PCA Case No. 2017-06

IN THE MATTER OF AN ARBITRATION
before
AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII
TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

between

UKRAINE

and

THE RUSSIAN FEDERATION

in respect of a

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

Volume I - REPLY OF THE RUSSIAN FEDERATION TO THE WRITTEN OBSERVATIONS AND SUBMISSIONS OF UKRAINE ON JURISDICTION

ARBITRAL TRIBUNAL:
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Judge Boualem Bouguetaia
Judge Alonso Gómez-Robledo
Judge Vladimir Golitsyn
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REGISTRY:
The Permanent Court of Arbitration

28 January 2019

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CHAPTER 1
INTRODUCTION

1. This Reply to the Written Observations and Submissions of Ukraine on Jurisdiction dated 27 November 2018 (Ukraine's Written Observations) is submitted by the Russian Federation (Russia) in accordance with Article 10.5 of the Rules of Procedure and Procedural Order No. 4.

2. As was plain from Ukraine's Statement of Claim and Memorial, and as is only emphasized by the way that Ukraine has formulated the issues in its Written Observations, the defining issue in the current dispute concerns sovereignty over the land territory of Crimea. Ukraine's case, as encapsulated in the very first paragraph of the Written Observations, is that Russia is excluding Ukraine from "Ukraine's own maritime areas". This puts at centre stage the critical question as to whether the maritime areas appertaining to Crimea are indeed "Ukraine's own maritime areas". Ukraine says that it is sovereign over Crimea and hence its waters, whereas Russia – as is a matter of public record – considers that Crimea is part of Russia and hence Russia is sovereign in the relevant maritime areas. In simple terms, the dispute that Ukraine has brought before the Tribunal turns on which State is sovereign in Crimea. That issue of disputed land sovereignty falls outside the scope of Article 288(1) of UNCLOS, which is the sole provision on which Ukraine relies to found jurisdiction.[1]

3. Ukraine seeks to get round this point by framing its claim as follows in the Introduction to its Written Observations:

> "[t]he 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."[2]

4. But the "nullification" that this characterization refers to is nothing other than Russia's position that it is sovereign in Crimea. It is not by referring to maritime zones that Ukraine can bypass the reality that its claims turn on who is sovereign over the land territory of Crimea. Accordingly, the remainder of the Introduction to Ukraine's Written Observations is taken up

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[1] Notification under Article 287 and Annex VII, Article 1 of UNCLOS and Statement of the Claim and Grounds on which it is Based ("Statement of Claim"), para. 47; Ukraine's Memorial ("UM"), paras. 15-16; Ukraine's Written Observations ("UWO"), paras. 13 and 24.

[2] UWO, para. 4.

by Ukraine's arguments that it is correctly to be regarded by this Tribunal as sovereign in Crimea. With respect to those arguments, it is useful to identify three points up front:

(a) Ukraine wishes the Tribunal to believe that it is Russia that is introducing the issue of sovereignty over Crimea, asserting that "Russia has unilaterally introduced into these proceedings: a claim that the status of Crimea … was altered in 2014".[3] That, however, is precisely the opposite of what has happened. The correct position is that Ukraine has introduced a claim that depends on making good its assertion of sovereignty, i.e. that it is the coastal State in Crimea,[4] whereas Russia has merely said that this is a matter that the Tribunal cannot determine. It is Ukraine that asks the Tribunal to determine in one way or another that it is sovereign in Crimea, not Russia.

(b) The same basic difficulty arises with respect to Ukraine's invocation of General Assembly resolution 68/262 of 27 March 2014, and its argument that this Tribunal should not recognize any alteration in the status of Crimea.[5] It is not just that this resolution is not and does not purport to be binding, and that it does not reflect "an overwhelming consensus of the international community".[6] Rather, the obvious point is that Russia is not asking the Tribunal to determine whether or not the legal status of Crimea has in fact been altered; to the contrary, Russia's position is that determination of the dispute on territorial sovereignty lies outside this Tribunal's jurisdiction.

(c) Ukraine has elected not to engage with Russia's well-supported position that a tribunal constituted under Part XV of UNCLOS cannot resolve competing claims of territorial sovereignty.[7] Instead, it seeks application of a plausibility test that is not found in Part XV (or elsewhere in international law).[8] Ukraine's position is that a respondent State, which says at the jurisdictional stage that a certain matter is in dispute, must also put forward a plausible case in support of its position in that dispute. It is not just that this position is unsupported by any precedent and is contrary to the basic rule that a respondent should not be required to give an account of disputed acts before consent to jurisdiction has been established. The point here also is that all Ukraine is

[3] UWO, para. 5.
[4] See e.g. Statement of Claim, paras. 2-5, 7, 15, 21, 29.
[5] UWO, para. 5; also 18 and 26-33.
[6] *Cf.* UWO, para. 5.
[7] Russia's Preliminary Objections ("RPO"), paras. 48-57; *cf.* UWO, paras. 19 and 35.
[8] UWO, para. 6; also paras. 34-58.

doing is seeking to "frontload" the disputed issue as to land sovereignty. The Tribunal lacks jurisdiction under Article 288(1) of UNCLOS to determine that issue at the merits phase. It is *a fortiori* unable to determine the issue at the jurisdictional phase.

5. Russia's position in response to Ukraine's contentions as to jurisdiction over the sovereignty issue is developed in **Chapter 2** below.

6. The remainder of Russia's Reply is organized as follows.

7. **Chapter 3** contains the reply to Ukraine's contentions on Russia's objection that the Sea of Azov and the Kerch Strait are internal waters and are hence outside the scope of UNCLOS. Ukraine does not (and could not) challenge the basic legal proposition that a dispute as to internal waters falls outside the scope of Article 288(1) of UNCLOS. It also fails to refute the fact that, as supported by the relevant case law, a sea surrounded by more than one State can be internal waters. Instead, Ukraine posits a three-prong test for determining whether the Sea of Azov and the Kerch Strait constitute internal waters, and it alleges that this test is not satisfied. Yet Ukraine's test is not to be found in UNCLOS or the jurisprudence of any international court or tribunal. Moreover, Ukraine has no answer to the obvious point that it has continually recognized the Sea of Azov and the Kerch Strait as internal waters. The correct position is that the Sea of Azov and the Kerch Strait were established as internal waters, without opposition from any State, when they were internal to the USSR and that their status has not changed. Outside the context of these proceedings, Ukraine has confirmed and continues to confirm that status. Moreover, the Sea of Azov and the Kerch Strait are subject to historic title, therefore the Tribunal does not have jurisdiction due to the declarations made under Article 298(1)(a). Finally, Russia maintains its position that this objection (along with all its other objections) falls to be determined in a preliminary phase of the proceedings in accordance with the general principle established by Article 10(4) of the Rules of Procedure.

8. Ukraine's only response to Russia's fisheries and law enforcement objections is to state that those objections are entirely dependent on Russia's assertion that it is the coastal State of Crimea, and it repeats its position on the land sovereignty objection.[9] That response fails to address Russia's case on the scope and applicability of the automatic limitation and exceptions to binding settlement under Articles 297(3)(a) and 298(1)(b) of UNCLOS. Ukraine's

[9] UWO, paras. 102 and 108.

observations in this regard will therefore not be addressed in a specific chapter in the present Reply, and Russia refers the Tribunal to its Preliminary Objections as well as to Chapter 2 below. In this regard, Russia's objections under Articles 297(3)(a) and 298(1)(b) confirm and reinforce its land sovereignty objection, although they must not be confused with it: while Ukraine asserts that Russia's "main" objection as to sovereignty is "not based in the express exclusions from jurisdiction found in the text of the Convention",[10] the objections under Articles 297 and 298 constitute such express exclusions and remain an additional and distinct basis on which this dispute is excluded from the Tribunal's jurisdiction. The same is true so far as concerns Article 298(1)(a)(i).

9. **Chapter 4** concerns Article 298(1)(a)(i) of UNCLOS which, Ukraine concedes, must be given effect if "this case requires the Tribunal to interpret or apply Articles 15, 74, or 83 in connection with the delimitation of two overlapping areas of entitlement";[11] the Tribunal simply cannot determine Ukraine's claims without first determining where the relevant acts took place, and to do this it would need to determine where the relevant maritime zones are by delimiting the Parties' overlapping claims and entitlements and applying Articles 15, 74 and 83 from Crimean baselines – i.e. from contested territory.

10. In **Chapter 5**, Russia replies to Ukraine's contentions on the exclusion of disputes concerning military activities under Article 298(1)(b) of UNCLOS. Ukraine introduces the misconceived argument that it is for Russia to establish that the dispute concerns military activities. Russia has merely followed Ukraine's characterizations of the activities on which it relies. It is Ukraine that, in its Statement of Claim, its Memorial and now its Written Observations, is asserting that Crimea was acquired by Russia through unlawful use of force and hence that acquisition cannot be recognized. Ukraine cannot have it both ways, relying for the purposes of the land sovereignty objection on Russia's alleged unlawful use of force, but then asserting for the purposes of Article 298(1)(b) that the dispute does not concern military activities and that Russia must establish the contrary.

11. In **Chapter 6**, Russia examines Ukraine's case in relation to the objection that an Annex VIII tribunal is the forum – indeed the agreed forum – for the settlement of the claims brought by Ukraine relating to fisheries, the protection and preservation of the marine environment and

[10] UWO, para. 101.
[11] UWO, para. 115.

navigation. Ukraine seeks to circumscribe and downgrade Annex VIII. However, it accepts that Annex VIII tribunals are competent to consider the aforementioned categories of disputes and that certain of its claims fall within those categories; it has no answer to the basic point that it is a facet of Russia's consent to Part XV dispute resolution (as indeed it is in respect of Ukraine's consent) that such disputes must go to an Annex VIII tribunal.

12. Finally, in **Chapter 7**, Russia replies to the points made by Ukraine with respect to the application of Article 281 of UNCLOS in this case. In brief, Ukraine seeks incorrectly to dilute the meaning of the relevant provisions in the Treaty between Russia and Ukraine on the Russian-Ukrainian Border (the "State Border Treaty")[12] and the Treaty on Cooperation in the Use of the Sea of Azov and the Kerch Strait (the "Azov/Kerch Cooperation Treaty")[13] pursuant to which, if there were any UNCLOS dispute with respect to the Sea of Azov, the Kerch Strait and adjacent areas in the Black Sea (there is not), the Parties have agreed to settlement by a peaceful means of their own choice excluding mandatory arbitration.

13. This Reply concludes with Russia's formal submission, requesting the Tribunal to adjudge and declare that it is without jurisdiction in respect of the dispute submitted to the Tribunal by Ukraine (**Chapter 8**).

14. It is noted that Ukraine has requested that the Tribunal award Ukraine its costs for the jurisdictional phase of these proceedings.[14] It cites only Article 25 of the Rules of Procedure in support of that extraordinary request; that Article provides a presumption that each Party shall bear its own costs,[15] and there is no reason to depart from that position.

15. For the avoidance of doubt, this Reply addresses only the arguments advanced in Ukraine's Written Observations; Russia maintains those points made in its Preliminary Objections regarding which Ukraine elected not to respond.

[12] Treaty between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, 28 January 2003 (**RU-19**).
[13] Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, 24 December 2003 (**RU-20**).
[14] UWO, paras. 12 and 183(c).
[15] Article 25 provides: "Unless decided otherwise by the Arbitral Tribunal, each Party shall bear its own costs. The Arbitral Tribunal may make an award in respect of the costs incurred by the Parties in presenting their cases, as appropriate".

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CHAPTER 2
THE TRIBUNAL HAS NO JURISDICTION OVER UKRAINE'S CLAIM: THE TRIBUNAL CANNOT DETERMINE WHICH STATE IS SOVEREIGN OVER THE LAND TERRITORY OF CRIMEA

16. Ukraine has framed the dispute, and put forward its claim, on the basis of an alleged infringement of its rights as a coastal State.[16] Its claim is predicated on the basis that Ukraine is sovereign over the land territory of Crimea (Step 1), and therefore Ukraine is the coastal State with the corresponding rights in the appertaining maritime zones (Step 2). In its Written Observations, Ukraine seeks to argue in various ways that this Tribunal can somehow proceed to Step 2 of Ukraine's case despite the absence of jurisdiction to determine the disputed issue as to Step 1; yet that is neither a legal nor a logical possibility.

17. It is no answer for Ukraine to seek to play down the fact that its claims are made on the basis that it enjoys sovereign rights as the coastal State with respect to Crimea. It is said, for example, that: "Ukraine has used these words ['sovereignty', 'sovereign rights', and 'jurisdiction'] simply because they appear in the articles of the Convention defining the maritime rights that Russia has violated. … Ukraine can hardly be faulted for formulating its claims using the language of the Convention".[17] That fails to address Russia's fundamental objection. It is precisely because the Convention uses these terms, and is concerned with sovereignty over maritime zones that is the corollary of sovereignty over land territory, that no matter how the claim is cast, a prerequisite to determining the claim that Ukraine puts forward is a determination of whether or not Ukraine, or Russia, is the coastal State with sovereignty (and sovereign rights) in the appurtenant maritime zones.[18]

18. That dispute over territorial sovereignty is not a dispute concerning the "interpretation or application of the Convention" pursuant to Article 288(1) of UNCLOS,[19] and is thus outside the jurisdictional basis invoked by Ukraine.[20]

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[16] RPO, paras. 27-30 (citing from Ukraine's Statement of Claim) and paras. 37-46 (citing from UM). See also UWO, paras. 21-23.
[17] UWO, para. 55.
[18] RPO, Chapter 2(I). This was neatly summarized by Ukraine at UWO, para. 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."
[19] See RPO, Chapter 2(II).
[20] Article 288(1) is cited by Ukraine in its Statement of Claim at para. 47, UM at paras. 15-16 and UWO, paras. 13 and 24.

19. Notably (and correctly), Ukraine has not taken the position that a tribunal constituted under Part XV of UNCLOS can resolve competing claims of territorial sovereignty.[21] Rather, Ukraine seeks to bypass that issue altogether by advancing three misplaced arguments, namely that:

(a) *Russia's claim of sovereignty is inadmissible*:[22] relying on a resolution issued by the UN General Assembly that is neither binding nor applicable in the context of these proceedings, Ukraine asks the Tribunal simply to assume sovereignty over Crimea in its favour. But that would be to make the very determination on territorial sovereignty that, as Russia has demonstrated in its Preliminary Objections,[23] is a matter that falls outside of the dispute settlement provisions of UNCLOS (see **Section I** below).

(b) *Russia's claim of sovereignty is implausible*:[24] Ukraine asks, without any legal basis, for the application of a "plausibility" test to Russia's claim of territorial sovereignty over Crimea. As with Ukraine's admissibility argument, this would merely lead to the Tribunal making the same basic determination as to territorial sovereignty that is outside its jurisdiction, but in a different form, i.e. as a matter of supposed implausibility. Ukraine's desired outcome remains that the Tribunal determine that Russia is not sovereign over Crimea, and Ukraine's claims continue to depend on that critical starting point. Thus, all Ukraine's argument achieves is to bring Russia's principled objection to the Tribunal rendering a decision on sovereignty over Crimea into sharper focus: a dispute as to territorial sovereignty over Crimea indisputably exists, and Ukraine's case demands that the Tribunal exceed its jurisdiction by determining that dispute in Ukraine's favour (see **Section II** below).

(c) *Russia has misconstrued decisions by Annex VII tribunals in the Mauritius v. UK and Philippines v. China arbitrations*:[25] the argument presented in this regard

[21] This is merely said to be a matter on which "jurists have disagreed" and a matter of "pre-existing debate": see UWO, paras. 19 and 35.
[22] UWO, para. 18, Chapter Two, II (A) and para. 47.
[23] RPO, paras. 47-64.
[24] UWO, para. 19 and Chapter Two, II (B).
[25] UWO, para. 20 and Chapter Two, II (C).

simply repackages the argument on plausibility and therefore must also fail (see **Section III** below).

20. These points are developed in turn below.

I. Alleged inadmissibility

21. Ukraine claims that the Tribunal "should follow the international consensus" on the status of Crimea and proceed on the basis that Crimea is Ukraine's sovereign territory.[26] Specifically, Ukraine relies upon UN General Assembly resolution 68/262 of 27 March 2014, which "*Calls upon* all States, international organizations and specialized agencies not to recognize any alteration of the status of [Crimea]", and also "*Calls upon* all States, international organizations and specialized agencies … to refrain from any action or dealing that might be interpreted as recognizing any such altered status."[27] In its Memorial, Ukraine cited this same resolution, contending that "under international law [Russia's conduct] cannot, and in the clear view of the international community does not, alter the status of Crimea as Ukraine's indisputable sovereign territory."[28]

22. On the basis of this resolution, and without any basis in UNCLOS or international law more generally, Ukraine contends that Russia's claim that the status of Crimea has been altered is inadmissible and should not be entertained by the Tribunal.

