 October 2003) (UA-524); see also Russia PM Eases Ukraine Crisis, *BBC News* (22 October 2003) (UA-525).

¹²⁸ Treaty Between the Russian Federation and Ukraine on Cooperation in the Sea of Azov and the Kerch Strait (Kerch, 24 December 2003), Art. 1 (UA-19) (emphasis added). Ukraine’s English translation of the 2003 Sea of Azov Treaty is quoted here, as Russia has provided an inaccurate English translation as Exhibit RU-20. Ukraine’s translation was certified; it also aligns with the translation suggested by a leading Russian to English translation software, which translates “являться” as “constitute.” Lingvo, Translation of “являться” (2014) (UA-526); Certification of the Translation of the Treaty Between the Russian Federation and Ukraine on Cooperation in the Sea of Azov and the Kerch Strait as Submitted by Ukraine as UA-19 (Kerch, 24 December 2003) (UA-527). Russia’s translation (“shall be historical internal water bodies”) also misleadingly suggests that “являться” is referring to a future condition, which is not supported by the text, and incorrectly suggests that “historical” modifies “internal water.” The correct translation is Ukraine’s, which has “historically” modifying “constitute.”

¹²⁹ Oxford English Dictionary, online edition, *historically* (adv) (UAL-64).

¹³⁰ Alexander Skaridov, *The Sea of Azov and the Kerch Straits* in David D. Caron and Nilufer Oral (eds.), *Navigating Straits: Challenges for International Law* (2014), p. 234 (UA-528). The earlier 2003 Russian Ukrainian State Border Treaty does not lead to a different conclusion. It states: “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.” Treaty between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, Art. 5

82. The correct understanding of the Sea of Azov Treaty — as a framework for future agreement on the proper treatment of the sea, in light of its history — is further apparent from the content of the treaty, which, in areas as diverse as shipping, fishing, the marine environment, and search and rescue operations, conspicuously avoided constraining or changing the behavior of either Party in the Sea of Azov or the Kerch Strait.¹³¹ And it is confirmed by a joint declaration executed by Presidents Kuchma (of Ukraine) and Putin (of Russia) on the same day as the Sea of Azov Treaty.¹³² That Joint Statement affirmed that “historically the Sea of Azov and the Strait of Kerch are inland waters of Ukraine and Russia”¹³³ But as to the current status of those bodies of water, the Joint Statement said only that “the Azov-Kerch area of water is preserved as an integral economic and natural complex used in the interest of both states.”¹³⁴ This open-ended phrasing, notably devoid of legal terms drawn from UNCLOS or other treaties, is consistent with any number of outcomes for the Sea of Azov and Kerch Strait, including common internal waters, divided internal waters, and territorial seas and exclusive economic zones delimited according to UNCLOS. Notably, it was only the Joint Statement — and not the Sea of Azov Treaty — that was publicized in the *Law of the Sea Bulletin*.¹³⁵

83. The Russian Federation nonetheless appears to interpret the Sea of Azov Treaty differently. Notwithstanding the word “historically” as it qualifies the phrase “internal waters,” Russia believes that the treaty establishes a present legal status. And notwithstanding the Treaty’s requirement that the Sea of Azov “shall be delimited,” Russia believes that it reflects an agreement that finally settled the legal status of the Sea of Azov even without delimitation, such that both States could be said to hold the entire area of the

(28 January 2003) (UA-529). This language amounts merely to a reservation of each party’s positions without clarifying exactly what those positions are; it evinces no common agreement on the status of the Sea of Azov and Kerch Strait.

¹³¹ While the treaty did establish some principles concerning navigation, its overarching approach to other areas was to simply preserve the applicability of existing agreements and contemplate, in general terms, “the entering into of new [agreements] as appropriate.” Treaty Between the Russian Federation and Ukraine on Cooperation in the Sea of Azov and the Kerch Strait (Kerch, 24 December 2003), Arts. 2-3 (UA-19).

¹³² The 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), as published in United Nations Division for Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletin* No. 54 (2004), p. 131 (UA-530).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

sea in common and with no boundary. Beyond Russia's mistakes in reading the Sea of Azov Treaty, it has erred in attempting to introduce an interpretive dispute over that treaty into this proceeding. The Tribunal has jurisdiction to interpret and apply UNCLOS, under the terms of which the Sea of Azov is a semi-enclosed sea containing territorial sea and exclusive economic zone, and the Kerch Strait is an international strait. The Tribunal lacks jurisdiction to resolve an interpretive dispute introduced by the respondent State concerning a different treaty. And if the Sea of Azov Treaty were indeed interpreted in the way Russia suggests, the Tribunal would, pursuant to Article 293(1) of the Convention, be unable to apply the Sea of Azov Treaty, as the Treaty would in that case be incompatible with UNCLOS.¹³⁶

84. In any event, the practice between Russia and Ukraine subsequent to the Sea of Azov Treaty makes clear that, contrary to Russia's present position, the States at the time did *not* regard it as a final resolution of the legal status of the Sea of Azov. Rather, reflecting that the Sea of Azov Treaty was a short-term agreement to resolve immediate tensions and defer important decisions until later, Russia and Ukraine continued to negotiate over the legal status of the Sea of Azov and on its related delimitation. Critically, in the minutes summarizing the parties' first meeting following conclusion of the Sea of Azov Treaty, on 29-30 January 2004, the first issue discussed is described as "*fundamental approaches of the parties to determining the legal status of the Azov-Kerch waters, including issues of delimitation of these waters.*"¹³⁷ Minutes from a negotiation session in March 2004 similarly referred to the "18th round of Ukrainian-Russian negotiations on the issues of *determination of the legal status of the Azov Sea and the Kerch Strait.*"¹³⁸

85. Ultimately, however, no final agreement was ever reached on delimitation of the Sea of Azov or the Kerch Strait. At the final negotiating session in 2011, for example,

¹³⁶ UNCLOS, Art. 293(1) ("A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law *not incompatible with* this Convention.") (emphasis added).

¹³⁷ Minutes of the Seventeenth Meeting of the Delegations of the Russian Federation and Ukraine to Discuss Issues Pertaining to the Sea of Azov and Kerch Strait (29-30 January 2004), p. 1 (emphasis added) (UA-531).

¹³⁸ Minutes of a Meeting of the Working Group on the Issues of Environmental Protection in the Framework of the 18th Round of the Ukrainian-Russian Negotiations on the Issues of Determination of the Legal Status of the Azov Sea and the Kerch Strait (25-26 March 2004), p. 1 (emphasis added) (UA-532).

delimitation remained an agenda item for discussion.¹³⁹ As Ukraine insisted on linking any internal waters status with delimitation, and the parties could never reach agreement on delimitation, Ukraine and Russia never reached agreement on an internal waters regime in the Sea of Azov and Kerch Strait. Inconclusive negotiations that fail to resolve interrelated issues cannot be treated as a final agreement, particularly in a context such as this one involving the closure of a large and navigationally important sea.¹⁴⁰ The evidence simply does not support Russia's allegation that Ukraine and Russia agreed to treat the Sea of Azov as non-delimited "common internal waters."

86. Further reflecting this lack of agreement, both before and after the Sea of Azov Treaty, Ukraine did not in practice treat the Sea of Azov and Kerch Strait as "common internal waters."¹⁴¹ Not only, as noted, has Ukraine invoked the regime of transit passage in

¹³⁹ Minutes of the Fifth Meeting of the Sub-Commission on the Issues of the Azov-Kerch Settlement of the Sub-Committee for International Cooperation of the Ukrainian-Russian Interstate Commission and the Thirty-Sixth Meeting of the Delegation of Ukraine on Delimitation of the Azov and Black Seas, as well as the Kerch Strait, and the Delegation of the Russian Federation on Delimitation of the Azov and Black Seas, as well as Settlement of Issues Related to the Kerch Strait (2-3 March 2011) ([UA-533](#)).

¹⁴⁰ The International Tribunal for the Law of the Sea reached a similar conclusion in *Bangladesh v. Myanmar*. In that case, Bangladesh sought to treat as binding an "Agreed Minutes" document reflecting an apparent agreement between the parties on a boundary in the territorial sea. However, "[f]rom the beginning of the discussions Myanmar made it clear that it did not intend to enter into a separate agreement on the delimitation of territorial sea and that it wanted a comprehensive agreement covering the territorial sea, the exclusive economic zone and the continental shelf." In light of this broader context, the Tribunal refused to accept Bangladesh's claim that the agreement just on the territorial sea was binding. *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, Judgment of 14 March 2012, ¶¶ 93, 98 ([UAL-63](#)).

¹⁴¹ Contrary to Russia's contentions, Ukraine's pilotage scheme was not necessarily inconsistent with UNCLOS and has no bearing on the status of the waters of the Kerch Strait or Sea of Azov. See [Russia's Objections](#), ¶ 107. States and law of the sea scholars have argued that compulsory pilotage may be permissible under UNCLOS where navigation through the strait is hazardous and environmental risks are heightened — as is the case with the Kerch Strait. See S. Bateman and M. White, *Compulsory Pilotage in the Torres Strait: Overcoming Unacceptable Risks to a Sensitive Marine Environment*, 40 *Ocean Dev. & Int'l L.* 184 (2009) ([UAL-65](#)); see also [Memorial of Ukraine](#), ¶¶ 208-209 (citing, *inter alia*, to [Kideys Report](#), ¶¶ 125-49); *id.* at ¶ 78 & n. 152 (describing navigational challenges posed by the relatively shallow shipping channel in the Kerch Strait). Australia and Papua New Guinea, for example, justified their imposition of a compulsory pilotage scheme in the Torres Strait based on similar circumstances, and argued that the scheme was consistent with UNCLOS. See International Maritime Organization, *Identification and Protection of Special Areas and Particularly Sensitive Sea Areas*, Doc. MEPC 49/8 (10 April 2003), ¶ 6.2.1 ([UA-534](#)); International Maritime Organization, *Routeing of Ships, Ship Reporting and Related Matters*, Doc. NAV 50/3 (22 March 2004), ¶ 5.10 ([UA-535](#)). The mere adoption of such a regime does not suggest a view that UNCLOS has no application to the strait.

the Kerch Strait,¹⁴² but even where it has consented to describe the Sea of Azov and Kerch Strait as “internal waters,” it has claimed a “part” or “sector” of the Sea of Azov and Kerch Strait in which its rights trump Russia’s. For example, when Russia issued a decree asserting the authority of its Federal Border Service to patrol the entire Sea of Azov,¹⁴³ Ukraine protested that decree, as well as the detention of fishing vessels by Russia in Ukraine’s “sector” of the Sea of Azov.¹⁴⁴ By way of further example, Ukraine has regularly protested Russian dredging activities on the Ukrainian side of the Kerch Strait.¹⁴⁵ This practice is consistent with Ukraine’s insistence, in the unresolved bilateral negotiations, that any internal waters regime had to be accompanied by an agreement on delimitation.

87. While Ukraine’s position has been consistent, Russia has tried to have it both ways. Even since the filing of its Preliminary Objections, the Russian Federation has contradicted its pleadings and its own reading of the Sea of Azov Treaty by declaring that the Kerch Strait is not common internal waters, but is “under the full sovereignty of Russia.”¹⁴⁶ And, as recently as 25 November 2018, Russia has taken concrete steps to enforce that view, including by forcibly preventing Ukrainian vessels from transiting the strait, obstructing entry to the strait for all vessels,¹⁴⁷ and justifying its interference with navigation in the Kerch

¹⁴² See *supra* ¶ 78 & n. 124.

¹⁴³ *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation*, No. 3438/2dsng (19 May 1999) (UA-536).

¹⁴⁴ *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 610/22-422-234 (12 February 2009) (protesting Russia’s detention of a fishing vessel “in the Ukrainian sector of the sea”) (UA-537); see also *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-446-933 (8 May 2002) (“Russian border guard vessels continue to illegally detain Ukrainian fishermen in the Ukrainian part of the Sea of Azov.”) (UA-538)

¹⁴⁵ *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-446-933 (8 May 2002) (“There are still taking place the arbitrary attempts to conduct dredging and hydrotechnical works in the Ukrainian internal waters of the Kerch Strait under the flag of the Russian Federation.”) (UA-538); *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-446-2304 (27 June 2003) (“[D]raw[ing] the attention of the Russian Side to the unlawful unilateral activities involving the dredging operations in the *Ukrainian sector* of the Kerch Strait . . . by the Russian dredging vessel Urengoy.”) (emphasis added) (UA-539); *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-410-897 (23 February 2004) (“[E]xpress[ing] concern over unlawful activities conducted by the Russian vessel Urengoy, which has been performing dredging operations in internal waters of Ukraine in the Kerch Strait since 7 February 2004 without approval from the Ukrainian Side, and in doing so commits regular illegal crossings of the state border of Ukraine.”) (UA-540).