23. This contention fails for the following reasons.

24. First, General Assembly resolution 68/262 is not binding, whether as a matter of international law or pursuant to its terms. The General Assembly is a political body and is not entrusted with general powers to make binding determinations on disputed issues of international law.[29] Subject to certain exceptions that are not material to the current context, a resolution of the General Assembly is not binding as follows from the relevant articles of the

[26] UWO, para. 18.
[27] United Nations General Assembly resolution 68/262, 27 March 2014, para. 6 (**UA-129**) and UWO, paras. 18 and 27-28.
[28] UM, para. 8. See also para. 102 "Russia's violations of the Convention began in 2014 — *i.e.*, at the time the Russian Federation invaded and occupied the Crimean Peninsula, and then purported to annex it, actions that have been rejected as unlawful and invalid by the international community."
[29] See e.g. B. Simma *et al.* (eds.), The Charter of the United Nations: A Commentary, Vol. I, 3rd ed., Oxford University Press, 2012, at Chapter IV, Article 9, p. 446, para. 1, noting: "it can be described as the world's most important political discussion forum." (**RUL-71**).

UN Charter,[30] the legislative history of those articles,[31] and as confirmed subsequently by the principal judicial organ of the UN (the ICJ)[32] as well as by state practice.[33] Moreover, the language in resolution 68/262 "calls upon" States, international organizations and specialized agencies to act or refrain from acting in a certain way; this is not framed as a requirement or a decision (and is obviously not directed to an adjudicative body such as the Tribunal). It is presumably because of these points that Ukraine's submission is merely that the Tribunal "should" follow the terms of the resolution.[34]

25. Second and in any event, the reference in resolution 68/262 to the "altered status" of Crimea is concerned with the recognition of Crimea's legal status as sovereign territory of Russia,[35] whereas:

(a) Russia does *not* ask the Tribunal to recognize Crimea as sovereign territory of Russia. The issue of whether or not the legal status of Crimea has in fact altered is *not* one that Russia asks this Tribunal to determine; to the contrary, Russia's position is that determination of that dispute on territorial sovereignty lies outside this Tribunal's jurisdiction.[36]

(b) Rather, Russia's position is that there is an inescapable reality that Russia *claims* sovereignty over Crimea, and that the Parties are in dispute over whether the legal status of Crimea has changed from Ukraine sovereign territory to Russian sovereign territory. The fact of that dispute is well documented;[37] and acknowledgement of an indisputable

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[30] See Articles 10-14 of the UN Charter (**UAL-1**).

[31] See e.g. B. Simma *et al.* (eds.), The Charter of the United Nations: A Commentary, Vol. I, 3rd ed., Oxford University Press, 2012, at Chapter IV, Article 10, pp. 480-481, para. 49 (**RUL-71**): "At the San Francisco Conference, a proposal presented by the Philippines expressly to vest the GA with the legislative competence to enact rules of international law was unequivocally rejected. On the other hand, the lack of a legislative function was precisely the pre-condition for the granting of an extensive power of discussion and recommendation."

[32] See *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966,* p. 50, para. 98 (**RUL-49**) which states: "subject to certain exceptions not here material [General Assembly resolutions] are not binding, but only recommendatory in character."

[33] See e.g. the position of France that it is not bound by the General Assembly resolutions (e.g., United Nations General Assembly resolution 31/4, 21 October 1976) condemning the occupation by France of the Comorian island of Mayotte and the referenda organised on that territory by France.

[34] UWO, para. 18. See also para. 33.

[35] See United Nations General Assembly resolution 68/262, 27 March 2014, at paras. 5 and 6 (**UA-129**).

[36] See e.g. RPO, para. 7.

[37] See RPO, para. 61 noting the dispute over the critical issue of sovereignty, with reference to contemporaneous statements.

fact that Russia claims sovereignty over Crimea cannot somehow be characterized as an action or dealing that might be interpreted as recognizing an "altered status".[38]

(c) By contrast, it is *Ukraine* that asks the Tribunal to determine the legal status of Crimea i.e. to assume or find in Ukraine's favour that, contrary to the objective reality, under international law Crimea remains Ukraine's sovereign territory.[39] As Russia explained in the Preliminary Objections, Ukraine's contention that its sovereignty cannot be questioned merely re-states the territorial sovereignty issue in dispute, placing it into more extreme terms.[40]

26. In addition, contrary to what Ukraine asserts, there is not an "international consensus" on the status of Crimea.[41] Fifty eight States abstained from voting in favour of General Assembly resolution 68/262 with 11 States voting against it, and there has been a notable dwindling of support for subsequent relevant resolutions in the General Assembly:[42] in a recent resolution only 65 States voted in favour of the resolution and 27 States voted against it, with 70 States abstaining.[43]

27. As to the other statements relied upon by Ukraine in its Written Observations,[44] they similarly have no legally binding effect on this Tribunal and include political statements of third States[45] and organisations to which Russia is not party.[46] As with the General Assembly

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[38] UWO, para. 32.
[39] UWO, para. 5 asserting Russia's claim to sovereignty over Crimea "may not be entertained in this proceeding"; UWO, para. 55 "Ukraine is undeniably the coastal State"; para. 58 "[t]he objective reality is that there has been no change in the status of Crimea as an unquestioned part of Ukraine".
[40] RPO, paras. 41(d); 61-63.
[41] UWO, at para. 18. This refrain is repeated at paras. 5, 27-28, 30, 32 and 47.
[42] As regards UN General Assembly resolutions 71/205 (2016) and 72/190 (2017) respectively, only 70 States voted in favour of the resolution, and 26 States voted against it, with a majority of States abstaining from voting (77 States and 76 States respectively) (see United Nations General Assembly, Seventy-first session, 65th Plenary meeting, A/71/PV.65, 19 December 2016, pp. 40-41 (**UA-468**) and United Nations General Assembly, Seventy-second session, 73rd Plenary meeting, A/72/PV.73, 19 December 2017, p. 29 (**UA-469**) respectively). As regards General Assembly resolution 73/194 (2018), only 66 States voted in favour of the resolution and 19 States voted against it, with 72 States abstaining (see United Nations General Assembly, Seventy-third session, 56th Plenary meeting, Record of voting for resolution 73/194, 17 December 2018, available at http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares73194) (**RU-86**).
[43] United Nations General Assembly, Seventy-third session, 65th Plenary meeting, Record of voting for resolution 73/263, 22 December 2018, available at: http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares73263 (**RU-87**).
[44] UWO, para. 29.
[45] E.g. at fns. 33 and 35.
[46] E.g. the Caribbean Community, the Group of 7, NATO, the Nordic-Baltic Eight and the Visegrad Group of Central European States.

resolution, they provide no answer to Russia's fundamental objection that this Tribunal has no jurisdiction over the territorial sovereignty dispute.

28. It follows that the basis for an alleged duty of non-recognition is absent;[47] there is no binding determination as to the legality of Russia's sovereignty over Crimea, and in any event Russia does *not* ask the Tribunal to recognize Crimea as sovereign territory of Russia.

29. Finally, in seeking to establish a recognised legal basis for its assertion of inadmissibility, Ukraine refers to the Tribunal's "duty to ensure the integrity of these arbitral proceedings", citing the *Northern Cameroons* case, which in turn referred to the "duty of the Court to maintain its judicial character."[48] The reference is both misconceived and inappropriate. The issue for the Court in *Northern Cameroons* was whether, in a case where it had jurisdiction, it might nonetheless be incompatible with its judicial function to exercise that jurisdiction because: "There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore."[49] In the current context, this Tribunal is concerned with the anterior question of whether or not it has jurisdiction, not whether such jurisdiction (having been established) should be exercised. Moreover, it is entirely supportive of the integrity of the current proceedings, and of Part XV proceedings more generally, for Russia to seek that this Tribunal remain within the confines of its jurisdiction and, in considering those confines, apply only the applicable law as established by Article 293(1) of UNCLOS, not non-binding materials such as resolution 68/262 or unsupported and unworkable tests for admissibility.

II. Alleged implausibility

30. Ukraine also seeks to introduce an unsupported and unworkable "plausibility test". It is said that "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."[50] Ukraine's position is that: "the circumstances described by Russia in its preliminary objections … would not produce a legally plausible claim to have acquired sovereignty over Crimea." Hence, it is said, the dispute truly falls within

[47] *Cf.* UWO, paras. 30 and 33.
[48] UWO, para. 33 and fn. 53 citing *Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963: I.C.J. Reports 1963*, p. 29 (**UAL-39**).
[49] *Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963: I.C.J. Reports 1963*, p. 29 (**UAL-39**).
[50] UWO, Chapter Two, II (B). See e.g. at para. 42.

Article 288(1) of the Convention and is "not one concerning competing legitimate claims to territorial sovereignty."[51]

31. This is misconceived on two very basic levels:

(a) Ukraine' approach merely advances to the jurisdictional phase the consideration of the disputed issue as to territorial sovereignty. It is no answer to the well-supported position that a court or tribunal under Part XV has no jurisdiction to determine a territorial sovereignty dispute[52] to say that the territorial sovereignty dispute can be determined on some sort of a "strike out" basis at a preliminary stage in the proceedings.

(b) There is no basis for the plausibility test that Ukraine puts forward in Part XV or Annex VII, and Ukraine does not suggest otherwise. That is unsurprising. The plausibility test has been developed to test whether the allegations made by a claimant are plausible. The test is consistent with, and indeed supports, the fundamental rule on the need for consent to jurisdiction because (i) it is the claimant State that is asserting jurisdiction, i.e. its consent to the court or tribunal considering its allegations is not in doubt, and (ii) the respondent State needs to be protected against any jurisdiction being asserted by a court or tribunal in respect of a claim that is not plausibly within the scope of the treaty that the claimant invokes. Neither of these factors apply with respect to Ukraine's novel suggestion that a plausibility test falls to be applied in the current context.

32. In light of the above, it is unsurprising that Ukraine is unable to point to any sound legal basis for the application of its plausibility test, whether as a matter of argument or the past practice of international courts and tribunals.

33. First, Ukraine contends that a plausibility test must apply or otherwise a respondent State could always defeat jurisdiction.[53] It is said that the result in the *Philippines v. China* arbitration could, on Russia's view, easily have been changed by China abruptly asserting an implausible claim to Luzon, Palawan, or another Philippine island, creating a "dispute" over territorial sovereignty. Thus, it is argued that "in any future case concerning violations of a

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[51] UWO, para. 49.
[52] RPO, para. 47 *et seq*.
[53] UWO, paras. 40-41.

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."[54]

34. This is an irrelevance. It is no doubt correct that a State could not manufacture a territorial dispute to defeat jurisdiction.[55] Such conduct may qualify as an abuse of right/process, a concept that has been applied by the ICJ[56] and in various recent awards of investment treaty tribunals.[57]

(a) In the present case, however (i) a dispute over land territory in Crimea arose in 2014;[58] (ii) Russia has subsequently presented the basis of its legal claim to that land territory in various fora;[59] and (iii) it was some two years after the crystallisation of that dispute over land territory that the present proceedings were initiated by Ukraine in September 2016.[60] It was long *after* the formation of the land territory dispute that the issue of jurisdiction over that dispute has arisen; the existence of that dispute at the time Ukraine elected to commence these proceedings cannot be denied. The chronology therefore makes clear that Russia's claim over Crimea was not – indeed could not have been – made for the purpose of defeating the Tribunal's jurisdiction.

(b) The present case is therefore far removed from the hypothetical scenarios postulated by Ukraine of a State that, on being "accused of breaching UNCLOS", asserts a "baseless territorial claim … thereby manufacturing a territorial dispute".[61]

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[54] UWO, para. 41, footnote to Art. 31 of the Vienna Convention on the Law of Treaties omitted.

[55] *Cf.* UWO, para. 41; also UWO, para. 6.

[56] See e.g. *Immunities and Criminal Proceedings* (*Equatorial Guinea* v. *France*), *Preliminary Objections, Judgment of 6 June 2018*, paras. 146-152 (**RUL-79**).

[57] See e.g. *Phoenix Action Ltd. v. Czech Republic,* ICSID Case No. ARB/06/5, Award, 15 April 2009, at para. 144 (**RUL-69**).

[58] As acknowledged by Ukraine: see e.g. UM, para. 1.

[59] See e.g. the statements cited in RPO at fn. 92 (**RU-28, RU-30, RU-31, RU-35**). See also the statement of Russia on the General Assembly resolution 68/262, United Nations General Assembly, Sixty-eighth session, 80th Plenary meeting, 27 March 2014, A/68/PV.80, at pp. 3-4 (**UA-467**).

[60] Ukraine's Statement of Claim was dated 14 September 2016 and was served on the Russian Federation on 16 September 2016 (as recorded in the preamble of the Rules of Procedure).

[61] UWO, para. 41.

35. By contrast, Ukraine does not address Russia's concern regarding misuse of the process facilitated by Part XV,[62] namely that, on Ukraine's approach, whenever a State invoked one of the 64 articles of UNCLOS which use the term "coastal State", there would be jurisdiction under Part XV to resolve all or any disputes over sovereignty to determine whether State A is indeed the "coastal State" as opposed to State B. All territorial issues involving some island or mainland with a coast could be presented as an UNCLOS claim whenever a coastal State exercised some form of coastal State right.

36. Second, Ukraine seeks to re-cast the *Fisheries Jurisdiction* case, portraying this as establishing a presumption in favour of the claimant's characterisation of a given dispute and supporting the application of a plausibility test.[63] That is not a correct portrayal. The Court said that:

> "It is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the [claimant], to determine on an objective basis the dispute dividing the parties".[64]

37. As the Court explained, this determination would be based "not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence".[65] As to the dispute in the present case, the pertinent evidence demonstrating the central nature of the disputed territorial sovereignty dispute to Ukraine's claim is set out in Russia's Preliminary Objections, with reference to the pleadings of Ukraine,[66] Ukraine's contemporaneous statements[67] and Russia's claim to territorial sovereignty of Crimea.[68] In addition, Ukraine's Written Observations now also place the territorial sovereignty dispute squarely before the Tribunal.[69] In short, it is indisputable that a dispute about territorial

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[62] RPO, para. 60.
[63] UWO, para. 42 ("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] *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 448-449, paras. 30-31 (**RUL-22**). See RPO, para. 5; also the cross-reference at RPO, para. 24, fn. 26.
[65] *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998,* p. 449, para. 31 (**RUL-22**).
[66] RPO, Chapter 2, Section I (A) and (C).
[67] RPO, Chapter 2, Section I (B).
[68] RPO, para. 61.
[69] Specifically, by expressly asking the Tribunal to determine that Crimea is Ukraine's sovereign territory (see e.g. UWO, para. 53 ("Crimea's status as a part of Ukraine is settled"); UWO, para. 55 ("Ukraine is undeniably the coastal State"); UWO, para. 58 ("there has been no change in the status of Crimea as an unquestioned part of Ukraine".).

sovereignty over Crimea exists between Ukraine and Russia, and that Ukraine asks the Tribunal to determine that dispute in its favour.

38. Third, Ukraine refers to *M/V Saiga (No. 1)*,[70] which of course concerned the very particular issue of an application for prompt release of a vessel and its crew.

(a) The passage of the judgment to which Ukraine refers is not concerned with the characterisation of a dispute or the jurisdiction of the ITLOS.[71] Rather, it is concerned with the application of Article 292 of UNCLOS, i.e. whether the prompt release of the *M/V Saiga* should be ordered, and in doing so it had to consider Guinea's competing contention that arrest of the vessel was justified because it was effected following the exercise of the right of hot pursuit under Article 111 of UNCLOS.[72]

(b) This follows from the very nature of the required decision-making exercise conducted under Article 292(1), pursuant to which the ITLOS must assess an allegation "that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security". While, as the Tribunal noted, in the circumstances of Article 292, it was not appropriate to engage in a full assessment of the merits, it was appropriate to apply a standard of plausibility.[73] Its approach offers no support for the application of a plausibility test in the entirely different context of the current proceedings.

39. Finally, Ukraine relies on the Separate Opinions of Judge Ranjeva and Judge Shahabuddeen in the *Oil Platforms* case.[74] But the issue being addressed by those Judges was "if, on the facts as alleged by Iran, the United States actions complained of might violate the Treaty articles",[75] i.e. the Judges were considering whether jurisdiction *ratione materiae* had

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[70] UWO, para. 43 citing *M/V "Saiga" (No. 1) (St. Vincent and the Grenadines v. Guinea), Prompt Release, Judgment, ITLOS Reports 1997*, at pp. 30-31, paras. 59 and 61 (**UAL-48**).
[71] See *ibid.,* at paras. 37-45, where the Tribunal satisfied itself that it had jurisdiction to entertain the Application. The term "dispute" is mentioned nowhere in the judgment save for in the very first paragraph.
[72] *Ibid.,* paras. 36 and 60.
[73] *Ibid.,* para. 51.
[74] UWO, para. 43 (fn. 65) and paras. 44-45.
[75] Separate opinion of Judge Higgins, at p. 856, para. 33 (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, Separate opinion of Judge Higgins, I.C.J. Reports 1996*) (**RUL-61**). See also Separate opinion of Judge Ranjeva, at p. 843 (*Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection, Judgment, Separate opinion of Judge Ranjeva, I.C.J. Reports 1996*)

been established with respect to Iran's claims. It was Iran that was seeking assertion of the Court's jurisdiction, and it is entirely to be expected that, *qua* claimant, it would have to satisfy the Court that it had plausible claims.[76]

40. In the present case, by contrast, Russia is a respondent and is *not* trying to establish jurisdiction. To the contrary, it maintains that the Tribunal lacks jurisdiction – because the claim as presented by Ukraine necessitates a determination of a territorial sovereignty dispute that is outside of the Tribunal's jurisdiction. Russia's position is that to assume the key issue of territorial sovereignty in favour of Ukraine, or to consider and decide upon the plausibility of Russia's position on territorial sovereignty, would inevitably be to engage in a determination as to sovereignty that would necessitate asserting a jurisdiction that this Tribunal simply does not have.[77]

41. In these circumstances, it is not for Russia to advance a defence as to the legality of its position that it is sovereign in Crimea and/or to engage in questions of plausibility.[78] It is noted, however, that if the Tribunal were to engage in a determination of the sovereignty dispute, the Tribunal would have to consider such questions[79] (including by reference to all relevant evidence) as the circumstances in which Crimea was transferred to Ukraine in 1954 (including whether that transfer violated relevant constitutional provisions), Ukraine's proclamation of

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(**UAL-51**). As noted below, Judge Ranjeva also observed "where the jurisdiction of the Court is concerned, the rule of the strict interpretation of consent is unbending" (p. 844).

[76] In *Ambatielos case (merits: obligation to arbitrate) (Greece v. United Kingdom), Judgment of May 19th, 1953, I.C.J. Reports 1953,* p. 18 (**UAL- 46**) (cited in UWO, fn. 65), the Court asked "whether the arguments advanced by the Hellenic Government in respect of the treaty provisions on which the…claim is said to be based, are of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty."

[77] Ukraine also cites in a footnote a Joint dissenting opinion in the *Nuclear Tests case* (UWO, fn. 69) (*Nuclear Tests (Australia v. France), Judgment, Joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga, and Sir Humphrey Waldock, I.C.J. Reports 1974*) (**UAL-54**). In that dissenting opinion, the Judges were engaging in a "preliminary survey of the merits" in order to establish whether the "applicant's claim … discloses a right to have the claim adjudicated" (p. 364, para. 107). In the present case, the applicant's (Ukraine's) claim is premised on an assumption that it is the coastal State i.e. that Crimea is its sovereign territory. Whether or not that assumption is correct is simply not one in which the Tribunal can engage, and there can therefore be no right under UNCLOS to have Ukraine's claim adjudicated.

[78] *Cf.* RPO, para. 7 noting that Russia vigorously challenges and denies the accusations as to an alleged annexation or unlawful invasion, but that in any event these are plainly not matters for the present Annex VII Tribunal.

[79] See e.g. the issues raised in the statement of Russia during the discussion of the General Assembly resolution 68/262, United Nations General Assembly, Sixty-eighth session, 80th plenary meeting, 27 March 2014, A/68/PV.80, at pp. 3-4 (**UA-467**). See further the statements of Russia cited at RPO, fn. 92 (**RU-28, RU-30, RU-31, RU-35**). See further the oral submissions of Russia before the ICJ, CR 2017/2, p. 15, paras. 17-19 (Kolodkin) (Verbatim Record of the Public sitting held on Tuesday 7 March 2017, at 10 a.m., in *the Case concerning Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation),* CR 2017/2) (**RU-78**).

independence in 1991, the legitimacy of the process by which Ukraine abolished the Crimean Constitution and abrogated the post of President of Crimea in 1995, the scope of the right of self-determination,[80] including how it applies to the complex facts of this case, the legality of the change of government in Ukraine's capital in February 2014 and the Crimean referendum of March 2014, as well as the alleged unlawful use of force.[81]

42. To engage in such a determination of the sovereignty dispute, necessitating consideration of the aforementioned issues, would run counter to both the "essential point of legal principle …, namely that a party should not have to give an account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter, or whose jurisdiction has not yet been established",[82] and "the fundamental principle[] … that it [the Court] cannot decide a dispute between States without the consent of those States to its jurisdiction."[83]

III. *Mauritius v. UK* and *Philippines v. China*

43. Ukraine seeks to distinguish *Mauritius v. UK*[84] and *Philippines v. China*[85] from the present case on the basis that "those cases involved longstanding and acknowledged sovereignty disputes, with no question as to the plausibility of the sovereignty claims on each

[80] This would include consideration of the applicable law. Ukraine advances a position on the legality of the referendum with reference to *domestic law* (see e.g. UWO, paras. 19 and 49). The ICJ considered the legality of the Kosovo declaration of independence with reference to *general international law* (see *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010,* p. 436 at para. 78 (**RUL-70**)).

[81] The territorial dispute is not before the Tribunal and Russia does not intend to express a position with respect to arguments made by Ukraine in support of its claim to sovereignty over Crimea. For the avoidance of doubt, Russia's position in this regard does not constitute agreement with any of the assertions made by Ukraine, including with respect to the legality of the referendum.

[82] *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 56, para. 18(b) (**RUL-50**).

[83] *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 101, para. 26 (**RUL-59**). This passage was cited in *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275 at para. 116 where the Court noted that "[i]n order to determine where a prolonged maritime boundary beyond point G would run, where and to what extent it would meet possible claims of other States, and how its judgment would affect the rights and interests of these States, the Court would of necessity have to deal with the merits of Cameroon's request" (**RUL-62**). See further the observation in the Separate opinion of Judge Ranjeva relied upon by Ukraine where he observed "where the jurisdiction of the Court is concerned, the rule of the strict interpretation of consent is unbending" (*Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection, Judgment, Separate opinion of Judge Ranjeva, I.C.J. Reports 1996*, at p. 844) (**UAL-51**).

[84] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom),* Award, 18 March 2015, para. 208 (**UAL-18**) (hereinafter referred to as *Mauritius v. UK*).

[85] *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China),* Award on Jurisdiction and Admissibility, 29 October 2015, para. 150 (**UAL-3**) (hereinafter referred to as *Philippines v. China*).

side, and no resolution of the General Assembly addressing the inadmissibility of one set of claims".[86]

44. It is correct that there was no consideration or application of a plausibility test in either case, but that scarcely assists Ukraine's current position. Ukraine's view that sovereignty claims in those cases were or were not plausible is of no assistance to this Tribunal, and that view may or may not have been shared by the claimants in those cases (it appears that Mauritius did not consider the UK's sovereignty claim to be plausible[87]). Further, the fact that those cases concerned a "longstanding" sovereignty dispute is irrelevant; regardless of how Ukraine may wish to portray matters, the present case unquestionably involves a sovereignty dispute that had crystallized long before the commencement of these proceedings.[88]

45. Ultimately, Ukraine's attempt to distinguish the important reasoning in *Mauritius v. UK* comes down to the repeated but unprincipled assertion that:

> "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."[89]
>
> "While, in a different case, an UNCLOS tribunal would be free to interpret and apply the term coastal State, 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."[90]
>
> "The objective reality is that there has been no change in the status of Crimea as an unquestioned part of Ukraine."[91]

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[86] UWO, para. 51.

[87] See e.g. Counsel for Mauritius: "This brings me to my second point: the Chagos Archipelago is and has always been an integral part of the territory of Mauritius. The United Kingdom makes the implausible and somewhat convoluted argument that the 'detachment' from Mauritius did not contravene international law, including the principle of self-determination, because the islands of the Chagos Archipelago 'were never part of the territory of Mauritius'": *Mauritius v. UK,* Hearing on jurisdiction and the merits, Vol. 1, 22 April 2014, pp. 17-18, para. 6 (**RUL-74**). Of course, in *Philippines v. China*, the Parties' respective claims to territorial sovereignty were not at issue - precisely in recognition of the limitations on the tribunal's jurisdiction, the claimant did not ask the tribunal to assess the competing claims to territorial sovereignty. See e.g. *Philippines v. China,* Supplemental Written Submission of the Philippines, 16 March 2015, at paras. 26.13 and 26.24 (**RUL-75**); and *Philippines v. China,* Award, 12 July 2016, para. 5 (**UAL-11**) cited in RPO, para. 57.

[88] See para. 34(a) above, noting the dispute crystallised in 2014 and Ukraine's Statement of Claim was served in September 2016.

[89] UWO, para. 53.

[90] UWO, para. 55.

[91] UWO, para. 58.

46. Thus it is said that this Tribunal must proceed on the basis that Crimea is sovereign territory of Ukraine, whether because Ukraine considers that this is the "objective reality" or because it considers that Russia's position is not plausible. It follows that, on Ukraine's approach, the key disputed issue of territorial sovereignty – over which this Tribunal lacks jurisdiction – is either to be determined or assumed in Ukraine's favour (despite the "objective reality" in fact being that Russia exercises sovereign authority over the relevant territory). In other words, the award in *Mauritius v. UK* is not so much distinguished as ignored, and Ukraine's position is inconsistent with its own concluding assertion that it does not seek "any ruling on land territory, whether express or implicit."[92] Plainly it does:

(a) Ukraine has presented its claim on the basis of an alleged infringement of its rights as a coastal State;[93]

(b) Ukraine asks the Tribunal to find that Crimea is Ukraine's sovereign territory,[94] while all its coastal State claims are predicated on this being found in Ukraine's favour; and

(c) Ukraine has expressly stated that the relief it asks for would "vindicate Ukraine's national sovereignty".[95]

47. A ruling on land territory is precisely what Ukraine seeks, and is the obvious predicate to success in all its coastal State claims. Yet that is a ruling that falls outside of the dispute settlement provisions of UNCLOS.

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[92] UWO, para. 58.

[93] See para. 16 above citing RPO, paras. 27-30 (citing from Ukraine's Statement of Claim) and paras. 37-46 (citing from UM), and UWO, paras. 21-23.

[94] See para. 37, fn. 69 above citing from UWO.

[95] See UM, para. 264, cited in RPO, para. 45.

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

48. In Chapter Three of its Written Observations, Ukraine puts forward a series of arguments to reject Russia's second preliminary objection. This second preliminary objection is (in summary) that the Tribunal has no jurisdiction as regards Ukraine's claims pertaining to the Sea of Azov and the Kerch Strait because: a) the Sea of Azov and the Kerch Strait are internal waters; b) claims concerning the regime of internal waters are outside the scope of UNCLOS; and consequently c) a dispute concerning the Sea of Azov and the Kerch Strait is not a dispute concerning the interpretation or application of UNCLOS.[96]

49. Ukraine rejects Russia's position that the Sea of Azov and the Kerch Strait remain internal waters. Its main argument is that the Sea of Azov is an enclosed or semi-enclosed sea subject to the normal regime of the territorial sea, exclusive economic zone and continental shelf, and the Kerch Strait is an international strait subject to the regime of "transit passage" under UNCLOS.[97]

50. As will be demonstrated in the present Chapter, none of the arguments submitted in Chapter Three of Ukraine's Written Observations is well-founded.

I. The irrelevance of Ukraine's classification of the Sea of Azov as an enclosed or semi-enclosed sea

51. Ukraine has on many occasions outside the present proceedings acknowledged that the waters of the Sea of Azov are internal waters. One recent example[98] is a Decree of Ukraine's President Poroshenko of 12 October 2018 which refers to the Sea of Azov as "internal waters".[99]

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[96] RPO, paras. 66-133.
[97] UWO, paras. 61-96.
[98] For further examples, see below, paras. 107-112.
[99] President of Ukraine, Decree No. 320/2018 "On National Security and Defence Council of Ukraine Decision dated 12 October 2018 *'On Urgent Measures to Protect National Interests in the South and East of Ukraine, in the Black Sea, the Sea of Azov and the Kerch Strait'*", para. 2(4) of the annexed Decision (**RU-80**). Para. 2(4) provides that the Ministry of Foreign Affairs of Ukraine shall "make public in accordance with the established procedure, by notifying the Secretariat of the United Nations and the Russian Federation, the determined coordinates of the median line in the Sea of Azov, the Kerch Strait and the Black Sea, which, until a bilateral agreement is concluded, shall be the line of delimitation, i.e. the line of the state border between Ukrainian and Russian *internal waters*" (emphasis added).

52. To claim that the waters of the Sea of Azov do not have the status of internal waters Ukraine resorts in its Written Observations to the novel notion of "enclosed and semi-enclosed sea", to which it had never referred for that purpose in its Memorial (or diplomatic correspondence with Russia).[100] As explained in further detail below, however, Ukraine's reasoning is not only inconsistent with its long-standing position that the Sea of Azov is internal waters, it is also circular.

53. Ukraine states:

> "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."[101]

54. Thus, in the view of Ukraine, the fact that a sea qualifies as "enclosed or semi-enclosed" entails the consequence that it is composed of territorial seas and exclusive economic zones. In fact the converse is true: if a gulf, basin or sea meeting the other requirements of Article 122 consists primarily of territorial seas and exclusive economic zones, then such gulf, basin or sea can be considered "enclosed or semi-enclosed".

55. Under Article 122 of UNCLOS:

> "For the purposes of this Convention, 'enclosed or semi-enclosed sea' means 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" (emphasis added).

56. The definition thus provides for two alternatives as it emerges from the "or" in the text of Article 122. The first is a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet, whatever the legal nature of the maritime zones contained in it. The second is a gulf, basin or sea "consisting entirely or primarily of territorial seas and exclusive economic zones of two or more coastal States." While the Sea of Azov could be described as an "enclosed or semi-enclosed sea" under the first alternative definition because it is "connected to another sea … by a narrow outlet", this does not mean that it automatically consists "primarily of the territorial seas and exclusive economic zones of two

[100] UM, paras. 17, 22, 263 (o) and (p), refer to the enclosed and semi-enclosed seas for other purposes.
[101] UWO, para. 63.

or more coastal States",[102] and nor does it somehow mean that the Sea of Azov does not constitute internal waters.

57. It is not clear whether Ukraine, in referring to "enclosed or semi-enclosed sea", takes into account the fact that Article 122 of UNCLOS contains two alternative definitions (as is clear from the "or" in this provision), or if it considers that Article 122 is correctly interpreted as providing that a requirement for all enclosed or semi-enclosed seas is that it consists "entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States". Whatever the merits of this interpretation, the circularity of Ukraine's argument would remain. Instead of being a result of classification of a certain water area as an enclosed or semi-enclosed sea, as Ukraine claims, the existence of the territorial seas and exclusive economic zones in such an area is in fact the requirement for the latter to be classified as such enclosed or semi-enclosed sea. Just claiming that the Sea of Azov is an enclosed or semi-enclosed sea cannot make territorial seas and exclusive economic zones appear where there are none.

58. Ukraine's reliance on the notion of enclosed or semi-enclosed sea appears to be based on the idea that "enclosed or semi-enclosed seas" under Articles 122 and 123 and "bays" under Article 10 of UNCLOS, although addressing areas of the sea meeting different requirements, are somehow of the same category, so that if a certain zone of the sea is a semi-enclosed sea it cannot be a bay and vice-versa. As a matter of fact the provisions serve different purposes.

59. Article 10 concerns the drawing of a baseline across the mouth of the bay and the internal waters status of the waters enclosed by the baseline. Articles 122 and 123 concern the cooperation between the riparian States of the enclosed or semi-enclosed sea by coordinating on certain matters which do not include the drawing of baselines or delimitation, or the consequences thereof.

II. The non-existent "strong norm" that a sea surrounded by more than one state cannot be claimed as internal waters

60. Ukraine argues that the alleged status of the Sea of Azov as an enclosed or semi-enclosed sea "reflects the strong and long-standing norm that a sea surrounded by more than one State generally cannot be claimed as internal waters."[103]

[102] UWO, para. 65.
[103] UWO, para. 68.

61. The category of "strong" norms is an invention of Ukraine. Moreover, it may be wondered how can a "strong" norm apply only "generally". The authorities relied upon by Ukraine use the qualified terms "generally" and "in general",[104] and are far from categorically speaking of a "strong norm".

62. Further, the norm invoked by Ukraine, rather than "strong" is non-existent. Ukraine's Written Observations avoid engaging with the key reasoning from the *Croatia/Slovenia* Award, invoked in Russia's Preliminary Objections, according to which while Article 7(1) of the Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958 ("the Geneva Convention") and Article 10(1) of UNCLOS relate "only to bays the coasts of which belong to a single State",

> "[t]he limitation of the scope of application of these provisions does not, however, imply that they exclude the existence of bays with the character of internal waters, the coasts of which belong to more than one State."[105]

63. In other words, Articles 7(1) of the Geneva Convention and 10(1) of UNCLOS do not prohibit the establishment of internal waters in bays with more than one riparian State. Those Articles simply do not address the issue.

64. An additional source that confirms this position is the International Law Commission's Commentary to Article 7 of its Draft Articles on the Law of the Sea, which corresponds to Articles 7 of the Geneva Convention and 10 of UNCLOS. It states that:

> "The Commission felt bound to propose only rules applicable to bays the coasts of which belong to a single State. As regards other bays, the Commission has not sufficient data at its disposal concerning the number of cases involved or the regulations at present applicable to them."[106]

This remark of the ILC excludes an *a contrario sensu* reading of the above quoted provisions of the Geneva Convention and of UNCLOS to the effect that they would prohibit, for bays with more than one riparian State, the drawing of a closing line and, consequently, the establishment of internal waters landward of the closing line.

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[104] UWO, para. 68 and fn. 102.

[105] *Arbitration between the Republic of Croatia and the Republic of Slovenia,* Final Award, 29 June 2017, para. 884 (**RUL-41**); RPO, para. 93.