¹⁴⁶ Foreign Ministry: Kyiv’s Draft Law on the Maritime Territory Is Not Applicable to the Sea of Azov, *RIA News* (15 November 2018) (UA-541).

¹⁴⁷ Russia Prevents 3 Ukrainian Naval Ships from Passing Through Kerch Strait, Sanding Civilian Bulk Carrier under Crimean Bridge, *Interfax-RU* (25 November 2018) (UA-496)

Strait by asserting that “[it] is a Russian strait” and “is not subject to any regulation by international law.”¹⁴⁸ More broadly, Russia’s post-2014 practice has been entirely inconsistent with any “common” internal waters status in the Sea of Azov and Kerch Strait.¹⁴⁹ As set forth in Ukraine’s Memorial, Russia has seized Ukrainian gas fields in the Sea of Azov,¹⁵⁰ purported to unilaterally nullify Ukrainian licenses for such gas fields,¹⁵¹ unilaterally built a bridge, cables, and pipeline across the Kerch Strait,¹⁵² and imposed unilateral limits on the dimensions of vessels that may pass through the Strait, impeding navigation through the Kerch Strait to Ukraine’s Sea of Azov ports.¹⁵³ None of this can be reconciled with Russia’s assertion that Ukraine and Russia have agreed on and maintained any form of “common” or co-equal sovereignty in the Sea of Azov and Kerch Strait.

88. In sum, the factual record post-dating dissolution of the Soviet Union provides no reason to set aside the strong norm that UNCLOS governs. The record reflects that (1) Ukraine’s immediate and authoritative post-dissolution position was that UNCLOS would apply to the Sea of Azov and Kerch Strait; (2) Ukraine was willing to accept Russia’s preferred status of internal waters only if Russia agreed on a delimitation between the parties, and no such agreement was ever reached; and (3) the parties’ consistent course of conduct in the Sea of Azov and Kerch Strait, over the course of more than two decades, has been inconsistent with Russia’s claim that the two States had agreed on a “common internal waters” regime. There is thus no clear and consistent post-dissolution practice of the kind that might be sufficient to recognize an extraordinary pluri-State internal waters status, and to displace the strong norm that the principles of the law of the sea, including UNCLOS, govern.

¹⁴⁸ Ministry of Foreign Affairs of the Russian Federation, Foreign Minister Sergey Lavrov’s Remarks and Answers to Media Questions at a Joint News Conference Following Talks with Italian Minister of Foreign Affairs and International Cooperation Enzo Moavero Milanesi, Rome (23 November 2018) (“Let me also remind you that the Kerch Strait is not subject to any regulation by international law. It is a Russian strait.”) (UA-470).

¹⁴⁹ Even prior to 2014, Russia on occasion claimed “territorial waters” rather than “internal waters” in the Sea of Azov and Kerch Strait, and it appears on occasion to have enforced exclusive rights against Ukraine in at least part of what it now describes as common internal waters. See, e.g., Letter from A. N. Shkrebets, Prosecutor of Krasnodar Krai to Consul P.A. Matsarskyi, Embassy of Ukraine in Russia (30 May 2000) (reflecting the arrest of Ukrainian fishermen for allegedly carrying out unlawful acts “in the territorial waters of Russia” in the Sea of Azov) (UA-542).

¹⁵⁰ Memorial of Ukraine, ¶ 122.

¹⁵¹ *Id.* ¶ 136.

¹⁵² *Id.* ¶¶ 189-194.

¹⁵³ *Id.* ¶ 196-201.

3. Recognizing Russia's Claim to a Common Internal Waters Status in the Sea of Azov and Kerch Strait Would Prejudice Third States

89. A further reason to reject Russia's assertion of a common internal waters regime for the Sea of Azov and Kerch Strait is that any such arrangement would be prejudicial to third States, resulting in precisely the sort of harm to international navigation that UNCLOS is supposed to prevent. In *Gulf of Fonseca*, the International Court of Justice deemed the gulf to be internal waters only "in a qualified sense," and ensured that third States retained the right to innocent passage.¹⁵⁴ By contrast, under Russia's vision of the Sea of Azov and Kerch Strait as "common internal waters," third State navigational rights — *i.e.*, the rights conferred by Part III of UNCLOS, and by Articles 17 and 58 — would be entirely a matter of Russia's discretion. This is not a hypothetical concern but official Russian policy, in light of its claim to "full sovereignty" over the Strait.¹⁵⁵

90. The practical risks to third-State navigation posed by Russia's claim of full control are illustrated by recent events. Even before Russia's recent actions interfering with passage through the Kerch Strait,¹⁵⁶ Russia has since April 2018 been impeding both Ukrainian and third-State vessels in the strait and the Sea of Azov by stopping those traveling to and from Ukraine's ports.¹⁵⁷ Russia has carried out these stoppages, some of which occurred mere miles from Ukrainian ports, without any consultation with Ukraine, let

¹⁵⁴ *Gulf of Fonseca*, Judgment of 11 September 1992, ¶ 412 ("The Gulf waters are therefore, if indeed internal waters, internal waters subject to a special and particular régime, not only of joint sovereignty but of rights of passage. It might, therefore, be sensible, to regard the waters of the Gulf, insofar as they are the subject of the condominium or co-ownership, as *sui generis*. No doubt, if the waters were delimited, they would then become 'internal' waters of each of the States; but even so presumably they would need to be subject to the historic and necessary rights of innocent passage, so they would still be internal waters in a qualified sense.") (UAL-58).

¹⁵⁵ Foreign Ministry: Kyiv's Draft Law on the Maritime Territory Is Not Applicable to the Sea of Azov, *RIA News* (15 November 2018) (UA-541); see Ministry of Foreign Affairs of the Russian Federation, Foreign Minister Sergey Lavrov's Remarks and Answers to Media Questions at a Joint News Conference Following Talks with Italian Minister of Foreign Affairs and International Cooperation Enzo Moavero Milanesi, Rome (23 November 2018) (UA-470).

¹⁵⁶ See *supra* ¶ 87 and accompanying notes.

¹⁵⁷ United States Department of State, Press Statement, Russia's Harassment of International Shipping Transiting the Kerch Strait and Sea of Azov (30 August 2018) (UA-543); European Parliament, Resolution of 25 October 2018 on the Situation in the Sea of Azov (2018/2870(RSP)) (UA-544).

alone Ukraine's consent.¹⁵⁸ The State Border Guard Service of Ukraine and other relevant agencies are actively investigating and collecting evidence on these stoppages.

91. Russia's harassment campaign has prompted protests from affected third States and other members of the international community. Both the European Union and Turkey have, in connection with Russia's recent blockage of the Kerch Strait, emphasized that they expect their vessels to enjoy "freedom of passage" through the strait.¹⁵⁹ Previously, the European Parliament adopted a resolution on 25 October 2018 stating that it "[d]eplores the excessive actions of the Russian Federation in the Sea of Azov insofar as they breach international maritime law and Russia's own international commitments [and] condemns the excessive stopping and inspection of commercial vessels, including both Ukrainian ships and those with flags of third-party states, including ships under flags of various EU Member States."¹⁶⁰

92. The statements of the European Union and Turkey are of particular note, because, along with Georgia, they represent the remaining littoral States of the Black Sea. However, other States have also protested Russia's actions in the Sea of Azov and Kerch Strait, with the United States specifically condemning "Russia's harassment of international shipping" in those bodies of water.¹⁶¹

93. These objections illustrate that third States continue to assert navigational rights in the Sea of Azov and Kerch Strait, and that the international community has not acquiesced in a "common internal waters" status that would allow Russia to unilaterally harass international shipping anywhere in the Sea of Azov or Kerch Strait. Third States would be significantly prejudiced if Russia's view of the regime governing these waters were accepted.

¹⁵⁸ *Id.*; *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/23-194/601-2350 (30 August 2018) (UA-545).

¹⁵⁹ European Union, Statement by the Spokesperson on the Escalating Tensions in the Azov Sea (25 November 2018) (UA-486); Republic of Turkey, Ministry of Foreign Affairs, No. 321, Press Release Regarding the Tension in the Azov Sea and Kerch Strait (26 November 2018) (UA-477).

¹⁶⁰ European Parliament, Resolution of 25 October 2018 on the Situation in the Sea of Azov (2018/2870(RSP)), ¶ G(1) (UA-544); *see also* Russia Should Ensure Unhindered Access to Ukrainian Ports in Sea of Azov - EU, *Interfax-Ukraine* (5 September 2018) ("Over the past months, Russia has increasingly and deliberately hindered and delayed the passage of vessels, including vessels from EU Member States, transiting through the Kerch Strait to and from Ukraine's ports in the Sea of Azov. We expect Russia to ensure unhindered access to Ukrainian ports in the Sea of Azov.") (UA-546).

¹⁶¹ United States Department of State, Press Statement, Russia's Harassment of International Shipping Transiting the Kerch Strait and Sea of Azov (30 August 2018) (UA-543).

II. Russia's Argument that Ukraine's Claim Engages the Historic Title Clause of Article 298(1)(a) Is Incorrect

94. Russia raises a further jurisdictional objection that is dependent on its position that the Sea of Azov and Kerch Strait are “common internal waters.” In particular, Russia argues that because the Sea of Azov and Kerch Strait are internal waters by reason of their history, they should be considered a “historic bay”¹⁶² and an area subject to rights of “historic title,” within the meaning of the historic title clause in Article 298(1)(a)(i) of UNCLOS.¹⁶³

95. As shown in the preceding sections, however, the Sea of Azov and Kerch Strait do not in fact have the status of internal waters or waters subject to rights of historic title. Accordingly, the premise of Russia's objection under the historic title clause of Article 298(1)(a) is incorrect, and that objection must also fail.

96. Russia argues that Ukraine has implicitly acknowledged the existence of historic title over the Sea of Azov by making a declaration taking advantage of the historic title clause of Article 298(1)(a)(i).¹⁶⁴ In fact, Ukraine's declaration simply paraphrases the language of Article 298(1)(a)(i) — *i.e.*, it encompasses “disputes relating to sea boundary delimitations [and] disputes involving historic bays or titles”¹⁶⁵ Ukraine's decision to make a declaration pursuant to Article 298(1)(a) as a whole cannot be taken as an implicit acknowledgement that the Sea of Azov and Kerch Strait in particular are subject to rights of historic title.

¹⁶² Russia cites a U.N. memorandum on historic bays to argue that “the Sea of Azov is the first example of a historic bay quoted in the UN Memorandum on Historic Bays.” [Russia's Objections](#), ¶ 101. However, that memorandum included the Sea of Azov as an example of “[b]ays the coasts of which belong to a single State,” and thus does not support Russia's argument that the Sea of Azov is a historic pluri-State bay. *Historic Bays: Memorandum by the Secretariat of the United Nations*, U.N. Doc. No. A/CONF/13/1, extract from the Official Records of the United Nations Conference on the Law of the Sea, Volume I (Preparatory Documents) (24 February to 27 April 1958), ¶ 12 ([UA-547](#)). Moreover, Ukraine does not contest that the Sea of Azov was comprised of internal waters when surrounded by the Soviet Union. See [supra](#) Chapter Three, Section I.A.

¹⁶³ Article 298(1)(a)(i) provides an optional exception to jurisdiction over “disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, *or those involving historic bays or titles*” (emphasis added). Both Ukraine and Russia have made declarations availing themselves of the optional exception to jurisdiction in Article 298(1)(a).

¹⁶⁴ [Russia's Objections](#), ¶ 178.

¹⁶⁵ Declaration of Ukraine Upon Ratification of UNCLOS (26 July 1999) ([UA-8](#)).

III. Russia's Preliminary Objections Concerning the Status of the Sea of Azov and Kerch Strait Do Not Have a Preliminary Character

97. Although Russia's preliminary objections concerning the status of the Sea of Azov and Kerch Strait are unfounded and can be rejected now, the Tribunal could also appropriately defer consideration of them to the merits stage of proceedings. As set forth at Article 10, paragraph 4 of the Rules of Procedure, at the preliminary objections stage, this Tribunal should decide only those objections to jurisdiction which are of an "exclusively preliminary character."¹⁶⁶ An objection should be deferred to the merits stage "if answering the preliminary objection would determine the dispute, or some element thereof, on the merits."¹⁶⁷ That is the case with Russia's objections here.

98. Ukraine's position on the merits is that the Sea of Azov is a semi-enclosed sea that includes territorial sea and exclusive economic zone belonging to Ukraine, the Kerch Strait includes territorial sea belonging to Ukraine and is a strait used for international navigation, and Russia's actions in these areas have breached the provisions of the Convention governing territorial sea, exclusive economic zone, and international straits. Russia has now asserted the position that it cannot have violated these provisions of the Convention because they do not apply to the Sea of Azov and Kerch Strait, which are instead asserted to be internal waters, a classification addressed by Article 8 of the Convention. This assertion does not go to jurisdiction, but instead reflects a merits dispute, requiring the Tribunal to interpret and apply provisions of the Convention, and to determine on the merits whether Ukraine has rights in the Sea of Azov and Kerch Strait under, *inter alia*, Articles 2, 56, and 38, which Russia has breached.