[106] Report of the International Law Commission on the Work of its Eighth Session, *Official Records of the General Assembly*, Eleventh Session, Supplement No. 9 (A/3159), 23 April – 4 July 1956, Extract from the *Yearbook of the International Law Commission*, Doc. No. A/CN.4/104, 1956, Vol. II, p. 269 (**RUL-48**).

65. Logic and common sense support the possibility of drawing a closing line and of establishing internal waters for bays with more than one riparian State. As remarked by Lucius Caflisch:

> "It is difficult to see why one should prevent two States with adjacent coasts from doing what one coastal State can do alone."[107]

66. Similarly, in a study published four years before the *Croatia/Slovenia* Award, considering the question whether "should the line drawn by former Yugoslavia to close the Bay of Piran – which is a juridical bay – be withdrawn because, after the territorial changes occurring in that country, the bay is shared today by two successor States", Tullio Scovazzi answers that "[t]he more logical and simple response is a negative one."[108]

67. In a single footnote, Ukraine's Written Observations briefly mention and seek unconvincingly to reject[109] Russia's argument based on the obvious fact that States enjoy full sovereignty in their internal waters, while they have less than complete sovereignty in their territorial sea, and no sovereignty but sovereign rights or jurisdiction in their exclusive economic zone. Russia explained that, if the waters of the Sea of Azov were to cease to be internal waters, "Russia and Ukraine would lose certain rights they enjoyed in the internal waters constituting the bay."[110] This would be a renunciation of rights which, in light of the

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[107] L. Caflisch, "Les zones maritimes sous jurisdiction nationale, leurs limites et leur délimitation", in D. Bardonnet and M. Virally (eds.), *Le nouveau droit international de la mer*, Pedone, 1983, p. 38 (**RUL-54**) (translation from the original French: "*on voit mal pourquoi on empêcherait que deux Etats dont les côtes sont adjacentes fassent ce qu'un Etat côtier peut faire seul.*"). Caflisch refers to a draft provision relating to drawing of straight baselines set out in the Report of the International Law Commission on the Work of its Eighth Session, *Official Records of the General Assembly*, Eleventh Session, Supplement No. 9 (A/3159), 23 April – 4 July 1956, Extract from the *Yearbook of the International Law Commission,* Doc. No. A/CN.4/104, 1956, Vol. II, p. 268 (**RUL-48**). See also Article 6 of the Draft Convention on Territorial Waters, prepared by the Research in International Law of the Harvard Law School, *American Journal of International Law,* Vol. 23, Supplement, 1929, p. 243 (**RUL-43**): "When the waters of a bay or river-mouth which lie within the seaward limit thereof are bordered by the territory of two or more states, the bordering states may agree upon a division of such waters as inland waters", and C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Vol. 1, 2nd ed., 1945, p. 475 (**RUL-47**): "When the geographical relationship of a bay to the adjacent or enveloping land is such that the sovereign of the latter, if a single State, might not unlawfully claim the waters as a part of its territory, it is not apparent why a like privilege should be denied to two or more States to which such land belongs, at least if they are so agreed, and accept as between themselves a division of the waters concerned. No requirement of international law as such deprives them of that privilege, notwithstanding the disposition of some who would leave little room for its application" (footnotes omitted).

[108] T. Scovazzi, "Problems Relating to the Drawing of Baselines to Close Shared Maritime Waters", in C.R. Symmons (ed.), *Selected Contemporary Issues in the Law of the Sea,* Martinus Nijhoff, 2011, p. 21 (**UAL-60**).

[109] UWO, fn. 102.

[110] RPO, para. 85.

ICJ's jurisprudence Russia relies on, "must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right."[111]

68. Explicit support for this reasoning is found in a statement in the ninth edition of Oppenheim's *International Law* referring to the situation of a bay that after being surrounded by the coasts of one single State becomes a "pluristatal bay". This passage is worth quoting again:

> "[I]t would seem anomalous if the coastal states of a pluristatal bay should … be supposed jointly to enjoy markedly inferior powers of jurisdiction and control over the waters of their bay than might be enjoyed by the littoral state of a single-state bay."[112]

And it is worth recalling that the authors specify that: "[t]he anomaly would be greater" when the pluristatal bay "formerly was a bay surrounded only by a single state."[113]

69. Ukraine's brief objection to this argument is that the point made by Russia is "general and irrelevant."[114] The point may be general as it states a principle applicable in many situations, but is far from irrelevant. It is applicable to the Sea of Azov, as emerges from *Oppenheim's International Law* in which the learned authors consider it appropriate to speak of "an anomaly" as regards the view that the riparian States of a newly formed pluri-State bay could not establish internal waters in the bay.[115]

III. Ukraine's reliance on the alleged exceptional character of the cases in which internal waters have been established or recognized in bays with more than one riparian State is misplaced

70. After having dealt in just two pages with its "enclosed or semi-enclosed seas" and its "strong norm" arguments,[116] Ukraine's Written Observations move to a section covering sixteen pages entitled "Pluri-State Internal Waters Have Been Recognized Only in Narrow and Exceptional Cases, Under Conditions Not Met Here."[117]

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[111] *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 266, para. 293 (**UAL-32**).
[112] Sir R. Jennings and Sir A. Watts (eds.), *Oppenheim's International Law,* Vol. I, Peace, Longman, 1992, pp. 632-633 (footnote omitted) (**RUL-18**).
[113] *Ibid*., p. 633, fn. 4.
[114] UWO, fn. 102.
[115] The authors did not have the benefit of the ICJ's 2005 judgment quoted above, and were addressing a situation corresponding to that of the Gulf of Fonseca.
[116] UWO, paras. 63-68.
[117] UWO, paras. 69-93.

71. The starting point of Ukraine's argument is that "Russia places disproportionate weight on a few rare instances where tribunals have recognized narrow exceptions to the strong norm against pluri-State internal waters" and that the status of pluri-State internal waters is "exceptional".[118] Russia's Preliminary Objections rely on the judgment regarding the Gulf of Fonseca in the *Land, Island and Maritime Frontier Dispute*, on the *Croatia/Slovenia* Award as well as on the 1988 Tanzania-Mozambique Agreement concerning the Rovuma Bay.[119]

72. It so happens that the Gulf of Fonseca Judgment and the *Croatia/Slovenia* Award are the only existing decisions on the subject by international courts and tribunals, but they are unequivocal. By contrast, there are no judgments or awards stating that internal waters established in a bay with one riparian State cannot continue to exist where there is later more than one such State. Moreover:

(a) The Agreement concerning the Rovuma bay (which Ukraine's Written Observations seek to downplay in a footnote[120]) confirms that, in case of bays with two riparian States, these States may draw a closing line and consider the waters landward of it as internal waters.[121]

(b) Other bilateral agreements confirm this. One example is the Maritime Delimitation Treaty between Brazil and France (French Guyana) of 30 January 1981.[122] Under Article 1 the delimitation line separating the maritime zones of the two States starts at the middle point of the "outer limit", established by a mixed Commission of the Parties, closing the bay of Oyapock,[123] whose southern shore belongs to Brazil and

[118] UWO, para. 69-70.
[119] RPO, paras. 87-94.
[120] The 1988 Tanzania-Mozambique Agreement is mentioned in fn. 112 of UWO to remark that its internal waters claim "has not been judicially recognized" and that it has been called "controversial" in R.R. Churchill and V. Lowe, *The Law of the Sea,* 3rd ed., Manchester University Press, 1999, p. 46 (**UAL-62**). However, the lack of judicial recognition shows that there was no dispute concerning the internal waters in this bay.
[121] Agreement between the Government of the United Republic of Tanzania and the Government of the People's Republic of Mozambique regarding the Tanzania/Mozambique Boundary, Maputo, 28 December 1988, Article 2, available at: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/TZA-MOZ1988TM.PDF (**RU-13**).
[122] Maritime Delimitation Treaty between the Federative Republic of Brazil and the French Republic (French Guyana), Paris, 30 January 1981, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/BRA-FRA1981MD.PDF (**RU-54**).
[123] E. Jiménez de Aréchaga, "Brazil-France (French Guiana), Report Number 3-3", in J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, Vol. I, Martinus Nijhoff, 1993, p. 779 (**RUL-57**): "a closing line of the bay was established as a baseline with the agreement of both parties."

whose northern shore belongs to French Guyana. The bay is left undivided and its waters are, consequently, internal.

(c) Another relevant bilateral agreement is the Treaty of 19 November 1973 between Uruguay and Argentina concerning the Rio de la Plata,[124] in which the Parties closed with a straight line the mouth of the Rio de la Plata. They provided that their "maritime lateral limit, and that of the continental shelf" shall be an equidistance line starting from the mid-point of the closing line.[125] As stated by the former President of the International Court of Justice, Eduardo Jiménez de Aréchaga, "[t]he consequence of the establishment of a closing line at the mouth of the Río de la Plata is that the waters behind that line are internal waters, within the exclusive jurisdiction of the parties."[126] These waters are left undivided with the exception of two narrow areas defined under Article 2 and, for the purpose of a particular activity, under Article 41.

73. Ukraine further tries to challenge the relevance of the Gulf of Fonseca and of the *Croatia/Slovenia* decisions by arguing that neither the ICJ nor the Arbitral Tribunal "were subject to the Article 293 rule giving priority to the Convention."[127] Ukraine does not insist on this argument, and for good reason.

74. The *Croatia/Slovenia* Arbitral Tribunal bases its reasoning on Article 7 of the Geneva Convention and on Article 10 of UNCLOS, concluding that they do not cover the case of a pluri-State bay but do not exclude their existence.[128] The Award does not resort on this point to other rules of international law, even less so, to rules incompatible with UNCLOS. The Gulf of Fonseca Judgment, which also considers Article 10 of UNCLOS,[129] is based on the 1917 judgment of the Central American Court of Justice and on the notion of a historic bay, and confirms that the notion of internal waters can apply and has been applied to pluri-State bays.[130]

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[124] Treaty between Uruguay and Argentina concerning the Rio de la Plata and the Corresponding Maritime Boundary, Montevideo, 19 November 1973, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/URY-ARG1973MB.PDF (**RU-51**).

[125] *Ibid.,* Article 70 (**RU-51**).

[126] E. Jiménez de Aréchaga, "Argentina-Uruguay, Report Number 3-2", in J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, Vol. I, Martinus Nijhoff, 1993, p. 758 (**RUL-57**).

[127] UWO, para. 69.

[128] *Arbitration between the Republic of Croatia and the Republic of Slovenia,* Final Award, 29 June 2017, para. 884 (**RUL-41**).

[129] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 588, para. 383 (**RUL-19**).

[130] *Ibid*., pp. 604-605, para. 412.

The contrary view held in his dissent by Judge Oda was isolated.[131] Ukraine's suggestion that these decisions apply law which, if the jurisdiction of the Court and of the Tribunal had been based on UNCLOS, would not have been applied, is thus misplaced.

IV. The conditions Ukraine alleges must be met for accepting the existence of internal waters in pluri-State bays are artificial and in any case are met as regards the Sea of Azov

75. Ukraine states that "[t]he exceptional status of pluri-State internal waters has been recognized only when three conditions are present".[132] Those three "conditions" are not to be found in UNCLOS or the jurisprudence of any international court or tribunal; they are artificial abstractions deriving from Ukraine's assessment of the situation in the Gulf of Fonseca case, and made with a view to supporting Ukraine's position before this Tribunal. They do not appear in the *Gulf of Fonseca* Judgment (or the *Croatia/Slovenia* Award). These alleged "conditions" are:

(a) That "the body of water is small, and not large enough to contain an exclusive economic zone";

(b) That "there is a clear agreement between all bordering States to establish a pluri-State internal waters regime";

(c) That "third States are not prejudiced by the claim."[133]

By contrast, among the "conditions" there is no mention of the factor that, before becoming a pluri-State bay, the bay had only one coastal State that had closed the mouth of the bay making the waters landward of the closing line internal waters. This, however, is the characteristic common to the Gulf of Fonseca and the Bay of Piran – as well as the Sea of Azov.

A. INTERNATIONAL LAW DOES NOT PROVIDE FOR AN ALLEGED CONDITION REQUIRING A CERTAIN SIZE OF THE BAY

76. In its first alleged condition, Ukraine argues in favor of limiting the possibility of internal waters in a pluri-State bay to bays "not large enough to contain an exclusive economic zone or high seas."[134] It relies on an alleged "principle" containing the requirement of size that

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[131] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening), Judgment, Dissenting Opinion of Judge Oda, I.C.J. Reports 1992*, pp. 745-746, para. 24 (**UAL-59**).
[132] UWO, para. 70.
[133] *Ibid.*
[134] UWO, para. 73.

it claims to be "generally accepted".[135] The materials in support of such general acceptance are few and not convincing.

77. Ukraine refers to a remark by Tullio Scovazzi, an author that Ukraine acknowledges "support[s] the concept of pluri-State internal waters".[136] Scovazzi states that Caflisch's reasoning, referred to above[137] "could be extended also to bays bordered by two or more States, *at least where they do not include waters that have the status of an exclusive economic zone or high seas*."[138] This last remark, on which Ukraine relies, is merely tentative. Most importantly, it is motivated by the concern of avoiding a situation where a large body of water such as the Mediterranean Sea "which meets the geographical conditions required for a bay" be closed by a straight line at the entrance of the Strait of Gibraltar.[139] Yet the Mediterranean and the Sea of Azov are plainly not comparable, including because the Mediterranean has never been a single-State bay.

78. Further, Ukraine relies on the fact that while the Soviet Union had claimed the Gulf of Riga (which was wholly surrounded by its territory) as internal waters, after the dissolution of the Soviet Union, Latvia and Estonia (the new riparian States of the Gulf) concluded an agreement delimiting their territorial sea and exclusive economic zone.[140] This agreement merely shows that the two Parties deemed it consonant with their interest to establish territorial seas and exclusive economic zones and to draw a delimitation line in the Gulf of Riga. It does not support the view that the States considered themselves legally bound to adopt this course of action,[141] or that this course of action was required by the dimensions of the Gulf of Riga.[142]

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[135] *Ibid.*
[136] UWO, fn. 108.
[137] See above, para. 65.
[138] T. Scovazzi, "Problems Relating to the Drawing of Baselines to Close Shared Maritime Waters", in C.R. Symmons (ed.), *Selected Contemporary Issues in the Law of the Sea,* Martinus Nijhoff, 2011, p. 29 (**UAL-60**) (emphasis added - footnote omitted).
[139] *Ibid.*, p. 29, fn. 46 (**UAL-60**).
[140] Agreement between the Republic of Estonia and the Republic of Latvia on the Maritime Delimitation in the Gulf of Riga, the Strait of Irbe and the Baltic Sea, 12 July 1996, *Law of the Sea Bulletin*, 1999, Vol. 39, pp. 28-31 (**UA-510**).
[141] As a matter of fact, Latvia favored the retention of the historic bay status of the Gulf of Riga (see E. Franckx, "Maritime Boundaries in the Baltic Sea: Post-1991 Developments", in *Georgia Journal of International and Comparative Law*, Vol. 28, 2000, pp. 261-262 (**RUL-63**) and even declared the Gulf to be "enclosed joint internal waters of Estonia and Latvia" in its 1994 Maritime Code (see A. Lott, *The Estonian Straits. Exceptions to the Strait Regime of Innocent or Transit Passage*, Brill/Nijhoff, 2018, p. 129, fn. 549 (**RUL-78**)).
[142] As explained by A. Lott, the position of Estonia which opposed Latvia's proposal to declare the Gulf of Riga as their common historic bay was primarily prompted by political considerations: "the principle of State succession as applied in the *Gulf of Fonseca* case could have entitled Estonia and Latvia to declare the Gulf of Riga a historic bay upon their restoration of independence. On the other hand, the classification of the Gulf of Riga as a historic bay on the basis of the Soviet Union's prior practice and legal framework would have been in

Moreover, the conclusion of the agreement says nothing about the status of the waters of the Gulf of Riga during the time (about six years) between the end of the USSR sovereignty over Estonia and Latvia and the entry into force of the agreement. The fact that the acknowledgment implied in the 1996 Agreement that the Gulf of Riga comprises territorial seas and other maritime zones happened "[a]fter the break-up of the Soviet Union"[143] does not mean this was the case "automatically since the moment of the break-up of the Soviet Union."