99. Russia's assertion that the Sea of Azov and Kerch Strait are internal waters is comparable to China's position in the *South China Sea* arbitration that it held historic rights beyond its entitlements under UNCLOS. At the jurisdictional stage, the *South China Sea* tribunal considered that China's assertion of historic rights in the South China Sea "require[d] the Tribunal to consider the effect of any historic rights claimed by China . . . and the interaction of such rights with the provisions of the Convention."¹⁶⁸ The Tribunal saw

¹⁶⁶ [Rules of Procedure, PCA Case No. 2017-06, Art 10\(4\)](#).

¹⁶⁷ *Case Concerning the Territorial and Maritime Dispute (Nicaragua v. Colombia)*, ICJ Judgment on Preliminary Objections of 13 December 2007, p. 852, ¶ 51 ([UAL-66](#)).

¹⁶⁸ *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 398 ("The Philippines' Submission No. 1 reflects a dispute concerning the source of maritime entitlements in the South China Sea and the role of the Convention. This is not a dispute concerning sovereignty or maritime boundary delimitation, nor is it barred from the Tribunal's consideration by any requirement of Section 1 of Part XV. The Philippines' Submission No. 1 does, however, require the

this as a “dispute concerning the interpretation and application of the Convention,” and decided that “[t]he nature and validity of any historic rights claimed by China *is a merits determination*.”¹⁶⁹

100. Here, Russia has made a comparable claim (including by expressly invoking an alleged “historic title”). The nature and validity of Russia’s claim to an internal waters status for the Sea of Azov and Kerch Strait, and the interaction of such a claim with the provisions of the Convention, is likewise a merits determination. As Professor Marcelo Kohen writes, “[t]he determination of what constitutes internal waters . . . is governed by the UNCLOS.”¹⁷⁰ Thus, while the Tribunal has sufficient submissions and evidence before it to reject Russia’s position now, it would also be appropriate for the Tribunal to reserve consideration of the Russian Federation’s preliminary objections concerning the status of the Sea of Azov and Kerch Strait for the merits phase in accordance with Article 10, paragraph 4 of the Rules of Procedure.

Tribunal to consider the effect of any historic rights claimed by China to maritime entitlements in the South China Sea and the interaction of such rights with the provisions of the Convention.”) (UAL-3).

¹⁶⁹ *Id.* (emphasis added).

¹⁷⁰ See Marcelo G. Kohen, *Is the Internal Waters Regime Excluded from the United Nations Convention on the Law of the Sea?* in Lilian del Castillo (ed.), *Law of the Sea, from Grotius to the International Tribunal for the Law of the Sea* (2015), p. 123 (UAL-67).

Chapter Four: Russia's Objections Under the Exclusions in Article 297 and 298 Are Baseless

101. Russia's two main objections, addressed above, are notably not based in the express exclusions from jurisdiction found in the text of the Convention. Russia adds a series of further jurisdictional objections that do attempt to invoke the exclusions found in Articles 297 and 298. In large part, however, these objections depend on Russia's assertion that it is the coastal State in Crimea, and thus collapse into its principal jurisdictional objection — its inadmissible and implausible claim to have altered the legal status of Crimea. This defect requires the rejection of Russia's objections under Article 297(3) (coastal State management of fisheries) and the law enforcement clause of Article 298(1)(b), and it also causes Russia's Article 298(1)(a) (delimitation) objection to fail. Russia's military activities objection, meanwhile, suffers from different, but equally serious, flaws — not least, reliance on an untenable legal standard that Russia has simply invented. In short, nothing in Article 297 or 298 affects this Tribunal's ability to hear Ukraine's claims.

I. Russia's Article 297(3) Fisheries Objection and Its 298(1)(b) Law Enforcement Objection Fail for the Same Reason as Its Principal Objection

102. Russia claims that two of Ukraine's submissions fall within the exception to jurisdiction under Article 297(3), which allows coastal States to decline to arbitrate disputes relating to their "sovereign rights with respect to the living resources in the exclusive economic zone."¹⁷¹ Russia also argues that three of Ukraine's submissions fall within the optional exception to compulsory dispute settlement in Article 298(1)(b), which covers "disputes concerning [coastal State] 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(3)]'."¹⁷² Both of these objections rest on Russia's claimed status as the coastal State in the waters adjacent to Crimea and thus, ultimately, on Russia's claim that the status of Crimea as part of Ukraine has been altered. In particular, to prevail on its Article 297(3) objection and its Article 298(1)(b) law enforcement activities objection, Russia must show that it is entitled to an exclusive economic zone in the waters at issue. Since, as explained in Chapter Two, Russia's claim that the status of Crimea has changed is inadmissible before this Tribunal and does not provide a plausible basis for the Tribunal's decision on jurisdiction, Russia's objections must fail.

¹⁷¹ See [Russia's Objections](#), ¶ 180 (quoting Article 297(3)(a)). Russia's Article 297(3) objection relates to Ukraine's submissions (g) and (f). *Id.* ¶¶ 189, 194.

¹⁷² *Id.* ¶ 149 (quoting Article 298(1)(b)). Russia's Article 298 objection relates to Ukraine's submissions (g), (h), and (i). *Id.* ¶ 152.

103. The exception to jurisdiction presented in Article 297(3)(a) applies, by its express terms, only to disputes concerning rights or discretion granted by the Convention to the coastal State within its own coastal zones. Article 297(3)(a) provides:

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.¹⁷³

104. Accordingly, the plain language of the Convention makes clear that Article 297(3)(a)'s exception to jurisdiction can be raised only in disputes concerning a coastal State's rights with respect to the marine living resources in its own exclusive economic zone.¹⁷⁴

105. In the *South China Sea* arbitration, the Tribunal confirmed that the exception located in Article 297(3)(a) did not interfere with its jurisdiction over Chinese actions that interfered with the Philippines' petroleum exploration, seismic surveys, and fishing activities in the Philippines' exclusive economic zone. There, the Tribunal reasoned that the provision "serve[s] 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."¹⁷⁵ The Tribunal expressly stated that the exception in Article 297(3)(a) "do[es] not apply where a State is alleged to have violated the Convention in respect of the exclusive economic zone of another State."¹⁷⁶ That is, of course, what Ukraine alleges here.

106. The law enforcement activities clause of Article 298(1)(b), which incorporates Article 297 by reference, is subject to the same limitation. In particular, this clause refers to:

[D]isputes concerning . . . law enforcement activities in regard to the exercise of sovereign rights or jurisdiction

¹⁷³ UNCLOS, Art. 297(3)(a) (emphasis added).

¹⁷⁴ Russia's argument that Articles 297(3) and the law enforcement clause of 298(1)(b) apply in the territorial sea, as well as the exclusive economic zone, is inconsistent with the plain text of those articles. See UNCLOS, Art. 297(3)(a) (quoted in text); *id.*, Art. 298(1).

¹⁷⁵ *South China Sea Arbitration*, Award of 12 July 2016, ¶ 695 (emphasis in original) (UAL-11).

¹⁷⁶ *Id.*

excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3.¹⁷⁷

107. As with Article 297(3)(a), the *South China Sea* tribunal concluded that Article 298(1)(b), “do[es] not apply” where a State is alleged to have violated the Convention in respect of another State’s exclusive economic zone.¹⁷⁸ In the *Arctic Sunrise* arbitration, the Tribunal reached the same conclusion, reasoning that the law enforcement clause of Article 298(1)(b) relates solely to a coastal State’s sovereign rights with respect to living resources within its own exclusive economic zone.¹⁷⁹

108. Accordingly, under the plain text of Articles 297(3) and 298(1)(b), and the interpretation of that text in the *Arctic Sunrise* and *South China Sea* arbitrations, Russia’s objections under these articles are entirely dependent on its claim to coastal State status in the waters adjacent to Crimea. Indeed, Russia itself appears to acknowledge that its objections rest on an assumption that it is the coastal State.¹⁸⁰ Consequently, Russia’s Article 297(3) and Article 298(1)(b) law enforcement objections fail for the same reasons that its principal objection fails — they are grounded in a claim by Russia that provides neither an admissible nor a plausible basis for a jurisdictional objection.¹⁸¹

109. To the extent that Russia predicates its Article 297(3) fisheries objection and 298(1)(b) law enforcement activities objection on a claimed entitlement extending from its own coastline rather than the Crimean coastline, then, as noted in the next Section, it is incumbent on Russia to clearly articulate that claim.¹⁸² Specifically, Russia must explain why it believes that the actions at issue in this case have taken place within its actual exclusive economic zone, something it has not done.

¹⁷⁷ UNCLOS, Art. 298(1)(b) (emphasis added).

¹⁷⁸ *South China Sea Arbitration*, Award of 12 July 2016, ¶ 695 (UAL-11).

¹⁷⁹ *Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on Jurisdiction of 26 November 2014, ¶ 75 (UAL-69).

¹⁸⁰ See *Russia’s Objections*, ¶ 151 (“[I]t is submitted that the law enforcement activities took place within Russia’s EEZ This is a bar to the Tribunal’s jurisdiction over the Parties’ disputes relating, among others, to Russian fisheries enforcement measures, and the operation of Russian law enforcement vessels in the Black Sea.”).

¹⁸¹ Moreover, because Ukraine is the coastal State, Ukraine’s allegations regarding the activities of Russian vessels in the waters adjacent to Crimea cannot constitute Russian “law enforcement activities” within the meaning of Article 298(1)(b), as the Convention does not entitle Russia to enforce its laws in the maritime zones of other States. Indeed, to read the Convention otherwise would obviate the clearly defined rights and obligations granted to coastal States.

¹⁸² See *infra* Chapter Four, Section II.

II. Russia's Delimitation Objection Under Article 298(1)(a)(i) Is Also Dependent on Its Principal Jurisdictional Objection, and Thus Also Fails

110. Russia maintains that Ukraine's claims "cannot be determined without prior delimitation of the maritime areas concerned,"¹⁸³ and that the dispute therefore falls within the optional exclusion of Article 298(1)(a)(i) for "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations."

111. As explained below in Section III of this Chapter, the Convention's use of the word "concerning" reflects a choice that the exclusion should apply only to disputes that are actually about "the interpretation or application of articles 15, 74 and 83." Ukraine's claims plainly do not concern those three articles, none of which is mentioned in any of the submissions in Ukraine's Memorial.

112. Ignoring the language of the Convention, Russia offers a broader reading of Article 298(1)(a)(i), arguing that it 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 . . . [as well as] all matters *connected with* the entire delimitation process."¹⁸⁴ Russia attempts to support its interpretation by quoting from authorities that address language different from what appears in Article 298(1)(a)(i).¹⁸⁵ Focusing on the actual text of the article, however, Russia's argument is without support.

113. As used in Article 298(1)(a)(i), the word "concerning" modifies the phrase "the interpretation or application of articles 15, 74 and 83," not the phrase "relating to sea boundary delimitations." The latter phrase simply indicates that the three articles in

¹⁸³ [Russia's Objections, Chapter 4, Section II, Part B](#) (heading).

¹⁸⁴ *Id.* ¶ 161 (emphasis added).

¹⁸⁵ Russia cites to: (i) the International Court of Justice's *Aegean Sea Continental Shelf* case, which interpreted the phrase "disputes relating to" and (ii) the International Court of Justice's *Fisheries Jurisdiction (Spain v. Canada)* case, which interpreted the phrase "disputes arising out of or concerning" (emphasis added). See *id.* ¶¶ 158-159 (citing *Aegean Sea Continental Shelf (Greece v. Turkey)*, ICJ Judgment of 19 December 1978, ¶¶ 81, 86 (RUL-9); *Fisheries Jurisdiction (Spain v. Canada)*, ICJ Judgment of 4 December 1998, ¶ 62 (RUL-22)). Russia cites also to *M/V Louisa*. See [Russia's Objections](#), ¶ 160 (citing *The M/V Louisa (Saint Vincent and the Grenadines v. Spain)*, ITLOS Case No. 18, Judgment of 28 May 2013, ¶ 83 (RUL-36)). But *M/V Louisa* held simply that in the context of a dispute that, as a whole, concerned the arrest of a ship, a declaration limiting the jurisdiction of the International Tribunal for the Law of the Sea to disputes "concerning the arrest or detention of vessels" did not preclude the tribunal from addressing provisions of the Convention that, while not referring expressly to arrest or detention, were nevertheless of relevance to the dispute. See *The M/V Louisa (Saint Vincent and the Grenadines v. Spain)*, ITLOS Case No. 18, Judgment of 28 May 2013, ¶¶ 77, 83 (quotations removed) (UAL-71).

question (*i.e.*, Articles 15, 74, and 83) all “relate to” delimitation.¹⁸⁶ This is confirmed by the French text of Article 298(1)(a)(i), which reads: “les différends concernant l’interprétation ou l’application des articles 15, 74 et 83 relatifs à la délimitation de zones maritimes.” The ordinary meaning of Article 298(1)(a)(i) is therefore that only disputes that turn on the interpretation or application of one or more of the enumerated articles can fall within the scope of the Article 298(1)(a)(i) exclusion.