79. The last argument of Ukraine concerns the claim raised in the 1950s by the Arab States bordering the Gulf of Aqaba that its waters were "a national inland waterway, subject to absolute Arab sovereignty"[144] or "Arab internal waters",[145] and the fact that this claim was rejected by "many States", in one case partly because of "its breadth".[146] Again, there can be no comparison between that case and the Sea of Azov; the Arab States' inland waters claim was based not on legal, but religious grounds[147] and was not made by all the riparian States (it did not include Israel). That case was distinct from the Sea of Azov in other respects as well, namely lack of evidence concerning peaceful and continuous use of the Gulf by the Ottoman Empire to the exclusion of other nations[148] and the inconsistent position of the Arab States who had all previously claimed a limit of territorial sea in the Gulf.[149] Nonetheless, at a news conference held on 19 February 1957 the U.S. Secretary of State Dulles stated that "[i]f the

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contravention with the doctrine of State continuity as adopted by Estonia and Latvia. Estonia had declared on 8 October 1991 that it did not consider itself as a successor State to the Soviet Union. By recognizing the Gulf of Riga as a historic bay, Estonia and Latvia could have indirectly declared themselves as successor States to the Soviet Union – not as continuators of the pre-1940 Estonian and Latvian republics. While Estonia, in principle, had not been against the legal concept of historic bay … it rejected Latvia's proposal to declare the Gulf of Riga a historic bay primarily on the grounds of State continuity with pre-1940 independent Estonia" (A. Lott, *The Estonian Straits. Exceptions to the Strait Regime of Innocent or Transit Passage*, Brill/Nijhoff, 2018, pp. 127-128 (**RUL-78**) (footnotes omitted). Estonia also feared negative effects of joint sovereignty over the Gulf of Riga on its fishing industry: "The Estonian foreign minister explained in Parliament that upon the establishment of a regime of joint sovereignty over the Gulf of Riga, Latvian fishing vessels would catch fish under their domestic legal framework that provides lesser protection for the fish stocks in maritime areas that reach even close to the Abruka archipelago. This, he remarked, could have caused irreversible damage to *inter alia* the spawning grounds around Ruhnu Island" (*ibid*., p. 128) (footnote omitted).

[143] UWO, para. 74.

[144] United Nations General Assembly, Twelfth Session, 697th Plenary meeting, 2 October 1957, A/PV.697, p. 233 (Mr. Shukairy) (**UA-511**).

[145] UWO, para. 74.

[146] *Ibid*.

[147] United Nations General Assembly, Twelfth Session, 697th Plenary meeting, 2 October 1957, A/PV.697, p. 233 (Mr. Shukairy) (**UA-511**): "The Gulf [of Aqaba] 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."

[148] A.E. Danseyar, "Legal Status of the Gulf of Aqaba and the Strait of Tiran: From Customary International Law to the 1979 Egyptian-Israeli Peace Treaty", in *Boston College International and Comparative Law Review*, Vol. 5, 1982, p. 136 (**RUL-53**).

[149] *Ibid*, p. 138.

four littoral states which have boundaries upon the Gulf should all agree that it should be closed, then it could be closed."[150]

B. THE INTERNAL WATERS STATUS OF THE SEA OF AZOV AND THE KERCH STRAIT HAS NOT CHANGED AND UKRAINE AND RUSSIA HAVE AGREED TO CONFIRM IT

80. Ukraine argues that its second condition for holding that the Sea of Azov consists of internal waters is not satisfied because "there was no agreement between Russia and Ukraine to hold these waters in common."[151]

81. The argument is untenable for two reasons. First, there was no need for an agreement between the two States because the Sea of Azov and the Kerch Strait have been internal waters since the dissolution of the USSR, in continuation of their prior status. Second, and in any case, Ukraine and Russia have in fact agreed that these waters are internal waters.

82. There is no disagreement between the Parties that the Sea of Azov and the Kerch Strait were internal waters of the USSR.[152] Since the dissolution of the USSR, Russia continued and Ukraine succeeded to the rights of the predecessor, including its rights with respect to maritime zones. Thus the waters of the Sea of Azov and the Kerch Strait, which had been the internal waters of the USSR, became the internal waters of Russia and Ukraine. This is consistent with the *Croatia/Slovenia* Arbitral Tribunal, when it stated that, in the case of the Socialist Federal Republic of Yugoslavia,

> "The dissolution, and the ensuing legal transfer of the rights of Yugoslavia to Croatia and Slovenia as successor States, did not have the effect of altering the acquired status."[153]

No agreement was required – nor made – in that respect. Similarly, the internal waters status of the Sea of Azov was maintained and the rights inherent in such status became Russia's and Ukraine's rights.

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[150] *Ibid*, p. 137, fn. 70.
[151] UWO, para. 76.
[152] RPO, Chapter 3, section 1 (A); UM, para. 26.
[153] *Arbitration between the Republic of Croatia and the Republic of Slovenia,* Final Award, 29 June 2017, para. 883 (**RUL-41**). It is worth noting that in *Croatia/Slovenia* case the Arbitral Tribunal came to this conclusion despite Croatia's contention that even if the Bay of Piran was a juridical bay under the SFRY (which it also contested), the effect of the dissolution caused it to be re-characterized as territorial waters (*ibid*., para. 790). Thus, in that case one of the successor States was clearly opposed to the retention of the previously acquired internal waters status of a pluri-State bay.

83. Contrary to what Ukraine argues, there is no need for, "[a]ll interested States wishing to preserve an internal waters regime following a State's dissolution" to "manifest an express, clear, and consistent agreement on the communal nature of the regime they wish to create."[154] The communal regime is already there and agreements are only necessary in order to amend or replace it.

84. Undelimited common internal waters may create practical difficulties for the riparian States, and it may be that one or both of them will wish to establish a different regime such as an agreed delimitation of the common internal waters or establishing territorial waters and an exclusive economic zone for each riparian State and proceeding to the delimitation thereof. Ukraine has on different occasions indicated its preference for one or the other of these regimes. But either regime must be agreed upon. [155]

85. That no change to the existing regime of internal waters has been agreed upon, and the Parties in fact expressly confirmed that the Sea of Azov remains internal waters, is clear from (1) statements made during the negotiations (see **sub-section 1** below), (2) the terms of the agreements ultimately agreed upon (see **sub-section 2** below), and (3) the practice of the Parties (see **sub-section 3** below).

1. Russian-Ukrainian negotiations were based on the internal waters status of the Sea of Azov

86. Russia and Ukraine have been negotiating for years through meetings of important delegations,[156] with the starting point that:

> "the parties proceed from the premise that the Sea of Azov is treated as internal waters of Ukraine and the Russian Federation."[157]

[154] UWO, para. 77.

[155] Even the authority that Ukraine invoked in support of its position (Y.Z. Blum) notes: "The change of the character of such water areas from a closed sea into essentially high seas is, however, generally not brought about automatically through the territorial changes along the coast. As a rule, special treaty arrangements provide for the recognition of the new status of the maritime area in question", Y.Z. Blum, *Historic Titles in International Law*, Martinus Nijhoff, 1965, p. 279 (**UAL-56**).

[156] See e.g., 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 (**UA-520**).

[157] *Ibid*. This statement is confirmed in the 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 (**UA-521**).

Even more explicitly, the Parties have recorded that, in the negotiations, they were

> "proceeding from the premise that the Sea of Azov will *retain* [its] status as internal waters of Ukraine and the Russian Federation."[158]

87. In these negotiations, Ukraine has thus accepted that the status of the waters under discussion was that of internal waters. [159] While it insisted on the need to delimit these waters, it expressed its belief that

> "delimitation of the state border in the Sea of Azov would not change the status of internal waters."[160]

88. These statements confirm those made by the Parties in other negotiations in 1996 and 1997 and referred to in Russia's Preliminary Objections.[161] That this was the understanding of Ukraine is also reflected in a statement made by Mr. A.A. Chaly, member of the Collegium of the Ministry of Foreign Affairs of Ukraine, when introducing in the Verkhovnaya Rada a draft Law "On exclusive (maritime) economic zone":

> "negotiations with Russia begin now and it is possible that we, the two states, will be able to agree on maintaining the status of the Sea of Azov, which exists today, as a closed sea, which waters are exclusively under the jurisdiction of coastal states. … [I]f we manage to reach an agreement with Russia, the status of the Sea of Azov will not change, and it will be considered as an internal sea of two countries. I would not say that the status of the Sea of Azov is not decided. Today it is what it was."[162]

89. It is clear that the Parties did not consider it necessary to enter into some new agreement to establish that the waters of the Sea of Azov were internal waters of the two States. This was the existing situation. Agreement was deemed necessary to the extent that there were to be changes or some modifications to this status.

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[158] 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**) (emphasis added).

[159] See Minutes of the 6th (**RU-63**), 7th (**RU-65**), 12th (**RU-67**), 13th (**RU-73**) Meetings of the Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Areas in the Black Sea**.**

[160] 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**).

[161] RPO, para. 98.

[162] Transcript of the 42nd Plenary session of the Verkhovnaya Rada of Ukraine (Parliament of Ukraine), Statements of A.A. Chaly, 13 July 1994, available at: http://iportal.rada.gov.ua/meeting/stenogr/show/3511.html (**RU-61**).

90. The agreement to maintain the status of the Azov-Kerch waters as Russia-Ukraine internal waters was confirmed at a summit of the Presidents of Russia and Ukraine (Boris Yeltsin and Leonid Kuchma) during the State visit of the Ukrainian President to Moscow on 26 February - 1 March 1998.[163] It was reconfirmed at the presidential meeting in January 2000[164] and in the exchange of letters between the Vladimir Putin and Leonid Kuchma in July-August 2001. In his response to President Putin, President Kuchma wrote:

> "I would like to reiterate that Ukraine agrees to the Russian Federation's proposal on preserving the status of internal waters for the water areas of the Sea of Azov and the Kerch Strait."[165]

91. Several draft joint statements by the Presidents of Russia and Ukraine[166] on the legal status of the Sea of Azov and the Kerch Strait, and delimiting the maritime areas in the Black Sea that were transmitted by Ukraine to Russia in the same period included provisions on the retention of the status of the Sea of Azov as internal waters of Russia and Ukraine (and its delimitation by the state border in order to "define limits of both states' sovereignty"), as well as on the prohibition of third states' military vessels in the Sea of Azov.[167]

92. When in 2002 Ukraine unexpectedly communicated its baselines for measuring the breadth of the territorial sea in the Sea of Azov,[168] Russia promptly reacted by sending a Note

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[163] See *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine No. 2378/2dsng, 30 March 1998 (**RU-62**).

[164] See Letter of the President of the Russian Federation Vladimir Putin to the President of Ukraine Leonid Kuchma, 9 July 2001 (**RU-68**): "The high-level agreement between Russia and Ukraine to maintain the special status of the Azov-Kerch water area as internal waters of Russia and Ukraine was confirmed during our conversation in January 2000."

[165] Letter of the President of Ukraine Leonid Kuchma to the President of the Russian Federation Vladimir Putin, transmitted by *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 5211/13-011-268-2001, 13 August 2001 (**RU-70**).

[166] See Draft Declaration of the Presidents of Ukraine and Russia on defining the legal status of the Sea of Azov and the Kerch Strait and delimiting the maritime areas in the Black Sea, transmitted by *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Embassy of the Russian Federation in Ukraine No. 21/20-410-1228, 6 August 2001 (**RU-69**)**;** Draft Declaration of the Presidents of Ukraine and Russia on defining the legal status of the Sea of Azov and the Kerch Strait and Delimiting the Maritime Areas in the Black Sea, transmitted by *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Embassy of the Russian Federation in Ukraine No. 21/20-410-1453, 31 August 2001 (**RU-71**)**;** Draft Statement on the progress in treaty formalization of the Ukrainian-Russian State Border, transmitted by the *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 5211/13-013-402/2001, 12 December 2001 (**RU-74**).

[167] The "coinciding positions" of the Parties on the retention of internal waters status of the Sea of Azov and its closed regime for foreign military vessels are also confirmed by Minutes of the 12th (**RU-67**) and 13th (**RU-73**) meetings of Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Areas in the Black Sea.

[168] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-446-1375, 25 June 2002 (**UA-513**).

that reiterated its "commitment to the well-known high-level agreements concerning the preservation of the historically established and undisputed status of the Sea of Azov and the Kerch Strait as internal waters of both Russia and Ukraine" and emphasised that "the current regime of the maritime area, which is in common use by the two States, can be modified only by mutual agreement."[169]

93. The above quoted passages demonstrate that Ukraine's presentation of the negotiations in its Written Observations is inaccurate. It is now alleged that for Ukraine "it was imperative that the concept of an internal waters status be tied to delimitation between the States",[170] and that Ukraine "never agreed to Russia's vision of 'common internal waters' with no border between Russian and Ukrainian waters."[171] The correct position, however, is that Ukraine accepted that the starting point was that the Sea of Azov constituted internal waters of the two States, although it wanted the two Parties to establish a delimitation line. There can be no implication that if no agreement on delimitation was reached, the internal waters status of the Sea of Azov would somehow disappear.

2. The 2003 Treaties and Joint Statement confirm the existing internal waters status of the Sea of Azov

94. The negotiations never reached an agreement on delimitation, but resulted in the Azov/Kerch Cooperation Treaty. In that Treaty, the Parties confirmed the internal waters status of the Sea of Azov (as they had confirmed it earlier in the same year in the State Border Treaty[172]). Article 1 of the Azov/Kerch Cooperation Treaty stated that:

> "The Sea of Azov and the Kerch Strait historically constitute internal waters of the Russian Federation and Ukraine."

And that:

> "The Sea of Azov shall be delimited by the state border line in accordance with an agreement between the Parties."[173]

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[169] *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine No. 6437/2dsng, 8 August 2002 (**RU-75**).
[170] UWO, para .79.
[171] *Ibid*.
[172] See below, para. 99.
[173] Azov/Kerch Cooperation Treaty (**UA-19**). See also Certification of the Translation of the Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait as Submitted by Ukraine as UA-19, 2 November 2017 (**UA-527**). The translation submitted by Russia in **RU-20** ("The Sea of Azov and the Kerch Strait shall be historical internal water bodies of the Russian Federation and Ukraine. The

95. These provisions confirm, in the binding form of an international agreement, the position of the Parties in the negotiations preceding it, namely that the present status of the Sea of Azov and the Kerch Strait was that of internal waters and that delimitation was a task to be addressed in the future.

96. Ukraine argues, however, that:

> "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."[174]

This reading is incorrect. The status of the waters of the Sea of Azov and of the Kerch Strait was (and still is) that of internal waters and the Parties confirmed that status. Only the question of delimitation was left open.[175]

97. On the same day that the Azov/Kerch Cooperation Treaty was signed, Russia and Ukraine adopted a Joint Statement bearing the signature of President Putin and President Kuchma. This Statement confirmed the status of the waters of the Sea of Azov, consistent with the relevant articles of the Azov/Kerch Cooperation Treaty as set out above.[176] Ukraine argues that an introductory sentence in the Joint Statement indicating the "common understanding" of the Parties that "the Azov-Kerch area of water is preserved as an integral economic and natural complex used in the interests of both states"[177] is "open-ended phrasing" "consistent with any number of outcomes for the Sea of Azov and Kerch Strait."[178] The phrasing is not open-ended. It is plain that the States were in agreement that the area was to remain internal waters. In any event, that argument cannot apply to the provision on the internal waters status of the Sea of Azov and the Kerch Strait which is drafted in precise legal terms, as is the corresponding provision of the Azov/Kerch Cooperation Treaty.

Sea of Azov shall be delimited by the State border in accordance with the agreement between the Parties.") is not different in substance notwithstanding what Ukraine argues in fn. 128.

[174] UWO, para 81.

[175] To be noted that delimitation issues were excluded by the Declarations of both Parties pursuant to Article 298 of UNCLOS. See below, Chapter 4.

[176] Joint Statement by the President of the Russian Federation and the President of Ukraine on the Sea of Azov and the Strait of Kerch, 24 December 2003, *Law of the Sea Bulletin*, 2004, Vol. 54, p. 131 (**RU-21**).

[177] *Ibid*.

[178] UWO, para 82.

98. Ukraine comments that the Joint Statement - and not the Azov/Kerch Cooperation Treaty - was publicized in the *Law of the Sea Bulletin.*[179] That observation goes nowhere; the Azov/Kerch Cooperation Treaty was officially published in both Ukraine and Russia, while the publication on the *Law of the Sea Bulletin* is for informational purposes only. A recent monograph has underscored the importance of the Joint Statement in support of the view that the internal waters regime in the Sea of Azov was maintained after this Sea became surrounded by two States.[180]

99. The provision in the Azov/Kerch Cooperation Treaty affirming the internal waters status of the Sea of Azov and of the Kerch Strait must also be seen in light of another treaty that the Parties had concluded earlier in the same year, the State Border Treaty (referred to at para. 94 above). Pursuant to Article 5 of this Treaty, already quoted in Russia's Preliminary Objections[181]:

> "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."[182]

100. The use of the adverb "historically" in the Azov/Kerch Cooperation Treaty and in the Joint Statement of the Presidents does not somehow mean that the internal waters status is a mere historical relic, as Ukraine would like.[183] The adverb points to the historical origin of the internal waters status of the Sea of Azov and of the Kerch Strait,[184] which is the basis of the present internal waters status of the Sea and the Strait.

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[179] *Ibid*.
[180] M. Grbec, *Extension of Coastal State Jurisdiction in Enclosed or Semi-Enclosed Seas: A Mediterranean and Adriatic Perspective*, Routledge, 2013, p. 150 (**RUL-72**): "The importance of the 2003 Joint Statement derives also from the fact that with the latter, the two States impliedly confirmed that there was not an automatic conversion of the 'internal-historical waters' within the Sea of Azov and the Strait of Kerch into 'territorial seas', at the time of the dissolution of the former USSR. This may be implied particularly from paragraph 1 of the Joint Statement providing that '… the Azov-Kerch area of water is *preserved* as an integral economic and natural complex used in the interests of both States'. The latter wording seems to imply a condominium (joint sovereignty) of the two States over the 'Azov Kerch area'" (emphasis in original – footnote omitted).
[181] RPO, para. 96.
[182] State Border Treaty, Article 5 (**RU-19**).
[183] UWO, para. 81.
[184] RPO, paras. 72-80. As it has been explained by V. Socor, "Azov Sea, Kerch Strait: Evolution of Their Purported Legal Status (Part One)", *Eurasia Daily Monitor*, 3 December 2018, available at: https://jamestown.org/program/azov-sea-kerch-strait-evolution-of-their-purported-legal-status-part-one/ (**RU-83**), "the qualifier 'historically internal' is meant to emphasize that they never had an international status in the past".