114. Russia’s view is also contradicted by the only UNCLOS tribunal to have considered the scope of this exclusion. The tribunal in the *South China Sea* arbitration explained that “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.”¹⁸⁷ The tribunal emphasized that only the latter falls within the scope of the Article 298(1)(a)(i) exclusion.¹⁸⁸ In its judgment in the *Bay of Bengal* case, the International Tribunal for the Law of the Sea came to precisely the same conclusion, holding that “[d]elimitation presupposes an area of overlapping entitlements.”¹⁸⁹ Moreover, while overlapping entitlements are a precondition to the existence of a delimitation dispute, they are not sufficient to show that a dispute falls within the exception in Article 298(1)(a)(i). As the *South China Sea* tribunal further explained, although delimitation “may entail consideration of a wide variety of potential issues . . . [i]t does not follow . . . that a dispute over an issue that may be considered in the course of a maritime boundary delimitation constitutes a dispute over maritime boundary delimitation itself.”¹⁹⁰

115. Thus, contrary to Russia’s overbroad contention that Article 298(1)(a)(i) reaches any dispute having any “bearing” whatsoever on a delimitation issue,¹⁹¹ the delimitation exception of Article 298(1)(a)(i) does not apply unless Russia can establish that this case requires the Tribunal to interpret or apply Articles 15, 74, or 83 in connection with

¹⁸⁶ See UNCLOS, Arts. 15 (“*Delimitation of the territorial sea between States with opposite or adjacent coasts*”), 74 (“*Delimitation of the exclusive economic zone between States with opposite or adjacent coasts*”), 83 (“*Delimitation of the continental shelf between States with opposite or adjacent coasts*”) (emphasis added).

¹⁸⁷ *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 156 (UAL-3).

¹⁸⁸ *Id.*

¹⁸⁹ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, Judgment of 14 March 2012, ¶ 397 (UAL-63).

¹⁹⁰ See *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 155 (UAL-3).

¹⁹¹ *Russia’s Objections*, ¶ 161.

the delimitation of two overlapping areas of entitlement. Russia has failed to make this showing.

116. First, Ukraine has not asked this Tribunal to delimit its territorial sea, exclusive economic zone, or continental shelf pursuant to Articles 15, 74, or 83. On its face, therefore, this dispute does not concern the interpretation or application of Articles 15, 74, and 83.

117. Second, Russia's jurisdictional objection does not articulate any reason why — despite the fact that Ukraine's submissions make no reference to Articles 15, 74, and 83 — this case would nonetheless require the Tribunal to interpret or apply those articles. For example, Russia never specifies what entitlements it claims in the areas subject to this dispute, and it never shows how or why its claimed entitlements overlap with those of Ukraine and thus require delimitation.

118. Russia's failure to articulate what it believes to be its entitlements, and where it believes those entitlements to overlap with Ukraine's, appears to be an effort to obscure a fundamental defect in its jurisdictional objection. Russia seemingly contends that Article 298(1)(a)(i) excludes jurisdiction over the entirety of Ukraine's submissions referring to its territorial sea, exclusive economic zone, and continental shelf.¹⁹² Yet, under the Convention, Russia could not have any legal entitlement to most of the areas at issue in this dispute, which lie to the west or immediate south of Crimea, and are not within 200 nautical miles of the Caucasus region of Russia — *i.e.*, Russia's actual Black Sea coastline.¹⁹³ Russia could only assert the existence of overlapping entitlements in these areas if it could claim entitlements extending from the coast of Crimea. Accordingly, Russia's delimitation objection depends crucially upon its claim that the legal status of Crimea has been altered. For the reasons explained in Chapter Two, that claim is both inadmissible and not plausible, and thus cannot be relied on to support Russia's claimed entitlement.¹⁹⁴ And as the *South China Sea* tribunal

¹⁹² *Id.* ¶ 175.

¹⁹³ Ukraine's Memorial observes that all points within the Black Sea and the Sea of Azov are within 200 nautical miles of the coast of at least one of the littoral States. [Ukraine's Memorial](#), ¶ 4. Russia seizes upon this language, arguing that "Ukraine does not claim that Russia has engaged in any allegedly illegal activities beyond 200 nautical miles." [Russia's Objections](#), ¶ 173. While it is correct that all of Russia's activities took place within 200 nautical miles of *some* coastline, it is not the case that all of Russia's UNCLOS violations took place within 200 nautical miles of *Russia's* coastline. And as noted, Russia has declined to identify what it believes its entitlements to be, making it impossible for Ukraine to respond concerning any particular area where Russia might believe there is a true overlap of entitlements.

¹⁹⁴ See [supra](#) Chapter Two, Section II.

made clear, the mere *assertion* of an entitlement does not trigger application of the delimitation exclusion; an UNCLOS tribunal has jurisdiction, irrespective of that exclusion, to determine “the existence of an entitlement.”¹⁹⁵

119. In sum, Russia’s objection under the delimitation clause of Article 298(1)(a)(i) is premised on a legally defective reading of the relevant text, has been put forward without the explanation and factual support necessary to give it coherence, and collapses into Russia’s inadmissible and implausible claims regarding the land territory of Crimea. As such, this objection adds nothing to Russia’s other objections, and should be rejected.

III. Ukraine’s Claims Do Not Concern Military Activities Under Article 298(1)(b)

120. Russia asserts that this is a dispute “concerning military activities” and is thus covered by the optional exclusion from jurisdiction under Article 298(1)(b). Russia argues, first, that Ukraine’s claims share a causal link with Russia’s armed invasion of Crimea in 2014; and, second, that certain of Ukraine’s claims involve alleged “uses of force” by Russia. Russia’s arguments find no support in law or in the facts put forward in this proceeding by either Party.

121. To support its first argument, Russia offers an unprecedented and incorrect interpretation of Article 298(1)(b), asserting that the Tribunal’s jurisdiction may somehow be defeated by the existence of an alleged “causal link” between Russia’s 2014 invasion of the land territory of Crimea on the one hand, and, on the other, Russia’s non-military conduct, continuing today, in excluding Ukraine from its maritime areas, exploiting Ukraine’s maritime resources, and usurping Ukraine’s maritime rights. Russia cites no tribunal or scholar in support of its reading of Article 298(1)(b), which risks rendering UNCLOS inapplicable to a broad range of disputes to which historical armed conflict provides the backdrop, but is not the actual subject of the dispute.

122. As to its second argument, Russia fails to establish that any of its maritime activities at issue in this arbitration have been military in nature. The dispute before the Tribunal is, moreover, not about any instance in which Russia has used force, but is instead about Russia’s violation, through non-military acts, of Ukraine’s economic, navigational, environmental, and cultural rights under UNCLOS.

123. Finally, the Tribunal cannot uphold Russia’s military activities objection without intruding on issues that lack a preliminary character. Russia seeks to support its objection solely by reference to facts submitted by Ukraine in its Memorial. Thus, to accept

¹⁹⁵ *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 156 (UAL-3).

Russia's objection, the Tribunal would have to closely consider facts relevant to Ukraine's merits case and conclusively determine whether the activities to which those facts relate are military or non-military in nature. This is an inquiry that can only be undertaken in the merits phase of these proceedings.

A. Russia's Interpretation of Article 298(1)(b) Is Overly Broad and Fails Under Accepted Principles of Treaty Interpretation

124. Ukraine's Statement of Claim explained that "[t]he Russian Federation has repeatedly and unlawfully infringed Ukraine's maritime rights" under UNCLOS, and that this infringement occurred "*in the period following* [Russia's] unlawful acts of aggression and purported annexation of the Crimean Peninsula."¹⁹⁶ Drawing attention to these and similar statements, which make the straightforward chronological point that Russia's violations of UNCLOS took place *after* the invasion of Crimea,¹⁹⁷ Russia misrepresents Ukraine's argument to be that the violations of UNCLOS happened *because* of the invasion. In particular, it argues that "*all* the asserted violations of UNCLOS are portrayed by Ukraine as the direct result of alleged military conduct of Russia."¹⁹⁸ Russia further argues that the alleged "causal link" between Russia's invasion of Crimea and Russia's subsequent violations of UNCLOS implicates Article 298(1)(b) and defeats this Tribunal's jurisdiction. Finally, Russia argues that the Tribunal's decision on this dispute would require a determination regarding "the lawfulness of alleged military conduct of Russia."¹⁹⁹ Each of these contentions is wrong.

125. In the first instance, Russia's position relies on an unprecedented and incorrect reading of Article 298(1)(b). By its terms, the military activities exception in Article 298(1)(b) encompasses only "disputes *concerning* military activities."²⁰⁰ This language limits the application of the exception to disputes that actually are "about" military activities.

¹⁹⁶ [Russia's Objections, ¶ 144](#) (quoting from Ukraine's Statement of Claim, ¶ 2) (emphasis added).

¹⁹⁷ See, e.g., [id. ¶ 140 & n. 159](#) (quoting from [Ukraine's Memorial, ¶ 102](#), which reads: "Russia's violation of the [Law of the Sea] Convention began in 2014 — *i.e.*, *at the time* the Russian Federation invaded and occupied the Crimean Peninsula Russia's comprehensive UNCLOS violations — already unusually sweeping — have only become more grave and more extensive *in the years that followed.*" (emphasis added)); [Russia's Objections, ¶ 141](#) (quoting from Ukraine's Statement of Claim, ¶ 43, which reads: "The Russian Federation's . . . acts of aggression do not license the Russian Federation's illegal appropriation of valuable maritime natural resources[.]").

¹⁹⁸ [Russia's Objections, ¶ 144](#) (emphasis in original).

¹⁹⁹ [Id. ¶ 146](#).

²⁰⁰ [UNCLOS, Art. 298\(1\)\(b\)](#) (emphasis added).

The ordinary meaning of “concerning” is “to be about” or to be “in reference to.”²⁰¹ Read in light of this ordinary meaning, the military activities exception applies only where the subject of the dispute — *i.e.*, the very conduct complained of — is military in nature. The language of Article 298(1)(b) cannot be read to extend to all disputes with an asserted “causal link” to military activities. Had the States Parties intended to allow such a broad and sweeping application of Article 298(1)(b), they would have used different language, such as “arising out of,” “arising from,” or “in connection with.”²⁰² By instead using the word “concerning,” the plain text of the Treaty itself demonstrates that a dispute must actually *concern*, or “be about,” a military action in order to fall within article 298(1)(b).²⁰³

126. The context supplied by other articles of the Convention reflects the drafters’ intention to draw narrowly the scope of the military activities exception in Article 298(1)(b).²⁰⁴ The varying usage in UNCLOS of the term “concerning,” and the broader terms “arising from,” “arising out of” and even, as used in Articles 208 and 214, “arising from or in connection with,”²⁰⁵ indicates that the drafters were well aware of the distinctions between those terms, and that the distinct terms were used in a precise, intentional manner. This is well demonstrated by Article 297, which uses both the terms “concerning” and “arising out of,” as well as other formulations, to better communicate a sense of the scope and breadth of the various jurisdictional exceptions and claw-backs in that Article.

127. In addition to being at odds with the ordinary meaning in context of the military activities exception, Russia’s broad reading also conflicts with the object and

²⁰¹ See, e.g., Oxford English Dictionary, *concern* (v) (“ . . . To be about”) (UAL-64); *id.*, *concerning* (prep) (“In reference or relation to; regarding, about”); see also *supra* Chapter Four, Section II.

²⁰² See Black’s Law Dictionary, *arise* (9th ed.) (“To originate; to stem (from) To result (from)”) (UAL-72); see also Oxford English Dictionary, *arise* (v) (“17. Of circumstances viewed as results: To spring, originate, or result *from* . . . 18. a. Of matters generally: To spring up, come into existence or notice, ‘come up,’ present itself. *arising out of*: used, with loose construction, to introduce a circumstance, action, proposal, etc., arising out of an event, statement, etc.” (emphasis in original)) (UAL-64); *id.*, *connection*, (n) (“ . . . the condition of being connected or joined together”).

²⁰³ See, e.g., August Reinisch, *How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties*, 2 J. Int’l Disp. Settlement 115 (2011), pp. 155-156 (“To many tribunals interpreting the scope of a provision referring to disputes ‘involving’ or ‘concerning’ . . . [,] the ‘ordinary meaning’ of such clauses suggests a narrow meaning.”) (UAL-73).