101. The use of the present tense ("constitute internal waters") in Article 1 of the Azov/Kerch Cooperation Treaty, in contrast with the use of the future tense as regards delimitation ("shall be delimited"),[185] is further confirmation that the Parties were referring to the current status (and not to the past status) of the waters under consideration. If the Parties had intended to state that the waters were only regarded as internal in the past, as asserted by Ukraine,[186] the word "constitute" would have been used in the past tense (and not in the present tense).

102. In support of its interpretation, Ukraine relies on a passage in an article by Alexander Skaridov[187] stating that the provision of the Azov/Kerch Cooperation Treaty concerning the internal waters status of the Sea and of the Strait "is more declarative than legal" so that "internal" "may be explained as inland waters from a geographical, economical, historical or any other perspectives, but not legal."[188] This statement, however, is of no avail for Ukraine. It is based on a quotation of the key sentence of the Azov/Kerch Cooperation Treaty which does not correspond to - and substantially modifies - the text of that sentence. The text of that key sentence on which Professor Skaridov bases his opinion is as follows: "historically the Azov Sea and Kerch Strait *appears to be* internal waters of Russian Federation and Ukraine."[189] The expression "appears to be" is decisive for Skaridov's argument. But this expression is not found in the provision of the Treaty referred to, be it in the translation filed by Russia[190] or in the one submitted by Ukraine,[191] or in the original Russian and Ukrainian.[192] In fact, in the same article, Skaridov refers at various times to the waters of Sea of Azov and the Kerch Strait as internal waters of the two States.[193]

[185] Azov/Kerch Cooperation Treaty, Article 1 (**UA-19**). Article 1 is set out at para. 94 above.
[186] UWO, para. 81.
[187] *Ibid*.
[188] A. Skaridov, "The Sea of Azov and the Kerch Straits" in D.D. Caron and N. Oral (eds.), *Navigating Straits: Challenges for International Law*, Brill/Nijhoff, 2014, p. 234 (**UA-528**).
[189] *Ibid*. (emphasis added).
[190] Azov/Kerch Cooperation Treaty (**RU-20**).
[191] Azov/Kerch Cooperation Treaty (**UA-19**). See also Certification of the Translation of the Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait as Submitted by Ukraine as UA-19, 2 November 2017 (**UA-527**).
[192] O. Gorbun, *The Status of the Kerch Strait*, Master Thesis, Mykolas Romeris University Faculty of Law, 2018, pp. 36-37 (**RUL-77**), after an analysis of the term used in Russian and Ukrainian comes to the conclusion that the Russian term in the Azov/Kerch Cooperation Treaty does not mean "appears to be" but "is/are".
[193] A. Skaridov, "The Sea of Azov and the Kerch Straits" in D.D. Caron and N. Oral (eds.), *Navigating Straits: Challenges for International Law*, Brill/Nijhoff, 2014, p. 222 (**UA-528**), where referring to the Azov/Kerch Cooperation Treaty, the author states: "The Agreement, however, failed to provide for any delimitation agreement between the two States, but *did recognize that the Sea of Azov and the waters of the Kerch Strait constituted*

103. Ukraine inaccurately summarizes Russia's position on the Azov/Kerch Cooperation Treaty. According to Ukraine, "Russia believes that [the Azov/Kerch Cooperation Treaty] reflects an agreement that finally settled the legal status of the Sea of Azov even without delimitation".[194] In fact, as shown above, Russia's position is that the Azov/Kerch Cooperation Treaty confirms that the current status of the Sea of Azov and of the Kerch Strait is that of undelimited internal waters, without prejudice to future agreements providing for delimitation. Ukraine has agreed with this view in negotiating with Russia on the premise that the waters in question are internal waters of the two States.

104. Ukraine further argues that Russia is "attempting to introduce an interpretive dispute over [the Azov/Kerch Cooperation Treaty] into this proceeding."[195] But Russia is not doing so. It is Ukraine that is seeking to introduce a challenge to the plain meaning of the terms of this Treaty, notwithstanding its statements outside these proceedings that the Sea of Azov constitutes internal waters.

105. Negotiations held after the conclusion of the Azov/Kerch Cooperation Treaty were "based on" that Treaty.[196] Contrary to what Ukraine now claims,[197] they show nothing other than a lack of agreement on delimitation; they do not demonstrate any intention of either of the Parties to deny the existing status of these waters, as confirmed by the Azov/Kerch Cooperation Treaty.

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internal waters of Russia and Ukraine" (emphasis added). On pages 224 and 228 Professor Skaridov makes further references to the internal waters status of the Sea of Azov and the Kerch Strait.

[194] UWO, para. 83.

[195] *Ibid*.

[196] 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 (**UA-531**).

[197] UWO, para. 84. Ukraine holds that the Parties did not regard the Azov/Kerch Cooperation Treaty as the "final resolution of the legal status of the Sea of Azov" and that it was "a short-term agreement to resolve immediate tensions and defer important decisions until later". There is no doubt that the Parties continued to discuss the legal status of the Sea of Azov and the Kerch Strait, but they were doing so "on the basis" of the Treaty, so on the basis of the current status of internal waters of the Sea and the Strait in question.

106. In fact, various documents relating to the subsequent negotiations on delimitation (minutes of meetings of delegations,[198] draft treaties on delimitation,[199] diplomatic correspondence[200]) clearly distinguish between "delimitation of maritime areas" (territorial seas, EEZs, continental shelves) in the Black Sea and "delimitation of the state border" in the Sea of Azov. In the terminology used by the Parties "State border" does not concern areas beyond the limit of the territorial sovereignty i.e. beyond their land territory, internal waters or the territorial sea.[201] Given the dimensions of the Sea of Azov (maximum length of approximately 224 miles, maximum width of 109 miles),[202] any State border "separating the State territories (waters, seabed, subsoil and airspace) of the Contracting Parties in the Sea of Azov"[203] could have separated only internal waters of the two States.

3. Ukrainian practice and statements outside the present proceedings further confirm the internal waters status

107. Ukraine insists that its practice has been consistent in rejecting the internal waters status of the Sea of Azov and the Kerch Strait.[204] That is not correct.

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[198] 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, p. 2 (**UA-520**): "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*" (emphasis added); 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 (**UA-521**): "The Ukrainian side reaffirmed its position expressed in the course of preliminary meetings regarding the need to *delimit the state border in the Sea of Azov*" (emphasis added); 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, p. 2 (**UA-522**): "The Ukrainian side believes that *delimitation of the state border in the Sea of Azov* would not change the status of internal waters" (emphasis added).

[199] Draft Treaty between Ukraine and the Russian Federation on Ukraine-Russia State Border in the Sea of Azov, transmitted by *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, No. 72/22-410-831, 16 February 2004 (**RU-76**).

[200] See *Notes Verbales* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, No. 72/22-410-96, 17 January 2007, and No. 72/22-410-3380, 6 November 2007 (**RU-77**).

[201] See the Law of the Russian Federation No. 4730-1, "On the State Border of the Russian Federation", 1 April 1993, Article 1 ("The State Border of the Russian Federation … is a line and a vertical plane going along this line, determining the limits of the state territory (land, water, subsoil and airspace) of the Russian Federation, i.e., the spatial limit of the state sovereignty of the Russian Federation") (**RU-59**); Law of Ukraine No. 1777-XII "On the State Border of Ukraine", 4 November 1991, Article 1 ("The State Border of Ukraine is a line and a vertical plane along that line, which define the limits of the territory of Ukraine – land, waters, subsoil, airspace.") (**RU-58**).

[202] UWO, para 67.

[203] See Draft Treaty between Ukraine and the Russian Federation on Ukraine-Russia State Border in the Sea of Azov (**RU-76**).

[204] UWO, para. 88.

108. Russia has already given several examples of Ukrainian statements that undermine the position that Ukraine has adopted in these proceedings.[205] One notable example is the Note Ukraine sent to the Russian Federation on 29 July 2015.[206] As recalled in Russia's Preliminary Objections,[207] in that Note Ukraine drew Russia's attention to the fact that, in accordance with the current bilateral agreements, "the Sea of Azov and the Kerch Strait are historically defined as internal waters of Ukraine and Russia."[208] In the Note, Ukraine invokes the internal waters status as the current status of the waters of the Sea of Azov and of the Kerch Strait, and refers to the "applicable bilateral agreements" as concerning the current status of these waters. There is no trace of the suggestion, now put forward by Ukraine, that such status belongs only to the historical past and does not concern the current situation.[209] The Ukrainian Written Observations do not attempt to explain the compatibility of the statement in the Note with the position it holds in the present dispute against the internal waters status of the Sea of Azov and the Kerch Strait.

109. Russia has also referred to the Ukrainian practice establishing compulsory pilotage in the Kerch Strait which confirms the internal waters status of the Sea of Azov; such establishment in straits regulated by UNCLOS has raised protests, while no protests have been raised in this case.[210] Ukraine's attempt to refute that point is buried in a footnote and comes to the weak conclusion that "Ukraine's pilotage scheme was *not necessarily* inconsistent with UNCLOS".[211] The fact that the establishment of compulsory pilotage in straits covered by UNCLOS prompted objections, while the Ukrainian compulsory pilotage in the Kerch Strait did not, cannot be explained by the existence of environmental risks involved in the passage (which appear to exist also in the Kerch Strait). Rather, it was the preservation of the UNCLOS regime that was the cause of the protest, and the non-applicability of that regime to the Kerch Strait explains the lack of protests.

110. In its Written Observations Ukraine maintains that "both before and after the Sea of Azov Treaty, Ukraine did not in practice treat the Sea of Azov and Kerch Strait as 'common

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[205] RPO, paras. 106-112.
[206] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 610/22-110-1132, 29 July 2015 (**UA-233**).
[207] RPO, para. 111.
[208] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 610/22-110-1132, 29 July 2015 (**UA-233**).
[209] UWO, para. 81.
[210] RPO, paras. 107-108.
[211] UWO, fn. 141 (emphasis added).

internal waters.'"[212] Apart from a baseless invocation of transit passage in the Kerch Strait in a couple of diplomatic notes,[213] other examples of practice cited by Ukraine clearly demonstrate that Ukraine did not contest the internal waters status of relevant maritime areas. The only point that emerges from these examples is that, contrary to the preceding bilateral agreements, Ukraine insisted that the Sea of Azov and the Kerch Strait consisted of "Ukrainian internal waters" and "Russian internal waters". Such an understanding, though not shared by Russia, would not in any case make the UNCLOS regime of territorial seas, EEZs and continental shelves applicable to this maritime area.

111. Ukraine incorrectly asserts that Russia on one occasion claimed "territorial waters" in the Sea of Azov and the Kerch Strait quoting a letter from a Prosecutor of the region of Krasnodar Krai to a Ukrainian Consul.[214] With reference to the above-mentioned incident the Ministry of Foreign Affairs of Russia sent a Note to the Ministry of Foreign Affairs of Ukraine that in fact disavowed the statement by the regional prosecutor. In its Note Russia emphasized that the arrest of Ukrainian fishermen by Russian law-enforcement authorities for "overt and blunt" violation of the fishing rules was without prejudice to the "principled position of the Russian Side both on the status of the Sea of Azov and on fishing in its waters."[215] Furthermore, Ukraine considered measures taken by Russian authorities "as a violation of the agreements by the Presidents of Ukraine and the Russian Federation on defining the status of the Sea of Azov as internal waters of both States". In its Note of 8 August 2000 Ukraine insisted on "rigorous respect by the Russian Side of the agreements reached in relation to the status of the Sea of Azov."[216]

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[212] UWO, para. 86.

[213] In response to these notes, the Ministry of Foreign Affairs of Russia sent a *Note Verbale* to the Ministry of Foreign Affairs of Ukraine No. 7179/2dsng, 2 October 2001, rejecting Ukraine's reference to Article 41 of UNCLOS "first, since negotiations concerning the status of the Azov–Kerch water area have not been completed yet, and, secondly, since there is a mutual understanding between the Russian and Ukrainian Sides that solutions are to be found without invoking the above-mentioned Convention" (**RU-72**).

[214] UWO, fn. 149.

[215] *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine No. 2935/2dsng, 15 April 2000 (**RU-64**).

[216] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, No. 5.3/42165/SBS/079-00, 8 August 2000 (**RU-66**).

112. There are other, more recent, examples of Ukrainian practice based on the recognition that currently the waters of the Sea of Azov and of the Kerch Strait are internal waters:

(a) The Decree of the President of Ukraine No. 320/2018 of 12 October 2018, as mentioned above,[217] refers to the Sea of Azov as the internal waters of Ukraine and Russia.

(b) The Law of Ukraine No. 2630-VIII approving the Decree of the President of Ukraine No. 393 of 26 November 2018 on the imposition of martial law in Ukraine, provides that martial law will apply to certain regions of Ukraine and "in the *internal waters* of Ukraine in the Azov-Kerch water area."[218]

(c) On 8 December 2018, in a televised interview, the President of Ukraine, Mr. Poroshenko, "referred to the bilateral Ukrainian-Russian agreement, which specifies the special status of the Kerch Strait and the Sea of Azov." [219] "This is both Ukrainian and Russian waters – both the Kerch Strait and the Azov Sea".[220]

C. THE RECOGNITION OF THE COMMON INTERNAL WATERS STATUS OF THE SEA OF AZOV AND OF THE KERCH STRAIT DOES NOT PREJUDICE THIRD STATES

113. In Ukraine's view any "arrangement" for a common internal waters regime for the Sea of Azov and the Kerch Strait "would be prejudicial to third States."[221] This view is predicated on the premise that the internal waters regime would be the result of an "arrangement"[222] between the Parties, so that third States would be deprived of the freedom of navigation and transit passage rights they would have if the waters in question were regulated by UNCLOS.

114. This premise is unfounded. The current internal waters regime does not depend on an arrangement or agreement; the relevant waters have never been a strait regulated by UNCLOS, but have consistently been classified as internal waters, as confirmed by the Parties in the

[217] See above, para. 51.
[218] Law of Ukraine No. 2630-VIII on Approval of the Decree of the President of Ukraine No. 393 "On Imposition of Martial Law in Ukraine", 26 November 2018 (**RU-82**) (emphasis added).
[219] President of Ukraine official website, "Russia is opposed to the whole world, blocking the freedom of navigation in the Ukrainian territorial waters – President in the interview to Fox News", 8 December 2018, available at: https://www.president.gov.ua/en/news/rosiya-protistoyit-vsomu-svitu-blokuyuchi-svobodu-sudnoplavs-51902 (**RU-85**).
[220] Interview of P. Poroshenko to Fox News, 8 December 2018, available at: https://youtu.be/5lQUeQWJXUc (**RU-84**).
[221] UWO, para. 89.
[222] *Ibid*.

agreements referred to in Section B above. Third States currently are subject to the regime inherent in the internal waters status of the Sea of Azov and the Kerch Strait and to nothing more. The acceptance of the Ukrainian contention that in the Sea of Azov there are territorial seas and exclusive economic zones and that in the Kerch Strait the right of transit passage applies would have the effect of increasing third States' rights and diminishing those of Russia and Ukraine.