²⁰⁴ VCLT, Art. 31 (“(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (2) The context for the purpose of the interpretation of a treaty shall comprise . . . the text.”) (UAL-43).

²⁰⁵ For use of the term “arising from,” see, e.g., UNCLOS, Arts. 208, 214, 232, and 297. For use of the term “arising out of,” see, e.g., UNCLOS, Arts. 223, 263, and 297.

purpose of the Convention as a whole: to “establish[] . . . a legal order for the seas and oceans”²⁰⁶ — one that is “pivot[ed] upon”²⁰⁷ “the settlement of disputes [as] . . . an essential element of th[e] [C]onvention.”²⁰⁸ The *South China Sea* tribunal explicitly confirmed as much, stating that a narrow interpretation of the Convention’s jurisdictional exceptions is “consistent with the overall object and purpose of the Convention as a comprehensive agreement.”²⁰⁹ As reflected in Sections I and II, above, Articles 297 and 298 implement discrete and carefully negotiated exceptions to an otherwise comprehensive system for the resolution of law of the sea disputes.²¹⁰ Yet, were every UNCLOS dispute with a “causal link” to an historical military act to be excluded from the Convention’s compulsory dispute settlement provisions, potentially important UNCLOS disputes would be outside the scope of section 2 of UNCLOS Part XV. This cannot be reconciled with the purposes of the Convention and the dispute resolution processes established by it.

128. Finally, with respect to Russia’s argument that a decision on the merits of this dispute would entail a ruling on the legality of Russia’s military conduct: this is simply false. None of Ukraine’s merits submissions seeks a ruling on the legality of Russia’s use of force.²¹¹ Rather, it is Russia, again, that seeks to introduce unrelated issues into this arbitration, in an attempt to distract from Ukraine’s singular focus on the Convention.

B. Russia Fails to Establish that Any of its Unlawful Conduct Challenged in this Arbitration Concerns “Military Activities”

129. In addition to attempting to dismiss the entirety of Ukraine’s case on the basis of an alleged “causal link” to Russia’s 2014 invasion of Crimea, Russia argues that several of

²⁰⁶ UNCLOS, Preamble.

²⁰⁷ Third United Nations Conference on the Law of the Sea, *Memorandum by the President of the Conference on Document A/CONF.62/WP.9*, U.N. Doc. No. A/CONF.62/WP.9/ADD.1 (31 March 1976), p. 122, ¶ 6 (UAL-74).

²⁰⁸ Third United Nations Conference on the Law of the Sea, *Summary Records of Plenary Meetings: 51st plenary meeting*, U.N. Doc. No. A/CONF.62/SR.51 (29 August 1974), ¶ 9 (UAL-75).

²⁰⁹ *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 225 (UAL-3).

²¹⁰ See *supra* Chapter Four, Sections I-II; see also *supra* ¶¶ 14, 40.

²¹¹ Contrast this with *In the Matter of an Arbitration between Guyana and Suriname (Guyana v. Suriname)*, PCA Case No. 2004-04, Award of the Arbitral Tribunal of 17 September 2007, ¶¶ 263-273 (discussing Guyana’s specific claim that Suriname violated the UNCLOS — and the United Nations Charter — on the basis of its use of force) (UAL-76).

Ukraine’s individual submissions concern military activities because they “directly rely on alleged unlawful uses of force.”²¹²

130. Russia’s pleading is materially incomplete and, therefore, its objection on the basis of Article 298(1)(b) must fail as a matter of law.²¹³ In this arbitration Russia has not acknowledged military involvement in any of the events to which it alludes; neither has it affirmed the accuracy of Ukraine’s allegations; nor has it even attempted to explain why the events it complains of should be characterized as military in nature.²¹⁴ Yet, as the party to this proceeding asserting that Ukraine’s claims concern military activities, Russia bears the burden of proving as much.²¹⁵ Russia’s failure to allege, much less establish, the military nature of its own conduct is sufficient to dispense with its objection — particularly given that the evidence necessary to establish the objection is uniquely within Russia’s own possession.

131. In any event, as explained below, none of the specific Ukrainian submissions cited by Russia concern Russian military activities.

132. As set out by the *South China Sea* tribunal and quoted by Russia, the test for whether a dispute concerns an alleged military activity is straightforward:

“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

²¹² [Russia’s Objections](#), ¶ 147.

²¹³ See, e.g., *Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Judgment of 6 November 2003, sep. op. of Judge Owada, ¶¶ 42-46 (noting that, where Respondents allege a given set of circumstances, “the burden of proof on the factual aspects of the[] alleged activities . . . come[s] to rest with the Respondent. . . . It goes without saying as a basic starting point in this context that a fundamental principle on evidence *actori incumbit onus probandi* should apply in the present case as well. Thus, the onus of proof to establish these relevant facts inevitably lies with the Party which claims the existence of these facts. . . as the basis for the defence”) ([UAL-77](#)).

²¹⁴ See, e.g., [Russia’s Objections](#), ¶¶ 10-11 (“Russia categorically denies the allegations that it ‘invaded and occupied the Crimean Peninsula’”); [140](#) (“The core of Ukraine’s claims turns on *alleged* Russia’s [*sic*] military conduct in Crimea” (emphasis added)); [143](#) (“Russia’s *alleged* aggression”); [144](#) (“portrayed by Ukraine as the direct result of *alleged* military conduct” (emphasis added)); [147\(a\)](#) (“*The Memorial asserts* that Russia effected such exclusion through ‘physical force’” (emphasis added)); [147\(b\)](#) (noting only that Ukraine “asserts” and that witnesses submitted “hearsay evidence” on a Russian military presence); [147\(c\)](#) (“Submission (m) claims that Russia would have impeded transit passage through the Kerch Strait, thus *presumably implying* that it did this by force” (emphasis added)).

²¹⁵ The *South China Sea* Tribunal established that the military nature of a dispute is a fact-intensive determination, and the International Court of Justice has confirmed that under international law “it is the litigant seeking to establish a fact who bears the burden of proving it.” See *South China Sea*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶¶ 392, 394-396 ([UAL-3](#)); *Military and Paramilitary Activities in and Against Nicaragua (United States of America v. Nicaragua)*, ICJ Judgment of 26 November 1984, ¶ 101 ([UAL-78](#)); see also [supra](#) note 213.

dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute.”²¹⁶

133. Inexplicably, Russia interprets this passage to mean that the military activities exception “can be triggered by the mere involvement of the military forces.”²¹⁷ Russia relies on its misreading of *South China Sea* to claim that Ukraine’s submissions (a), (b), (d), (e), (f), (g), (h), (i), (m), (q), and (r) should be excluded from the Tribunal’s jurisdiction.

134. To the contrary, consistent with the reasoning of *South China Sea*, these submissions seek an adjudication *not* of military issues, but rather of Ukraine’s and Russia’s respective rights to hydrocarbons and fish, Russia’s obligations in respect of the marine environment, Russia’s interference with navigation through the Kerch Strait, and its disturbance of marine archeological sites. As the *South China Sea* tribunal found, the military activities exception applies to traditional military activities.²¹⁸ In that case, it was triggered by circumstances “involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another.”²¹⁹ Here, none of the events described in the Memorial involve military forces arrayed against one another. And, while the *South China Sea* tribunal did not explore the “outer bounds of what would or would not constitute military activities,” there can be little doubt that drilling for gas and oil, fishing, building a bridge, and excavating marine archeology are not in any sense “military activities,” traditional or otherwise.²²⁰ Thus, the UNCLOS disputes raised by Ukraine do not concern military activities within the meaning of the Convention.

135. Russia has, of course, deployed armed men and vessels to protect its civilian activities in the Black Sea, Sea of Azov, and Kerch Strait, and to prevent Ukraine from accessing these areas of water. But the mere presence of armed Russian personnel — even assuming those personnel are military and not, for example, law enforcement — and of Russian governmental vessels does not suffice to turn this dispute into one concerning “military activities.”²²¹ For example, the *South China Sea* tribunal determined that

²¹⁶ *South China Sea Arbitration*, Award of 12 July 2016, ¶ 1158 (emphasis added) (UAL-11).

²¹⁷ *Russia’s Objections*, ¶ 139.

²¹⁸ *South China Sea Arbitration*, Award of 12 July 2016, ¶ 1161 (UAL-11).

²¹⁹ *Id.*

²²⁰ *Id.*; see *id.* ¶ 1027 (distinguishing between military activities and “construction . . . intended to fulfil civilian purposes”).

²²¹ As Professor Natalie Klein explains, the mere fact that actions are taken by the military does not make such actions “military activities” under Article 298(1)(b). See Natalie Klein, *Dispute Settlement*

construction activities on a reef were *not* military activities, even though the construction work was undertaken by Chinese military forces,²²² thus expressly recognizing that the mere presence or involvement of military forces is *insufficient* to trigger the 298(1)(b) jurisdictional exception. In dealing with that question — of whether certain actions by China’s naval forces fell within the scope of the military activities exception — the *South China Sea* tribunal specifically noted that these naval actions could have been adjudicated as part of a claim that “remain[ed] dependent on an underlying dispute” over primarily non-military matters.²²³

136. For the same reasons, Russia’s argument that the recovery of archeological objects at sea constitutes a “military activity” simply because naval personnel may have participated in such recovery must fail.²²⁴ So, too, must its arguments fail regarding the presence of alleged Russian Federal Security Service (“FSB”) “guards,” warships, and military aircraft protecting fishing stocks and access to offshore oil platforms.²²⁵ It is Russia’s exclusion of Ukraine from its own maritime areas, its exploitation of the underlying natural resources in those areas, and its usurpation of Ukraine’s jurisdiction there — and not any military deployment that may be supporting these civilian activities — for which Ukraine seeks redress.

137. The *South China Sea* decision is important in another respect as well. In that case and under the circumstances discussed above, the Tribunal declined to “deem activities to be military in nature when China itself ha[d] consistently resisted such classifications and affirmed the opposite at the highest levels.”²²⁶ That is exactly what Russia has done here, confirming the civilian nature of its activities on multiple occasions and in various ways. Among other things, Russia has:

in the U.N. Convention on the Law of the Sea (2005), pp. 312-313 (UAL-79) (“It is difficult to assert that the right of hot pursuit and the right of visit are not law enforcement activities The mere fact that these rights are exercised by military . . . vessels does not justify a characterization of ‘military activities’ for the purposes of Article 298.”); accord *South China Sea Arbitration*, Award of 12 July 2016, ¶¶ 1158, 1161 (UAL-11).

²²² See, e.g., *South China Sea Arbitration*, Award of 12 July 2016, ¶ 938 (UAL-11).

²²³ *Id.* ¶ 1159.

²²⁴ *Russia’s Objections*, ¶ 147(d).

²²⁵ *Id.* ¶ 147(a), (b).

²²⁶ See, e.g., *South China Sea Arbitration*, Award of 12 July 2016, ¶¶ 1027-1028 (UAL-11).

- purported to license hydrocarbon blocks to private entities seeking profit, pursuant to laws administered by civilian authorities;²²⁷
- extended to Crimea the same civilian legal framework for the exploitation of fisheries applicable in Russia’s legitimate maritime areas;²²⁸ and
- described its Kerch Strait construction activities not in military terms, but rather as part of a long-term policy of “ensuring [the] sustainable socioeconomic development of Crimea.”²²⁹

138. Simply put, these are not military activities. To the extent that there was any alleged military involvement, it was used to further civilian ends.²³⁰ Indeed, if there is any theme intrinsic to Russia’s actions, it is not military but largely economic in nature. As Ukraine’s Memorial shows, a Russian State-owned enterprise has extracted gas worth almost two billion United States dollars from Ukrainian waters;²³¹ Russia has sought to substantially increase the production of fish from these waters, including for sale directly into the Russian market;²³² and Russia’s construction activities are enriching a close political ally of the President of the Russian Federation.²³³ The record speaks for itself. Any alleged military support employed in connection with Russia’s civilian activities does not convert this dispute into one concerning military activities.

C. Russia’s 298(1)(b) Objection Does Not Possess a Preliminary Character

139. Although Russia’s military activities objection can be decisively rejected now, the Tribunal can also appropriately defer consideration to the merits stage. In order to uphold Russia’s military activities objection, the Tribunal would have to engage with facts that are interlinked with the merits and cannot be determined conclusively at this preliminary stage. The *South China Sea* tribunal agreed, holding that “the specifics [of the activities] and whether such activities are military in nature [are] a matter best assessed in conjunction with the merits.”²³⁴

²²⁷ [Ukraine’s Memorial](#), ¶ 137.

²²⁸ *Id.* ¶ 174.

²²⁹ Comment by Foreign Ministry Spokesperson Maria Zakharova (16 March 2017) ([UA-548](#)).

²³⁰ See *South China Sea Arbitration*, Award of 12 July 2016, ¶ 1164 ([UAL-11](#)).

²³¹ [Ukraine’s Memorial](#), ¶ 262.

²³² *Id.* ¶¶ 169-170.

²³³ *Id.* ¶ 206.

²³⁴ *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 411 ([UAL-3](#)); see also *id.* ¶¶ 395-396 (finding that the military activities exception depends on the determination of material issues of fact).

140. That observation applies with particular force here, where, as explained more fully above,²³⁵ Russia itself has provided no factual support for the proposition that any of the activities in question are actually military in nature. Russia, in fact, does not even *assert* that any of these activities are military in nature.²³⁶ Instead, Russia argues that Ukraine has described certain of its activities using words or actions that *may* be indicative of a military nature.²³⁷ Where it serves Russia's purposes, Russia concurrently, and inconsistently, describes some of the same activities as law enforcement activities.²³⁸

141. Russia's characterization of Ukraine's position on the military nature of the activities at issue is incorrect. But even if it were correct, it would not matter: the Tribunal would have to determine, based on evidence submitted by Ukraine to support its merits case, whether each of the relevant activities *is* a military activity. This inquiry requires close engagement with facts demonstrating Russia's substantive violations of the Convention. Because the facts alleged are intertwined with the merits of Ukraine's case, they are best addressed in conjunction with the merits.²³⁹ Therefore, Russia's objection in this regard can be appropriately deferred to the next stage of these proceedings.

²³⁵ See *supra* Chapter Four, Section III.B; Russia's Objections, ¶¶ 146-147.

²³⁶ See *supra* note 214.

²³⁷ See Russia's Objections, ¶¶ 146-147.

²³⁸ *Id.* ¶ 152.

²³⁹ *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 411 (UAL-3).

Chapter Five: This Annex VII Tribunal Is the Proper Forum for Ukraine’s UNCLOS Claims

142. In its final two objections, Russia suggests, alternately, that this case should be resolved through unspecified consensual processes under the 2003 State Border Treaty and the 2003 Sea of Azov Treaty, or that aspects of this dispute should be determined by one or more Annex VIII special arbitration tribunals. These arguments are nothing more than a last attempt to avoid any external scrutiny of Russia’s violations of the Convention — indeed, even in seeking to divert pieces of Ukraine’s case to Annex VIII arbitration, Russia reserves the “right to raise objections with respect to [the] jurisdiction of any Annex VIII tribunal.”²⁴⁰ In all events, the provisions of the State Border Treaty and the Sea of Azov Treaty cited by Russia do not provide any mechanism for the resolution of disputes, and are thus irrelevant to the Tribunal’s jurisdiction. And Annex VIII arbitration was never meant, and is not available, for disputes like this one that extend far outside the four technical areas enumerated in that annex.

I. Russia’s Article 281 Objection Fails Because Ukraine and Russia Have Not Reached Any Separate Agreement for Settlement of Disputes Concerning the Interpretation or Application of UNCLOS

143. In its objection under Article 281, Russia asserts that the parties have agreed to settle UNCLOS disputes through means other than arbitration. Specifically, Russia argues that two supposed dispute resolution provisions in the State Border Treaty and the Sea of Azov Treaty either (i) exclude Ukraine’s recourse to mandatory arbitration of its claims regarding the Kerch Strait, the Sea of Azov, and undefined “adjacent sea areas of the Black Sea,”²⁴¹ or (ii) require Ukraine to engage in further negotiations with Russia before resorting to Annex VII arbitration.²⁴²

144. Russia’s objection is addressed only to limited portions of Ukraine’s claims. While Russia has not identified what portions of the Black Sea it considers to be “adjacent sea areas,” in the context of the State Border Treaty (in which the term appears) “adjacent” can only mean adjacent to the State border codified in the treaty. The areas of the Black Sea to the south and west of Crimea are not “adjacent” to any State border reflected in the treaty and are therefore not implicated by this objection.

²⁴⁰ [Russia’s Objections](#), ¶ 199.

²⁴¹ See *id.* ¶¶ 253-64.

²⁴² See *id.* ¶¶ 232-52.

145. As to the waters to which this objection could potentially apply, Russia’s position runs into three insurmountable obstacles. First, the provisions cited by Russia are not dispute resolution clauses in the first place. Second, even if the two treaty provisions that Russia identifies were dispute resolution clauses, they do not address resolution of disputes concerning the interpretation or application of UNCLOS, and do not expressly exclude the jurisdiction of UNCLOS tribunals to resolve such disputes. And, third, Russia’s attempt to suggest that further negotiations are necessary here is not only lacking in any apparent legal basis, but also relies on a self-serving and unsupported view of the facts.

A. The Provisions Cited by Russia Do Not Address Dispute Resolution

146. Article 281 of UNCLOS provides that, where “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 in Section 2 of Part XV will “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.”

147. By its terms, and as applied by prior tribunals, Article 281 gives effect to alternative dispute resolution procedures only if States Parties have agreed to settle UNCLOS disputes, or particular categories of UNCLOS disputes, through means other than those set out in UNCLOS Part XV.

148. In this case, neither the State Border Treaty nor the Sea of Azov Treaty comes close to reflecting such an agreement. Neither purports to disrupt the operation of the dispute resolution processes set forth in Part XV of UNCLOS; nor do those treaties impose a separate negotiation procedure that would serve as a pre-condition to UNCLOS dispute settlement. Indeed, the treaty provisions relied on by Russia are not dispute resolution provisions at all. Rather, as explained below, the language cited by Russia simply reflects that Ukraine and Russia had intended to negotiate future treaties with respect to “adjacent sea areas” and the Kerch Strait.

149. State Border Treaty. The State Border treaty defines the land border between Ukraine and Russia, commencing at “the junction of the State borders of the Russian Federation, Ukraine and the Republic of Belarus” and terminating to the east of Mariupol.²⁴³ Russia invokes Article 5 of that treaty, which states, in relevant part: “Settlement of

²⁴³ State Border Treaty, Preamble (“Acting out of the need to settle questions of the course of the Russian–Ukrainian State border”), Art. 1 (“In this Treaty, the term ‘Russian–Ukrainian State border’ . . . is understood to refer to the line and the vertical surface along that line dividing the State territories”) (UA-529).

questions relating to the adjacent sea areas shall be effected by agreement between the Contracting Parties in accordance with international law.”²⁴⁴ Read in context, the purpose of Article 5 is simply to indicate that the parties had not agreed on maritime boundaries, and that “questions” relating to maritime boundaries were intended to be the subject of a subsequent agreement.²⁴⁵ This is unsurprising, given that Ukraine and Russia were, at the time the State Border Treaty was signed, in the midst of a years-long process of attempting to agree on maritime boundaries.²⁴⁶ Article 5 does not mention “disputes” or disagreements at all, much less set out a procedure for resolving disputes.

150. Sea of Azov Treaty. Russia also relies on the third sentence of Article 1 of the Sea of Azov Treaty, which it translates as reading: “Settlement of questions relating to the Kerch Strait area shall be effected by agreement by the Parties.”²⁴⁷ For purposes relevant here, this sentence operates precisely like Article 5 of the State Border Treaty: it records the parties’ intent to reach a future agreement on issues pertaining to the Kerch Strait.²⁴⁸

151. In short, Article 5 of the State Border Treaty and Article 1 of the Sea of Azov Treaty are not dispute resolution provisions, and so cannot support Russia’s argument that Ukraine and Russia have agreed to resolve UNCLOS disputes pursuant to procedures specified in those treaties.

152. Russia’s arguments to the contrary are easily dispensed with. First, the Russian term for “questions” (“вопросы,” used in both treaties) does not, as Russia claims, encompass the concept of a “dispute.”²⁴⁹ Russia argues that, because “вопросы” is defined

²⁴⁴ *Id.*, Art. 5; see also, e.g., [Russia’s Objections](#), ¶¶ 222-64.

²⁴⁵ The Preamble to the State Border Treaty describes the Treaty as settling “*questions* of the course of the Russian-Ukrainian State border.” State Border Treaty, Preamble ([UA-529](#)). In using the same terminology — “settlement of questions” — to refer to the maritime boundary, Ukraine and Russia were plainly describing a planned, parallel treaty on the course of the maritime boundary between the two States.

²⁴⁶ See [supra](#) Chapter Three, Section I.B.2.

²⁴⁷ See [Russia’s Objections](#), ¶ 223 (citing “Azov/Kerch Cooperation Treaty, Article 1” ([RU-20](#))). Ukraine relies on Russia’s translation here for convenience, and it continues to maintain that its translation of the treaty ([UA-19](#)) is the correct one. The divergence in translations is not material here.

²⁴⁸ Similarly, the second sentence of Article 1 (which Russia does not seek to present as a dispute resolution clause) records the parties’ intent to reach agreement on delimitation of the Sea of Azov. See 2003 Sea of Azov Treaty, Art. 1 ([UA-19](#)).

²⁴⁹ Russia also suggests that the word “questions,” in English, encompasses the concept of a dispute. This is incorrect. Dispute resolution clauses in English do not generally refer to the “settlement of questions.” Further, the English translation appended to Russia’s pleading is not an authoritative text.

in Russian as “[a] situation or circumstance to be examined or assessed, a task that needs to be completed, a problem,” it must include the concept of legal disputes.²⁵⁰ But Russia disregards entirely the context in which the term is used. In the context in which it appears, the “situation . . . to be examined,” or the “task to be completed,” is the conclusion of a future agreement. Notably, Russia fails to mention that the Sea of Azov Treaty has an entirely distinct dispute resolution clause, Article 4 (which, correctly, Russia does not invoke here), which addresses “disputes” (“споры”) as opposed to “questions” (“вопросы”), thereby confirming that the two terms are distinct.²⁵¹ If, as Russia contends, Article 1 encompassed disputes, then Article 4 would be unnecessary.

153. Second, Russia’s reading also ignores the equally authentic Ukrainian text of the Sea of Azov Treaty, which further illustrates that, in Article 1 of that agreement, the parties contemplated a future treaty, not a dispute settlement procedure. The Ukrainian language has separate words for a formal documented agreement and for the process of giving consent — or reaching agreement — through negotiations. The Ukrainian text of the treaty uses the word “угода,” which, in the international context, specifically indicates a treaty.²⁵² If the parties had intended to indicate the more general process of seeking agreement through negotiations, the Ukrainian text would have used the word “домовленість.”²⁵³

154. Finally, reading the articles as unrelated to the resolution of disputes does not render them “without effect,” as Russia alleges.²⁵⁴ Instead, the provisions serve a very specific purpose: they clarify issues still under negotiation by the parties, which are not to be treated as resolved by the relevant treaties. Despite Russia’s unsupported assertion to the

²⁵⁰ [Russia’s Objections](#), ¶ 227 n. 247.

²⁵¹ In full, Article 4 reads: “Disputes between the Parties associated with the interpretation and application of this Treaty shall be resolved by means of consultations and negotiations, as well as other amicable means as may be selected by the Parties.” 2003 Sea of Azov Treaty, Art. 4 ([UA-19](#)).

²⁵² See V.I. Karaban, *Ukrainian-English Law Dictionary* (2003), p. 893 ([UAL-80](#)); 2003 Sea of Azov Treaty, final clause (noting that the Ukrainian and Russian texts are equally authentic) ([UA-19](#)), ([RU-20](#)); compare *id.* Art. 1 (Ukrainian text) ([UA-19](#)) with *id.* Art. 1 (Russian text) ([RU-20](#)).

²⁵³ See V.I. Karaban, *Ukrainian-English Law Dictionary* (2003), p. 214 (defining “домовленість” as “arrangement, agreement, accord, understanding, concert, engagement” and its attendant verb form — “домовлятися” — as “to agree . . . ; to bargain, to negotiate”) ([UAL-80](#)).

²⁵⁴ [Russia’s Objections](#), ¶¶ 229-231.

contrary, it is commonplace for States to memorialize their promise to negotiate in the future toward the completion of other treaties.²⁵⁵

B. Even if the Provisions Cited by Russia Were Dispute Resolution Clauses, They Have Nothing to Do with UNCLOS Disputes, and Do Not Expressly Exclude Resolving Such Disputes Through UNCLOS

155. Even assuming, *arguendo*, that the articles to which Russia points are dispute resolution provisions, they would not deprive this Tribunal of jurisdiction pursuant to Article 281. The ordinary meaning of Article 281, and the commentary and case law pertaining to that Article, all show that Article 281 is only engaged by dispute resolution clauses that extend to the resolution of UNCLOS disputes and that specify a particular procedure to be followed in addition to, or in lieu of, UNCLOS Part XV. Moreover, in order to “exclude [. . .] further procedure” within the meaning of the final clause of Article 281(1), dispute resolution clauses must contain express exclusionary language. The provisions relied on by Russia meet none of these requirements.