115. It is important to reiterate that the treatment of the Sea of Azov and the Kerch Strait by Russia and Ukraine as their common internal waters has never provoked protests from third States, as was the case, for instance, when Cambodia and Vietnam made a claim[223] to consider certain areas in the Gulf of Thailand as their shared "historic waters".[224]

116. The recent statements of the European Commission and Parliament, and from the Foreign Ministries of the United States and Turkey, on which Ukraine relies to argue that "the international community has not acquiesced in a 'common internal waters' status"[225] are clearly politically inspired. The terms used show that they are based on the misapprehension that, up to very recently, freedom of navigation in the Sea of Azov and "freedom of transit" in the Kerch Strait applied and that the Russian practice of inspection of vessels entering or exiting the Sea of Azov has violated these freedoms. As explained by Russia in a Statement of the Ministry of Foreign Affairs of 21 November 2018:

> "The Sea of Azov is the internal waters of Russia and Ukraine, where only Russian and Ukrainian vessels enjoy the freedom of navigation. The Kerch Strait is not and has never been an international waterway as per the spirit of the UN Convention on the Law of the Sea (1982), and therefore any claims concerning the right of transit or innocent passage for foreign vessels are inapplicable in the strait."[226]

117. The Resolution of the European Parliament of 25 October 2018 on the Situation in the Sea of Azov (2018/2870(RSP)) also relied upon by Ukraine correctly states in its preamble that "the bilateral agreement of 2003 between Ukraine and Russia … defines these territories as

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[223] Agreement on the Historical Waters of the Socialist Republic of Vietnam and the People's Republic of Kampuchea, 7 July 1982 (**RU-55**).
[224] See e.g. the Statement by the Ministry of Foreign Affairs of Thailand on the Vietnamese claims concerning the so-called historical waters and the drawing of baselines, 9 December 1985, *Law of the Sea Bulletin*, 1986, Vol. 7, p. 111 (**RU-56**): "the Government of Thailand is of the view that such claims cannot be justified on the basis of the applicable principles and rules of international law"; see also the Note of the Permanent Representative of the United States to the United Nations, *Law of the Sea Bulletin,* 1987, Vol. 10, p. 23 (**RU-57**).
[225] UWO, paras. 92-93.
[226] Statement of the Ministry of Foreign Affairs of the Russian Federation, No. 2215-21-11-2018, 21 November 2018 (**RU-81**).

internal waters of the two states and gives both parties the power to inspect suspicious vessels", but subsequently erroneously (and without any reference) asserts that the 2003 agreement provides for the freedom of navigation.[227] As a matter of fact, under Article 2 of the Azov/Kerch Cooperation Treaty, the regime of navigation of foreign vessels in the Sea of Azov and in the Kerch Strait does not correspond to, and is less liberal than, those of freedom of navigation and of transit passage as set out in UNCLOS.[228]

118. Indeed, the Agent of Ukraine in the present case, in her capacity of Deputy Minister of Foreign Affairs, is reported making, at a meeting of Ukrainian ambassadors in August 2018, a statement in which she concedes that Russia's actions in the Sea of Azov are legitimate:

> "[S]he stated that the actions of Russia in the Sea of Azov did not contradict the 'canons of international law of the sea' since the detention of ships by Russians 'does not exceed a reasonable time' and 'there are no complaints from captains and shipowners.' In her opinion, the 'question of Azov' is 'an artificially created aggravation in the information field'".[229]

V. Ukraine has acknowledged the existence of historic title over the Sea of Azov

119. Ukraine argues that the Russian contention that the Sea of Azov and the Kerch Strait should be considered as a historic bay and as an area subject to historic title within the meaning of Article 298(1)(a)(i) of UNCLOS fails because, in its view, Russia's premise that the waters of the Sea and Strait are internal waters is incorrect.[230] But, as amply demonstrated in Russia's Preliminary Objections[231] and in the present Reply, this is not the case. Consequently, the argument based on the historic origin of the present internal waters status of the Sea of Azov and of the Kerch Strait is maintained.

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[227] The European Parliament, Resolution on the Situation in the Sea of Azov (2018/2870(RSP)), 25 October 2018, preamble, para. A (**UA-544**).

[228] Azov/Kerch Cooperation Treaty, Article 2 (**UA-19**): "1. Trade vessels and military ships, as well as other government vessels under the flag of the Russian Federation or Ukraine, that are used for non-commercial purposes shall enjoy free passage in the Sea of Azov and the Kerch Strait. 2. Trade vessels under the flags of third states may enter the Sea of Azov and pass through the Kerch Strait if they are bound for or returning from a Russian or Ukrainian port. 3. Military ships and other government vessels of third states that are used for non-commercial purposes may enter the Sea of Azov and pass through the Kerch [Strait] if they are making a visit or business call to a port of one of the Parties at its invitation or with its permission, approved by the other Party."

[229] As reported by Ukrainian Ambassador V. Vasilenko quoted in "Is it worth terminating the Azov Treaty with Russia – opinions of intellectuals and experts", *Segodnya.ua,* 25 September 2018, available at https://www.segodnya.ua/ukraine/stoit-li-razryvat-dogovor-po-azovu-s-rossiey-mysli-intellektualov-i-ekspertov-1173717.html (**RU-79**).

[230] UWO, paras. 94-96.

[231] RPO, paras. 81-105.

120. Further, Russia noted that Ukraine has implicitly acknowledged the existence of historic title over the Sea of Azov by making a declaration under Article 298(1)(a)(i) which encompasses "disputes involving historic bays or titles."[232] Russia remarked that "[t]here would be no point for Ukraine, which has no other historic bay, to exclude such disputes unless it considered that the Sea of Azov and Kerch Strait had that status."[233] In its Written Observations Ukraine claims that in its declaration it was simply paraphrasing Article 298(1)(a)(i) and that its "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."[234] But why would a State make a declaration that, as regards historic bays and titles, would be without any possible effect? It would not, and the position must be that Ukraine made that declaration because it considered that the Sea of Azov and the Kerch Strait were indeed subject to rights of historic title.

121. Moreover, both Parties in the Azov/Kerch Cooperation Treaty and in the Presidents' Joint Statement of 2003 have confirmed their common view that the current internal waters status of the Sea of Azov and the Kerch Strait has been held "historically", i.e. its current status as internal waters has its roots in history and is a historic title.[235]

VI. Russia's preliminary objection to Ukraine's claims pertaining to the Sea of Azov and the Kerch Strait has an exclusively preliminary character

122. While insisting that Russia's preliminary objection concerning Ukraine's claims pertaining to the Sea of Azov and the Kerch Strait "can be rejected now", the Written Observations submit a subsidiary argument, namely that consideration of these claims could be deferred "to the merits stage of proceedings."[236] The reason would be that these objections, under Article 10(4) of the Rules of Procedure, would not be of an "exclusively preliminary character" because "answering the preliminary objection would determine the dispute, or some element thereof, on the merits."[237]

[232] RPO, para. 8 containing the text of the declaration.
[233] RPO, para. 178.
[234] UWO, para. 96.
[235] O. Gorbun, *The Status of the Kerch Strait*, Master Thesis, Mykolas Romeris University Faculty of Law, 2018, p. 50 (**RUL-77**), concludes that: "there is no doubt that the Sea of Azov and the Kerch Strait are historic waters of two states – Ukraine and Russia."
[236] UWO, para. 97.
[237] *Ibid.*, quoting *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 852, para. 51 (**UAL-66**).

123. The Tribunal has already decided that this is not the case in its Procedural Order No. 3. In paragraph 1 of the operative part the Tribunal stated:

> "The Arbitral Tribunal considers that the Preliminary Objections of the Russian Federation appear at this stage to be of a character that requires them to be examined in a preliminary phase".[238]

124. Ukraine relies, however, on the following operative paragraph 2 of Procedural Order No. 3 that establishes that:

> "If the Arbitral Tribunal determines after the closure of the preliminary phase of the proceedings that there are Preliminary Objections that do not possess an exclusively preliminary character, then, in accordance with Article 10, paragraph 8, of the Rules of Procedure, such matters shall be reserved for consideration and decision in the context of the proceedings on the merits."[239]

125. However, in adopting Procedural Order No. 3, the Tribunal had before it an abundance of materials on which to base its decision. Those materials consisted in Ukraine's Memorial, Russia's Preliminary Objections, as well as detailed letters sent to it by both Ukraine and Russia in which the Parties presented their arguments against and, respectively, in favour, of examining Russia's objections in a separate preliminary phase of the proceedings.[240]

126. In Russia's view there is nothing in Ukraine's Written Observations that somehow changes the basis on which the Tribunal decided to consider separately Russia's Preliminary Objections. There is thus no reason for the Tribunal to apply paragraph 2 of the operative part of Procedural Order No. 3.

127. It is recalled that the Preliminary Objections' purpose is to determine the jurisdiction of the Tribunal, and, more specifically, the scope of Russia's consent to jurisdiction. In order to ascertain to which disputes Russia's consent to compulsory jurisdiction under UNCLOS extends, it is necessary to determine whether any disputes concern the interpretation or application of the Convention. In doing so, the Tribunal would not apply the Convention to any set of facts, and thus enter into the merits, but simply determine its scope in order to avoid

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[238] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, Procedural Order No. 3 Regarding Bifurcation of the Proceedings, p. 5, para. 1.

[239] *Ibid*., para. 2.

[240] See Comments of Ukraine on the Russian Federation Request for Bifurcation, 18 June 2018; the Russian Federation's Comments on Ukraine's Letter of 18 June 2018, 4 July 2018.

that a Party should have to "give an account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter, or whose jurisdiction has not yet been established."[241]

[241] *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 56, para. 18(b) (**RUL-50**).

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CHAPTER 4
UKRAINE'S CLAIMS IMPLYING SEA BOUNDARY DELIMITATIONS ARE EXCLUDED FROM THE TRIBUNAL'S JURISDICTION BY ARTICLE 298(1)(A) OF UNCLOS

128. As already indicated in the Introduction of the present Reply,[242] Russia's objections concerning fisheries and law enforcement activities pursuant to Articles 297(3)(a) and 298(1)(b) will not be repeated here since Ukraine fails to address the scope and applicability of these automatic limitations and optional exceptions to binding settlement.

129. The case law relied upon by Ukraine in its Written Observations – especially the *Philippines v. China* arbitration[243] – is the same as that mentioned in Russia's Preliminary Objections.[244] Ukraine however partially quotes the relevant passages of the Awards, without addressing Russia's arguments, incorrectly asserting that the Tribunal does have jurisdiction. As already explained by Russia,[245] the starting assumptions in the *Philippines v. China* arbitration and in the present case are reversed and must thus lead to an opposite conclusion: since here the allocation of rights under the Convention is far from being unequivocal and the relevant areas cannot "only" constitute the EEZ and continental shelf of the Applicant, but involve at the very least potentially overlapping entitlements, Articles 297 and 298 prevent the Tribunal from addressing Ukraine's claims.

130. This being said, the present Chapter will focus on the "delimitation objection" pursuant to Article 298(1)(a) – while Chapter 5 will address the objection based on military activities which are excluded from the Tribunal's jurisdiction by paragraph 1(b) of the same Article. Russia maintains that, in order to determine Ukraine's case, the Tribunal would need to delimit the Parties' overlapping claims and entitlements, applying Articles 15, 74 and 83, the application of which is excluded by that provision.

131. As conceded by Ukraine, Article 298(1)(a)(i) must be given effect if "this case requires the Tribunal to interpret or apply Articles 15, 74, or 83 in connection with the delimitation of two overlapping areas of entitlement."[246] Ukraine also concedes that Russia would be correct in asserting the existence of overlapping entitlements if it could claim entitlements extending

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[242] See above, para. 8.
[243] UWO, paras. 105 (on Article 297(3)(a)), 107 (on Article 298(1)(b)) and 114 (on delimitation).
[244] See RPO, paras. 184, 149-150, 170-172.
[245] See RPO, paras. 185, 151, 173.
[246] UWO, para. 115.

from the coast of Crimea.[247] Russia does indeed consider that it has entitlements extending from the coast of Crimea, but that is not a matter for this Tribunal to rule upon. And while it is true that "Ukraine has not asked this Tribunal to delimit its territorial sea, exclusive economic zone, or continental shelf pursuant to Articles 15, 74, or 83",[248] the Tribunal simply *cannot* decide on Ukraine's case if it does not know first in which territorial sea, EEZ or continental shelf the relevant activities took place; to that end, it would need to apply Articles 15, 74, or 83 from the Crimean (Russian) baselines. This alone establishes that this Tribunal has no jurisdiction.

132. According to Ukraine, the authorities on which Russia relies in its Preliminary Objections in support of its interpretation of Article 298(1)(a)(i) "address language different from what appears in [that] Article".[249] Russia maintains that these authorities clarify precisely the meaning of the expressions "disputes concerning" and "disputes relating to".[250] Russia will therefore not repeat them here. Rather, it refers to an additional and most recent authority which addresses Article 298(1)(a)(i) specifically, and supports its interpretation of that Article: the *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*. In that case, Australia objected to the requests by Timor-Leste asking the Conciliation Commission to assist the Parties not only "to reach an agreement on the delimitation of permanent maritime boundaries" but also "to agree on appropriate transitional arrangements in the disputed maritime areas" and to find "the optimal way to come to a mutual position on dissolving the joint institutions and arrangements found in those provisional arrangements, and moving on."[251] Australia argued that

> "this amounted to an attempt to expand the competence of the Commission to include issues that are, in Australia's view, 'outside the notification by Timor-Leste which commenced the proceedings' and 'outside Article 298 of UNCLOS, because they do not concern the matters in that article.'"[252]

But the Commission found that:

> "*It is apparent from an examination of [Articles 15, 74 and 83] of the Convention that they address not only the actual delimitation of the sea boundary between States* with

[247] UWO, para. 118.
[248] UWO, para. 116.
[249] UWO, para. 112.
[250] RPO, paras. 158-160.
[251] *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia,* Decision on Australia's Objections to Competence, 19 September 2016, para. 93 (**RUL-76**).
[252] *Ibid.*, para. 94 (footnote omitted).

> opposite or adjacent coasts, but also the question of the transitional period pending a final delimitation and the provisional arrangements of a practical nature that the Parties are called on to apply pending delimitation. The Commission does not, therefore, see that Timor-Leste's request that the Commission also consider transitional arrangements, or the arrangements that the Parties may enter into following the termination of CMATS, lies outside the scope of Articles 74 and 83 or, correspondingly, of Article 298(1)(a)(i)."[253]

133. In doing so, the Commission interpreted the term "disputes concerning the interpretation or application of articles 15, 74 and 83" as not being confined to disputes over the actual maritime boundary delimitation itself; they also cover questions implying a determination based on these Articles.

134. Moreover, if, as Ukraine argues, the phrase "relating to sea boundary delimitations" "simply indicates that the three articles in question (*i.e.*, Articles 15, 74, and 83) all 'relate to' delimitation" as stipulated in their respective titles[254] and "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",[255] the phrase in question ("relating to") would only state the obvious and be left without any *effet utile*. Yet, according to the principle of effectiveness of interpretation (*ut res magis valeat quam pereat*), this phrase must *add* something,[256] especially since the language of "sea boundary delimitations" is only found in Article 298(1)(a) and not elsewhere in the Convention.

135. An interpretation of Article 298(1)(a)(i) that fails to give full effect both to its language and to a State's declaration made in accordance thereof defeats their object and purpose as well as the careful and well-designed balance struck by the Convention between States' sovereignty and compulsory procedures.[257] The scant normative and descriptive criteria in the Convention

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[253] *Ibid*., para. 97 (emphasis added).
[254] UWO, para. 113 and fn. 186.
[255] UWO, para. 113.
[256] *Free Zones of Upper Savoy and the District of Gex, (France v. Switzerland), Order of 19 August 1929, P.C.I.J. Series A, N° 22*, p. 13 (**RUL-44**). See also *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment of April 9th, 1949: I.C.J. Reports 1949*, p. 24 (**UAL-15**); *Territorial Dispute (Libyan Arab Jamahiriya/Chad*), *Judgment, I.C.J Reports 1994*, p. 23 (**RUL-58**); *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, para. 40 (rule E) (**RUL-55**) or *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 50 (**RUL-66**). See also the definition given by C. Calvo as early as 1885: « *Si l'ambiguïté ou l'obscurité, au lieu de porter seulement sur les mots, s'étend à une ou à plusieurs clauses, il faut interpréter ces clauses dans le sens qui [peut] leur faire sortir leur effet utile, et en faveur de celui au profit de qui l'obligation a été souscrite* », *Dictionnaire manuel de diplomatie et de droit international public et privé*, 1885, republished by The Lawbook Exchange Ltd., 2009, p. 223 (**RUL-42**).
[257] See RPO, paras. 135 and 156.

with respect to maritime delimitation – and historic bays and titles for that matter – coupled with the critical importance of the stakes involved in maritime territorial issues would have rendered acquiescence to compulsory procedures unacceptable without the inclusion of an optional exception[258] and a restrictive interpretation of it may lead parties to distrust such procedures.

136. This interpretation is in conformity with the "General Rule of Interpretation" embodied in Article 31 of the 1969 Vienna Convention on the Law of Treaties, on the ordinary meaning of the terms of Article 298(1) of UNCLOS "in their context and in the light of its object and purpose".

[258] See notably M. Nordquist (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. V, Nijhoff, 1989, pp. 109-110, para. 298.2 (quoted in RPO, para. 135) (**RUL-14**); Third United Nations Conference on the Law of the Sea, Seventh and Resumed Seventh Session, Reports of the Committees and Negotiating Groups on negotiations at the resumed seventh session contained in a single document both for the purposes of record and for the convenience of delegations, *Official Records*, Vol. X, A/CONF.62/RCNG/1, 19 May 1978, pp. 116 and 125 (**RU-53**); Third United Nations Conference on the Law of the Sea, Ninth session, *Official Records*, Vol. XIII, 126th Plenary Meeting, 2 April 1980, A/CONF.62/SR.126, p. 18, para. 110 (USSR) (**RU-10**).

CHAPTER 5
UKRAINE'S CLAIMS CONCERNING MILITARY ACTIVITIES ARE EXCLUDED FROM THE TRIBUNAL'S JURISDICTION BY ARTICLE 298(1)(B) OF UNCLOS

137. Ukraine rightly notes that "Russia has not acknowledged military involvement" in the events complained of,[259] and Russia categorically rejects any allegation that it has engaged in unlawful military activities. But this is not the question; what matters is what Ukraine's claim really involves. Ukraine's case comes down to a claim that Russia has taken Crimea through unlawful use of force and, for the reasons elaborated below, the dispute is excluded from the Tribunal's jurisdiction by Article 298(1)(b).