156. As noted above, Article 281 — by its plain terms — applies only to agreements between the States Parties to settle “dispute[s]” between them that concern “the interpretation or application of *this Convention*.”²⁵⁶ Nothing on the face of Article 281 suggests it is meant to give effect to an agreement pertaining to the resolution of amorphous “questions” relating to large, imprecisely-defined maritime areas. The fact that the provisions Russia relies on do not refer to the resolution of disputes arising under UNCLOS (or to the Convention at all) means that they cannot implicate Article 281.

157. The provisions cited by Russia also fail to specify any alternate procedure that would apply in place of Part XV. They make no reference to consultation, negotiation, mediation, or formal dispute resolution. For this reason as well, Article 1 of the Sea of Azov Treaty and Article 5 of the State Border Treaty cannot trigger the application of Article 281.²⁵⁷ As the *Virginia Commentary* explains, Article 281 requires the parties to “agree[] to resort to a *particular procedure*” that is different from UNCLOS dispute settlement.²⁵⁸

²⁵⁵ Indeed, in 2007 and 2012, respectively, Ukraine and Russia signed a protocol and a joint statement in which both States committed to “reach an agreement in the future.” Alexander Skaridov, *The Sea of Azov and the Kerch Straits*, pp. 222-23 (UA-528).

²⁵⁶ UNCLOS, Art. 281 (emphasis added).

²⁵⁷ See *South China Sea Jurisdiction Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 265 (UAL-3).

²⁵⁸ *Virginia Commentary*, p. 23 (UAL-35) (emphasis added); compare *Southern Bluefin Tuna Case*, Award on Jurisdiction and Admissibility of 4 August 2000, ¶¶ 55, 58 (relying on a “list of various

158. Furthermore, the provisions cited by Russia lack the specificity to “exclude [. . .] further procedure” within the meaning of Article 281. As the Virginia Commentary explains, for a dispute resolution clause to exclude further procedure, it must “specify that [the] procedure [it provides for] shall be an exclusive one and that no other procedures (including those under Part XV) may be resorted to even if the chosen procedure should not lead to a settlement.”²⁵⁹ In *South China Sea*, the tribunal held “that Article 281 requires some clear statement of exclusion of further procedures” and that “[r]equiring express exclusion for Article 281 is [. . .] consistent with the overall object and purpose of the Convention as a comprehensive agreement.”²⁶⁰ Even in *Southern Bluefin Tuna*, on which Russia relies heavily, the tribunal’s decision to apply Article 281 relied on the parties’ agreement to expressly exclude the possibility of any form of mandatory arbitration by stating that any arbitral procedure would have to be “with the consent *in each case* of all parties.”²⁶¹ The articles in question in this case, however, do not include any such express exclusionary language.²⁶²

named procedures of peaceful settlement” expressly identified and agreed to in the relevant agreement) (UAL-68).

²⁵⁹ Virginia Commentary, pp. 23-24 (emphasis added) (UAL-35); see *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, ICJ Judgment of 2 February 2017, ¶¶ 122, 126 (noting Parties are bound by the procedures in Section 2 of Part XV “unless their agreement to [other] means of settlement excludes the procedures entailing a binding decision in Section 2 (Art. 281, para. 1)”) (UAL-81).

²⁶⁰ *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶¶ 223-25 (UAL-3). Russia argues that the “present case is fundamentally different” from that of *South China Sea* because (i) the agreements in question between Ukraine and Russia are legally binding and (ii) they “do not include any reference to . . . [the] resolution of disputes in accordance with UNCLOS.” *Russia’s Objections*, ¶ 259. But neither distinction is relevant to the *South China Sea* tribunal’s conclusion that express language is required to exclude further procedure pursuant to Article 281. See *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 223 (UAL-3). The tribunal in fact made clear that its conclusion in that regard was independent of whether the agreement in question was legally binding. *Id.* ¶¶ 219, 221.

²⁶¹ *Southern Bluefin Tuna Case*, Award on Jurisdiction and Admissibility of 4 August 2000, ¶ 57 (emphasis added) (UAL-68). *Southern Bluefin Tuna* was, in any event, heavily criticized by the *South China Sea* tribunal. See *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 224 (“The Tribunal thus shares the views of ITLOS in its provisional measures orders in the *Southern Bluefin Tuna* and *MOX Plant* cases, as well as the separate opinion of Judge Keith in *Southern Bluefin Tuna* that the majority’s statement in that matter that ‘the absence of an express exclusion of any procedure . . . is not decisive’ is not in line with the intended meaning of Article 281.”) (UAL-3).

²⁶² Russia obliquely argues that the word “agreement” satisfies the express exclusion condition. *Russia’s Objections*, ¶¶ 253-59, 262. To argue as much, it relies exclusively on *Southern Bluefin Tuna*. But this reliance is misplaced. The tribunal in *Southern Bluefin Tuna* relied on an “express obligation” in the relevant agreement “to continue to seek resolution of the dispute by the listed means

159. In short, as demonstrated above, even the authorities cited by Russia itself make clear that Article 281 requires a high threshold for any agreement that seeks to condition or exclude recourse to section 2 of Part XV. The articles to which Russia points do not meet this high threshold:

- They do not purport to apply to disputes concerning the interpretation or application of UNCLOS. Instead, they concern the future resolution of open delimitation issues, which are not at issue here.
- The two articles in question do not describe detailed dispute resolution procedures that preclude UNCLOS arbitration as a matter of fact — no dispute resolution procedures are actually outlined in those articles at all. The lack of specific procedures in the State Border Treaty and Sea of Azov Treaty means that there is no clear alternative procedure to apply in place of Part XV.
- Neither provision contains an “express exclusion” of jurisdiction for UNCLOS tribunals.

160. For these reasons, the articles identified by Russia in the State Border Treaty and the Sea of Azov Treaty could not interfere with the Tribunal’s jurisdiction, even if, as Russia incorrectly contends, they relate to the settlement of disputes.

C. Russia’s Arguments Relating to Ukraine’s Good Faith Approach to Negotiations Lack Any Legal Relevance, and Are Incorrect

161. As discussed above, the treaty provisions that Russia has identified do not deal with the resolution of disputes. Accordingly, they cannot be read to imply any requirement that the parties consult with one another before pursuing a formal dispute resolution process, such as this one — certainly, as described above, no such requirement is apparent from their texts. As a consequence, Russia’s arguments on Ukraine’s approach to pre-dispute negotiations between the Parties lacks any legal basis, and is of no consequence.²⁶³

162. Nevertheless, Ukraine strongly objects to Russia’s characterization of the consultations between the Parties, which is false and misleading. For the avoidance of doubt, Ukraine confirms that, as made clear in its Memorial, Ukraine sought in good faith to exchange views on and settle the current dispute. The Russian Federation, however, failed to provide a meaningful reply to any of Ukraine’s protests and consistently ignored the substance of Ukraine’s concerns.²⁶⁴

[in that convention]” after a sustained inability to mutually agree on the resolution of the dispute. *Southern Bluefin Tuna Case*, Award on Jurisdiction and Admissibility of 4 August 2000, ¶ 57 (**UAL-68**). There is no such “express obligation” or other “listed means” in this case.

²⁶³ See [Russia’s Objections](#), ¶¶ 232-52.

²⁶⁴ See, e.g., [Ukraine’s Memorial](#), ¶¶ 18-21.

163. It bears recalling that Ukraine launched this arbitral process in September 2016, more than two years after Russia embarked on the course of conduct detailed in Ukraine’s memorial. That alone is testament to Ukraine’s forbearance, and gives the lie to Russia’s suggestion that Ukraine was somehow seeking to rush to arbitration.

II. This Dispute Does Not Fall Within the Competence of an Annex VIII Tribunal

164. Russia asserts that six of Ukraine’s twenty submissions fall within the competence of an Annex VIII tribunal, rather than this Annex VII Tribunal, and that Ukraine is therefore required to divide its case between two or more separate fora.²⁶⁵ Annex VIII contains the Convention’s “special arbitration” provisions, which enable States Parties to submit disputes concerning the interpretation or application of the articles of the Convention relating to (a) fisheries, (b) the marine environment, (c) marine scientific research, or (d) navigation to a specialized tribunal composed of “experts” with relevant subject-matter expertise, provided the Parties have mutually agreed.²⁶⁶ As a matter of treaty interpretation and common sense, Annex VIII can have no application to a dispute of this kind, where an interrelated course of conduct by a State Party gives rise to wholesale violations of the Convention across numerous subject areas, both within and outside the four categories of disputes that may be submitted to an Annex VIII tribunal. Certainly, Ukraine’s declaration under Article 287 does not reflect its agreement that such a dispute may be heard by an Annex VIII tribunal. And the Convention does not require that disputes such as this one be dissected, artificially separating closely interlinked legal and factual issues, so that the resulting subparts can be apportioned between different bodies. No precedent exists for the use of Annex VIII in this way and the Tribunal should decline Russia’s invitation to create one.

A. Annex VIII Tribunals May Hear Only Limited Categories of Disputes

165. Applying the principles of treaty interpretation established by the Vienna Convention on the Law of Treaties, Annex VIII tribunals are only competent to hear disputes that fall entirely within one or more of the four enumerated categories. Annex VIII tribunals are not, by contrast, competent to hear a dispute, like the one between Russia and Ukraine, that extends *beyond* the boundaries of the enumerated categories and encompasses other matters.

²⁶⁵ [Russia’s Objections](#), ¶ 213.

²⁶⁶ See [UNCLOS Annex VIII, Arts. 1-2](#); [UNCLOS, Art. 287\(4\)](#).

166. This conclusion follows directly from the ordinary meaning of Article 287 and of Annex VIII itself. By their express terms, Article 287 and Annex VIII permit States Parties to submit to special arbitration only disputes “concerning the interpretation or application of the articles of this Convention relating to” fisheries, the environment, scientific research, or navigation²⁶⁷ — *i.e.*, disputes that actually are about the provisions of the Convention addressing those four subjects.²⁶⁸

167. The text of the Convention is equally unambiguous about the procedure for resolving disputes that extend beyond the confines of those four categories. In particular, Article 287 gives effect to the written declarations of Ukraine and Russia, which, as explained in the next section, cannot be read to apply here.²⁶⁹ Even absent those declarations, Article 287 establishes Annex VII arbitration as the default method for the resolution of all disputes under the Convention.²⁷⁰ In other words, and in contrast to Annex VIII tribunals, Annex VII tribunals were designed to address disputes concerning any part of the law of the sea, necessarily including multi-faceted disputes implicating multiple parts of UNCLOS.

168. The inapplicability of Annex VIII to such broad and multi-faceted disputes is confirmed by its context. Whereas Annex VII arbitrators are selected for their expertise in all areas of “maritime affairs,”²⁷¹ Annex VIII arbitrators are selected for narrower, specialized expertise. In particular, Article 2 of Annex VIII directs four named international organizations to maintain separate lists of experts relating to each of the enumerated categories. As is apparent from the identity of those organizations — the Food and Agriculture Organization for fisheries, the United Nations Environment Programme for marine environment, the Intergovernmental Oceanographic Commission for marine scientific research, and the International Maritime Organization for navigation — each of the lists was intended to comprise experts capable of deciding disputes within one of the four Annex VIII categories.²⁷² Article 3 of Annex VIII permits each party to an Annex VIII dispute to appoint two members of the tribunal, “preferably from the appropriate list or lists

²⁶⁷ UNCLOS Annex VIII, Art. 1; *see also* UNCLOS, Art. 287(1)(d) (permitting States Parties to select an Annex VIII tribunal “for one or more of the categories of disputes specified” in Annex VIII).

²⁶⁸ *See supra* Chapter Four, Section III.A.

²⁶⁹ *See infra* Chapter Five, Section II.B.

²⁷⁰ *See* UNCLOS, Art. 287(3) (“A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.”).

²⁷¹ UNCLOS Annex VII, Art. 2.

²⁷² UNCLOS Annex VIII, Art. 2.

referred to in article 2.”²⁷³ No provision is made for experts to be appointed with the expertise that would be needed to resolve disputes implicating issues outside the four Annex VIII categories. Thus, the context supports the commonsense conclusion that the drafters of the Convention intended Annex VIII tribunals to handle disputes concerning the four enumerated categories, where specialized expertise would be useful, but nothing beyond that.²⁷⁴

169. If recourse to supplementary means of interpretation were needed, the *travaux préparatoires* similarly confirm that Annex VIII was expected to play a limited role. During the Third U.N. Conference on the Law of the Sea, the vast majority of negotiating States rejected the notion of a compulsory dispute resolution regime led by technical and scientific experts.²⁷⁵ Annex VIII was ultimately adopted on the basis of a compromise that was dependent on it being not only optional, but also strictly limited to four discrete categories of disputes where technical expertise was expected to be particularly relevant, and not applicable to broader disputes under the Convention.²⁷⁶

B. Ukraine Has Not Consented to the Resolution of Complex and Multi-Faceted Disputes Through Annex VIII Proceedings

170. Because Annex VIII is an optional means of dispute settlement, Ukraine’s declaration sets the maximum boundaries of Annex VIII jurisdiction in any case involving Ukraine.²⁷⁷ Even if Annex VIII could be read as broadly as Russia suggests as a general

²⁷³ [UNCLOS Annex VIII, Art. 3\(b\)](#).

²⁷⁴ See also Virginia Commentary, p. 442 (noting that the Informal Working Group on the Settlement of Disputes at Caracas — a body tasked with preparing draft text for the Convention — began developing the Convention’s special arbitration proceedings in order “to squarely face the problem of disputes [. . .] involv[ing] scientific or technical questions”) ([UAL-35](#)); *id.* pp. 441-42 (describing proposals which highlighted the focus of special arbitration on scientific and technical issues).

²⁷⁵ See *id.* p. 445; Alexander Proelss, et al., United Nations Convention on the Law of the Sea: A Commentary (2017) (“Proelss Commentary”), p. 2495 ([UAL-82](#)).

²⁷⁶ See Virginia Commentary, p. 445 (noting the rejection of a proposal to add a residual class of dispute for “any field not falling within the four [enumerated] categories”) ([UAL-35](#)). Drawing on the *travaux préparatoires*, the Virginia Commentary notes that, if a special tribunal under Annex VIII is presented with issues that go beyond the narrow boundaries of Annex VIII, the tribunal may “be faced with a successful challenge to its jurisdiction.” *Id.*, p. 449. Similarly, the Proelss treatise states that: “Given that many disputes, even those ostensibly raising these matters [*i.e.*, fisheries, the environment, research, or navigation] as a topic of central concern, may not necessarily be strictly confined to the issues specified in Annex VIII, it is questionable as to whether the special arbitration process could be validly invoked under such circumstances.” Proelss Commentary, p. 2496 ([UAL-82](#)).

²⁷⁷ See [UNCLOS, Art. 287\(4\)-\(5\)](#).

matter, Ukraine's declaration under Article 287 still would not apply to complex and multi-faceted disputes extending beyond the boundaries of the enumerated categories in Annex VIII.

171. Ukraine's declaration "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."²⁷⁸ Ukraine has agreed to Annex VIII arbitration only in connection with "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."²⁷⁹

172. The wording of Ukraine's declaration is important here for two reasons. First, while Russia relies heavily on the principle of *lex specialis*, Ukraine's declaration establishes that Annex VIII jurisdiction is an exception to Ukraine's general selection of Annex VII dispute resolution. Thus, it is not the principle of *lex specialis* that governs, but rather the principle *exceptio est strictissimae applicationis* (exceptions must be narrowly interpreted).

173. Second, Ukraine's declaration requires a link between the "dispute" — *i.e.*, the legal or factual issues in contention²⁸⁰ — and "questions relating to" one of the four enumerated categories. Notably, the text of Annex VIII does not include this additional limiting language. A complex dispute that raises overarching questions, and which is not focused narrowly on fisheries, the environment, marine scientific research, and navigation, cannot fairly be characterized as being a dispute "in respect of questions relating to" those subjects.

174. The same two observations apply also to Russia's declaration. In particular, Russia has selected Annex VII arbitration as "the basic means" for the settlement of disputes under the Convention, with Annex VIII arbitration serving as an exceptional procedure.²⁸¹ And Russia has consented to Annex VIII arbitration only in connection with "matters relating to fisheries, the protection and preservation of the marine environment, marine

²⁷⁸ Declaration of the Ukrainian Soviet Socialist Republic Upon Signature of UNCLOS (10 December 1982) (UA-8); Declaration of Ukraine Upon Ratification of UNCLOS (26 July 1999) (UA-8).

²⁷⁹ Declaration of Ukraine Upon Ratification of UNCLOS (26 July 1999) (UA-8) (emphasis added); see also Declaration of the Ukrainian Soviet Socialist Republic Upon Signature of UNCLOS (10 December 1982) (UA-8).

²⁸⁰ See *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, PCIJ Judgment of 30 August 1924, p. 11 (UAL-83).

²⁸¹ Declaration of the Union of Soviet Socialist Republics upon Signature of UNCLOS (10 December 1982) (UA-8).

scientific research, and navigation.”²⁸² But because, under Article 287(4), the more restrictive of the two declarations prevails, the clear limitations on the scope of Ukraine’s declaration relieve the Tribunal of the need to separately interpret Russia’s declaration.

C. The Convention Does Not Require the Artificial and Inefficient Division of this Dispute Between Two or More Separate Forums

175. Russia accepts that most of this dispute falls well outside the bounds of an Annex VIII proceeding and of the Parties’ declarations relating to Annex VIII. Yet, it contends that just under a third of Ukraine’s submissions are “covered by Annex VIII” and thus appropriate for resolution by a tribunal other than the present one.²⁸³ Russia’s suggestion that this dispute be artificially splintered into subparts for resolution by multiple tribunals ignores the integrated nature of the dispute presented by Ukraine, and finds no support in the Convention.

176. In this arbitration, Ukraine presents a single, integrated dispute detailing expansive violations of its coastal State rights.²⁸⁴ Russia has unlawfully excluded Ukraine from exercising its sovereign rights under the Convention in its maritime zones, exploited Ukraine’s resources, and usurped Ukraine’s authority to regulate and manage activities within its territorial sea, exclusive economic zone, and continental shelf. Ukraine’s claims touch on a wide array of legal rights, only some of which intersect with the categories listed in Annex VIII. Equally critical are, for example, Ukraine’s rights to hydrocarbon resources, its jurisdiction over platforms and Ukrainian-flagged vessels, and its interest in preserving underwater cultural heritage.²⁸⁵ As a result, this dispute, as a whole, does not concern one of the four categories enumerated in Annex VIII, does not fall within the scope of Ukraine’s declaration, and thus is properly heard by an Annex VII tribunal.²⁸⁶

177. The six submissions cited by Russia cannot simply be extracted from the broader and more fundamental Annex VII dispute over Ukraine’s coastal State, flag State, and other rights under the Convention. Two of the six submissions cited by Russia, submissions (f) and (g), require a determination of whether Russia has violated Ukraine’s sovereignty in its territorial sea and sovereign rights in its exclusive economic zone under Articles 2 and 56. This is an inquiry with implications that extend well beyond the confines

²⁸² *Id.*

²⁸³ [Russia’s Objections, Chapter 6, Section III](#) (heading).

²⁸⁴ See [supra](#) Chapter Two, Section I.

²⁸⁵ See *id.*

²⁸⁶ See [UNCLOS, Art. 287](#).

of fisheries, the environment, research, and navigation, and accordingly it is an inquiry reserved for Annex VII tribunals. Submissions (f) and (g) also refer to articles of the Convention that focus on fisheries issues, but Russia's violations of these further articles follows directly from the same conduct that has caused it to violate Articles 2 and 56. The remaining four submissions relied upon by Russia — submissions (m), (n), (o), and (p) — similarly call for non-technical, legal determinations that flow directly out of the Tribunal's assessment of the overall course of conduct by the Russian Federation described in Ukraine's Memorial.²⁸⁷ Thus, all six of the submissions cited by Russia are factually and legally intertwined with Ukraine's case as a whole — a case that can only be heard by an Annex VII tribunal.

178. To artificially segregate the six submissions from the remainder of this dispute — and, indeed, to attempt to isolate and extract the parts of those submissions that concern the four subjects mentioned in Annex VIII — would violate the boundaries of Ukraine's limited consent to Annex VIII arbitration, which nowhere contemplates the possibility of deconstructing a unified dispute.

179. Segregating the six submissions identified by Russia would also undermine the fairness and efficiency of the Convention's dispute resolution mechanisms. Part XV of the Convention serves to promote the fair and efficient resolution of disputes, a purpose reflected both in the Convention's overarching objective to create "a legal order for the seas and oceans"²⁸⁸ and in the provisions empowering tribunals to manage proceedings to efficiently reach the merits of a case.²⁸⁹ Accordingly, the Convention cannot be read, as

²⁸⁷ Russia's violations of Articles 38, 43, and 44 (submissions (m) and (n)), and its failure to comply with its environmental obligations in the Kerch Strait (submission (o)), each stem from the same course of conduct that underlies submissions (j), (k), and (l), which concerns Russia's violations of Ukraine's Article 2 rights through its Kerch Strait construction activities. Similarly, the facts underlying submission (p) — *i.e.*, Russia's failure to cooperate with Ukraine concerning an oil spill in Sevastopol — are closely related to Russia's broader usurpation of Ukraine's coastal State rights as set out in several other submissions that have nothing to do with the environmental provisions of the Convention (including, for example, submission (i), which relates to Russia's interference with the ability of Ukrainian government vessels to access and monitor the waters adjacent to Sevastopol, among other areas of water).

²⁸⁸ [UNCLOS, Preamble](#) (noting that the States Parties were "[p]rompted by the desire to settle . . . all issues relating to the law of the sea").

²⁸⁹ [UNCLOS, Art. 294](#) (providing for preliminary proceedings to determine whether cases are *prima facie* unfounded and recognizing the right of States Parties to make preliminary objections); [UNCLOS, Art. 299](#) (permitting States Parties "to agree to some other procedure for the settlement of [. . .] dispute[s] or to reach an amicable settlement"); [UNCLOS Annex V, Art. 4](#) (power of a conciliation commission to determine its procedure); [UNCLOS Annex VI, Art. 16](#) (power of the

Russia would have it, to require that one or more Annex VIII tribunals address the fisheries, navigational, environmental, and scientific aspects of a single, multifaceted dispute, while a separate Annex VII tribunal addresses the rest of the dispute. Such an approach would be inefficient and expensive, would pose a significant risk of the Annex VIII tribunal straying into areas beyond its competence and pre-judging areas outside its expertise, and could also lead to unjust or inconsistent decisions in cases, like this one, where a single dispute touches on multiple subject areas and its fair resolution requires a holistic approach. Rather than promote the Convention's objective to create "a legal order for the seas and oceans," Russia's divide-and-isolate approach would, instead, invite disorder.²⁹⁰

180. Moreover, no practical purpose would be served by excising subcomponents of the present dispute for resolution by an Annex VIII tribunal. Ukraine's submissions do not present technical issues that require special, non-legal expertise to resolve.²⁹¹

181. In short, Russia's Annex VIII argument is just another example of its attempt to avoid meaningful and holistic consideration of its conduct in the Black Sea, Sea of Azov, and Kerch Strait. The correct outcome here — from both a legal and practical perspective — is for the entire dispute to be heard by the present Tribunal.

International Tribunal for the Law of the Sea to set its own rules of procedure); [UNCLOS Annex VII, Art. 5](#) (power of an Annex VII tribunal to determine its own procedure).

²⁹⁰ [UNCLOS, Preamble](#); see also Proelss Commentary, p. 2496 (noting that "there is little practical advantage to advancing the use of the Annex VIII process if a resultant special arbitral tribunal is only empowered to deal partially with the dispute in question") ([UAL-82](#)).

²⁹¹ Russia relies on the fact that Dr. Kideys authored an expert report to assert that this dispute concerns complex technical issues. See [Russia's Preliminary Objections](#), ¶ 212. Dr. Kideys' expert report, however, principally serves to demonstrate that the waters at issue in this arbitration contain valuable fisheries resources, from which Russia has excluded Ukraine and that Russia is now exploiting for itself. To the extent technical issues were to arise at the merits stage of these proceedings which the Tribunal felt it needed assistance to resolve, each Party may present expert witnesses and the Tribunal may appoint its own experts. See [Rules of Procedure, Art. 17](#) (allowing this Tribunal to appoint independent experts); [UNCLOS, Art. 289](#) (permitting a tribunal considering a "dispute involving scientific or technical matters" to select experts drawn from the Annex VIII lists to sit with it in a non-voting capacity).

Chapter Six: Conclusion and Submissions

182. For the foregoing reasons, Russia's Preliminary Objections fail to show that the Tribunal lacks jurisdiction over any aspect of the submissions in Ukraine's Memorial.

183. Ukraine accordingly:

- a. reiterates and renews the submissions and requests for relief contained in Chapter 7 of its Memorial;
- b. requests that this Tribunal adjudge and declare that its submissions fall within the jurisdiction conferred on the Tribunal pursuant to the Convention;
and
- c. requests that the Tribunal award Ukraine its costs for the jurisdictional phase of these proceedings, pursuant to Article 25 of the Rules of Procedure.

Kyiv, Ukraine, 27 November 2018



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