138. As the Agent of Russia underlined in his letter to the Tribunal of 4 July 2018,[260] it is because Ukraine has made express and specific allegations of acts of military aggression and unlawful use of force that Russia has raised a jurisdictional objection with respect to the Parties' declarations pursuant to Article 298(1). These serious accusations made in Ukraine's Statement of Claim and in its Memorial, as well as in contemporaneous official statements,[261] are repeated in the introduction to its Written Observations.[262] Ukraine is now seeking to raise spectres of complexity whereas the true position is that, in order to decide on the Preliminary Objections, the Tribunal needs merely to read Ukraine's initial claims and pleadings and assess its jurisdiction by reference to the rules set out in Articles 288, 297 and 298. As is well-known the Tribunal "cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character".[263]

[259] UWO, para. 130.
[260] At para. 26.
[261] See *e.g.*: Statement of Claim, para. 4. See also notably *ibid*., paras. 2, 42, 43; UM, paras. 4, 83, 102, 169, 231; Statement of the Delegation of Ukraine at the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, 20 February 2018 (**RU-49**); Ministry of Foreign Affairs of Ukraine official website, "Statement of the Ministry of Foreign Affairs of Ukraine on the Initiation of Arbitration against the Russian Federation under the United Nations Convention on the Law of the Sea", 14 September 2016 (**RU-44**); President of Ukraine official website, "President instructed Foreign Ministry to file a lawsuit against Russia to international arbitration", 14 September 2016 (**RU-45**).
[262] See UWO, para. 6. See also notably para. 49.
[263] *Société commerciale de Belgique, Judgment of 15 June 1939, P.C.I.J., Series A/B, No. 78,* p. 173 (**RUL-46**); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 427, para. 80 (**UAL-78**). See also *Prince von Pless Administration, Order of 4 February 1933, P.C.I.J. Series A/B, No. 52*, p. 14 (**RUL-45**); *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 266-267, para. 69 (**RUL-56**).

139. Yet, having itself already made the allegations and characterisations relevant to Article 298(1)(b), Ukraine suddenly offers a truncated version of its former position. On the one hand, it invokes General Assembly resolution 68/262 to argue that Russia's claim to sovereignty over Crimea is in breach of the prohibition on the use of force.[264] On the other hand, it affirms that the dispute is "not about any instance in which Russia has used force"[265] but that its allegations are purely on civilian matters.[266] Ukraine cannot have it both ways. If the Tribunal were to reject the preliminary objection as to sovereignty accepting Ukraine's allegation that Russia unlawfully used force (*quod non*), it would then necessarily have to admit that the case involves military activities and is thus outside its jurisdiction pursuant to the declarations made under Article 298(1)(b).

140. In accordance with their ordinary meaning, military activities are simply any activity conducted by the armed forces of a State or paramilitary forces. Military activities span a vast spectrum of naval missions, ranging from – *inter alia* – provision of humanitarian aid and disaster relief to military exercises, engagement, and manoeuvres, maritime law enforcement, such as counter-drug operations and migrant interdiction, maritime security operations as well as strategic deterrence patrols. Argentina's withdrawal of its optional exceptions in 2012 – mere days before initiating arbitration over Ghana's seizure of the warship *ARA Libertad* – suggests its concern that even the goodwill visit at the heart of that incident could qualify as a military activity. More generally, aggression, invasion, occupation and annexation by the use of force – each term being used by Ukraine[267] – also qualify as military activities. As underlined by Professor Natalie Klein,

> "it is clear that a dispute arising out of the context of an armed conflict will fall under [the military activities] exception. Such a characterization would only be avoided if, for example, States pointed to failures to cooperate in respect of fishing conservation, denying passage, or unlawfully suspending marine scientific research as violations of the Convention *without citing the conflict as possible reason for this alleged transgression*."[268]

141. While Ukraine is indeed asserting alleged violations of its economic, navigational, environmental, and cultural rights under UNCLOS, it cites Russia's alleged unlawful use of

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[264] See e.g. UWO, paras. 5, 27, 30.
[265] See e.g. UWO, para. 122.
[266] See e.g. UWO, para. 136.
[267] See RPO, para. 140.
[268] N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge University Press, 2005, p. 285 (**RUL-65**) (emphasis added).

force as the starting point of the dispute and the reason why its maritime jurisdiction must be upheld.[269] The Tribunal simply *cannot* rule on Ukraine's claims – i.e. on the exclusion from "its" maritime areas, exploitation of "its" maritime resources and usurpation of "its" rights – without prejudging the legality of the so-called annexation. It *is* precisely "the actual subject of the dispute", in spite of Ukraine's assertion to the contrary,[270] and it is the Tribunal's "duty to isolate" it.[271]

142. Such an interpretation is not "overly" broad. Ukraine attempts to argue that "[t]he *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.'"[272] However, it must be recalled that the *Southern Bluefin Tuna* Award on Jurisdiction admitted that "UNCLOS falls significantly short of establishing a truly comprehensive regime".[273] Further, there is actually widespread agreement that issues concerning military activities must not be interpreted restrictively.[274] The minimal substantive regulations under UNCLOS, along with the optional exclusion covering military activities, are indicative of an intention "to retain considerable flexibility in the military uses of the oceans and thereby allow States to pursue their assorted strategic objectives"[275] as well as

> "of a preference on the part of States not to use compulsory third-party procedures for resolving disputes about military activities. The optional exclusion is beneficial to naval powers not wishing to have their military activities questioned through an international process. [… It] is also beneficial to coastal States that could use the exception to prevent review of any of their interference with naval exercises in their EEZ. The deliberate obfuscation of rights and duties in different maritime areas provides States with considerable leeway in deciding what actions to take and how certain disputes should

[269] See above, para. 139.
[270] UWO, paras. 121, 125.
[271] *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974,* p. 466, para. 30 (**RUL-51**); see also *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand v. France) *Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 304, para. 55 (**RUL-60**); *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, paras. 30-31 (**RUL-22**); *Mauritius v. UK*, para. 208 (**UAL-18**). See RPO, para. 5.
[272] UWO, para. 127.
[273] *Southern Bluefin Tuna (Australia and New Zealand v. Japan),* Award on Jurisdiction and Admissibility, 4 August 2000, *UNRIAA*, Vol. XXIII, p. 45, para. 62 (**RUL-24**), quoted at RPO, para. 182.
[274] See notably S. Talmon, "The South China Sea Arbitration: Is There a Case to Answer?", in S. Talmon and Bing Bing Jia (eds.), *The South China Sea Arbitration: A Chinese Perspective*, Hart Publishing, 2014, pp. 57-58 (**RUL-73**); N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge University Press, 2005, pp. 285-286, 291-292 (**RUL-65**); J. King Gamble Jr, "The Law of the Sea Conference: Dispute Settlement in Perspective", *Vanderbilt Journal of International Law*, 1976, Vol. 9, No. 1, pp. 323, 331 (**RUL-52**).
[275] N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge University Press, 2005, p. 286 (footnote omitted) (**RUL-65**).

> be resolved. The intention of the States parties is respected through Article 298 in this regard. Permitting 'military activities' to be excluded from compulsory dispute settlement reinforces the versatility allowed for this issue: 'It is obvious that States can define military matters as broadly as they wish.'[276] Such choices can be made in accordance with strategic policies and protects States from formal international review through legal processes if they so elect."[277]

143. Russia does not bear the burden of proving that Ukraine's claims concern military activities. Affirming the contrary as Ukraine does[278] is both legally wrong and against common sense. As the ICJ underlined on several occasions,

> "the establishment of the Court's jurisdiction … is a 'question of law to be resolved in the light of the relevant facts' (*Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 76, para. 16).
> 38. That being so, there is no burden of proof to be discharged in the matter of jurisdiction."[279]

144. Ukraine's argument amounts to saying that Russia must prove what it is accused of, which would be absurd. It is also contrary to the position in the *Philippines v. China* arbitration; China did not invoke the optional exception for disputes concerning military activities – therefore neither acknowledging nor proving its military involvement – and yet that exception was held to apply to the Philippines' submission concerning Chinese challenged activities at Second Thomas Shoal. Those activities consisted of the Chinese Government (non-military) vessels attempting "to prevent the resupply and rotation of the Philippine troops on at least two occasions", this representing, according to the Tribunal, "a quintessentially military situation" therefore falling "well within the exception" envisaged in Article 298(1)(b).[280]

145. On the other hand, the construction activities on the reefs in the Spratly Islands were not deemed by the Tribunal to be military because China "consistently and officially resisted such classifications and affirmed the opposite at the highest levels".[281] This is the only reason leading to the rejection of the 298(1)(b) jurisdictional exception. The Tribunal's finding in this specific context is wrongly relied upon by Ukraine in its attempt to prove that involvement of

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[276] Fn. 287 in the original: J. King Gamble Jr, "The Law of the Sea Conference: Dispute Settlement in Perspective", *Vanderbilt Journal of International Law*, 1976, Vol. 9, No. 1, at p. 331 (**RUL-52**).
[277] N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge University Press, 2005, p. 291-292 (**RUL-65**).
[278] UWO, para. 130.
[279] See *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 450-451, paras. 37-38 (**RUL-22**).
[280] *Philippines v. China,* Award, 12 July 2016, para. 1161 (**UAL-11**), quoted in full in RPO, para. 139.
[281] *Ibid*., para. 938.

military forces is insufficient to trigger the exception.[282] All this shows is that a respondent can elect not to invoke the exception which is, after all, simply an option offered to it. In the present case, Russia, while denying that it unlawfully used military force, has explicitly and formally invoked the exception since Ukraine's case turns on and is rooted in allegations of military action.[283]

146. In addition, Ukraine has incorrectly paraphrased the *Philippines v. China* Award when it further argues that, in dealing with the "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": [284] in this passage, the Tribunal was exclusively dealing with the issue of "*aggravation* of the dispute"[285] and not with the dispute *per se* as originally submitted to it. In the present case, the original dispute is over alleged military actions to which Article 298(1)(b) applies.[286]

147. In light of the above, the correct characterisation of the activities is a discrete issue that can be determined at a preliminary phase contrary to Ukraine's argument based on the decision of the *Philippines v. China* Tribunal to join an apparently comparable issue to the merits.[287] However, it must be underlined again that in that case, China chose not to avail itself of the exception of Article 298(1)(b), thus allowing the Tribunal some leeway to delve into the facts. On the contrary, in the present case Russia is firmly invoking its right to contest the jurisdiction of the Tribunal on this basis. If the Tribunal were to decide to subject the activities to closer scrutiny, the whole purpose of the military activities exception would be defeated.

[282] UWO, para. 135.
[283] See above, para. 138.
[284] UWO, para. 135 referring to *Philippines v. China,* Award, 12 July 2016, para. 1159 (**UAL-11**).
[285] *Philippines v. China,* Award, 12 July 2016, para. 1159 (**UAL-11**) (emphasis added).
[286] See above, para. 138.
[287] See UWO, para. 139 relying on *Philippines v. China*, Award on Jurisdiction and Admissibility, 29 October 2015, paras. 395-396 and 411 (**UAL-3**).

148. For its part, the Tribunal in the *Arctic Sunrise Arbitration* acknowledged, in its Award on Jurisdiction, its duty to

> "determine whether the present dispute falls within the scope of the exception that is set out in article 298(1)(b) of the Convention".[288]

149. It stems from the above that:

(a) Ukraine has elected to denounce Russia's alleged unlawful use of force and occupation of Crimea in both its Statement of Claim and its Memorial, and it cannot now retract these allegations;

(b) These claims concerning military activities are at the very heart of the dispute brought by Ukraine before this Tribunal and the Tribunal would necessarily have to decide on these allegations;

(c) Article 298(1)(b) of UNCLOS and Russia's declaration therefore exclude the Tribunal's jurisdiction in this case.

[288] *The Arctic Sunrise Arbitration (Netherlands v. Russia),* Award on Jurisdiction, 26 November 2014, para. 73 (**RUL-37**).

CHAPTER 6
AN ANNEX VIII TRIBUNAL IS THE PROPER FORUM FOR UKRAINE'S CLAIMS RELATING TO FISHERIES, PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT AND NAVIGATION

150. This Tribunal cannot rule on Ukraine's claims related to fisheries, protection and preservation of the marine environment or navigation since such claims belong to the jurisdictional domain of a special arbitral tribunal constituted in accordance with Annex VIII; both Parties expressly opted for an Annex VIII tribunal for the consideration of those categories of disputes.

151. Ukraine's Written Observations insist on an irrelevant distinction between "limited categories of disputes" and "complex and multi-faceted disputes",[289] without addressing the basic point regarding Russia's qualified consent to jurisdiction. It is indeed true that "Annex VIII Tribunals may hear only limited categories of disputes";[290] but when such special procedures have been agreed by the Parties to deal with these kinds of dispute, they must be resorted to.

152. Annex VII arbitration is simply, as Ukraine rightly underlines, a "*default* method"[291] in the event that a dispute cannot be resolved by other means, while Annex VIII arbitration is indeed "*special*" in accordance with the terms of Article 287. This adjective does not require any interpretation, its ordinary meaning is… special – not "exceptional" as Ukraine would like to distort it! A "special" method takes precedence over a "default" method.

153. Ukraine's attempt to circumscribe Annex VIII to a "strictly" "limited role"[292] amounts to giving it no role at all. Quite usually, issues are not isolated, as was recognised during UNCLOS III where questions "were raised about likely difficulties with respect to fitting a particular dispute within a particular category (e.g., whether it related to pollution, navigation or fishing)."[293] The existence of any such difficulties must not lead to the agreed procedure being disregarded, depriving the provisions on Annex VIII of any effect and denying the choice of the Parties. Notwithstanding the objective of the Convention to create "a legal order for the

[289] See the titles of Chapter Five, Sections II.A and B.
[290] UWO, Chapter Five, Section II.A.
[291] UWO, para. 167 (emphasis added).
[292] UWO, para. 169.
[293] M. Nordquist (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. V, Nijhoff, 1989, p. 43, para. 287.3 (**RUL-14**).

seas and oceans",[294] fragmentation is also at its heart as part of the price of securing consensus on compulsory binding dispute settlement. In this regard, Russia refers again to the Annex VII Tribunal in the *Southern Bluefin Tuna* case which admitted that "UNCLOS falls significantly short of establishing a truly comprehensive regime".[295] It is indeed the very logic of the Convention itself to "dissect" and "separate" issues, even though they can be closely interlinked,[296] requiring a categorisation of different kinds of dispute, with different consequences for the mode of settlement.

154. What matters here is the scope of consent to jurisdiction given by the Parties. The Tribunal's "jurisdiction is based on the consent of the parties and is confined to the extent accepted by them".[297] It must interpret the compromissory clause and "the relevant words of a declaration … in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction".[298]

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[294] See UWO, para. 179 relying on the Preamble of UNCLOS.

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

[296] See UWO, para. 164 reproaching Russia for following that logic.

[297] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88 (**RUL-67**); *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 200, para. 48 (**RUL-68**).

[298] *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 49 (**RUL-22**); *Aerial Incident of 10 August 1999 (Pakistan v. India), Jurisdiction of the Court, Judgment, I.C.J. Reports 2000*, p. 31, para. 42 (**RUL-64**).

155. Ukraine is incorrect to assert that the text of the Parties' respective declarations aims at limiting the application of Annex VIII, i.e. that either State restricted their consent.[299] For ease of comparison, the relevant texts are reproduced in the table below:

Russia's declaration upon signature – which remains in force	**Ukrainian Soviet Socialist Republic's declaration upon signature**	**1999 Ukraine's declaration upon ratification**	**Annex VIII, Article 1**
"for the consideration of *matters*[300] relating to fisheries, the protection and preservation of the marine environment, marine scientific research, and navigation, including pollution from vessels and dumping"	"For the consideration of *questions* relating to fisheries, protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels and by dumping"	"For the consideration of disputes concerning the interpretation or application of the Convention *in respect of questions* relating to fisheries, protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels and by dumping"	"dispute concerning the interpretation or application of the articles of this Convention relating to (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, or (4) navigation, including pollution from vessels and by dumping"

156. It is true that neither Russia's nor Ukraine's declaration tracks the language of Annex VIII – or Article 287. As underlined by Ukraine, the text of Annex VIII does not include the expression "in respect of questions" found in Ukraine's declaration *upon ratification*. However, contrary to what it affirms, this "additional" language is only "limiting" compared to its declaration *upon signature*, not compared to Annex VIII.[301] The table shows that Ukraine's declaration upon ratification simply mixes the broader language used in its original declaration (upon signature) with the language used in the Convention, presumably in an attempt to put them in line. In fact, the term "questions" used in Ukraine's and Russia's respective declarations is broader than the notion of "dispute" (i.e. a disagreement between the parties); they include other issues where the parties have not yet formulated opposing positions so as to constitute a dispute.[302]

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[299] See UWO, para. 173.
[300] Russian authentic text uses the word "questions" (same as Ukrainian SSR's declaration).
[301] See UWO, para. 173.
[302] This is also true in Russian and Ukrainian, see below, para. 167.

157. The terms of the declarations should not be interpreted narrowly as Ukraine contends[303] – or broadly for that matter; they must be interpreted in a natural way, in accordance with their ordinary meaning and context, in light of the purpose of both the declarations and Annex VIII. Russia's election of Annex VII arbitration as the basic means for the settlement of dispute cannot be read as if it were unqualified.

158. Second, with "regard to the intention of the State concerned",[304] Russia's reticence with respect to general compulsory arbitration is evident both from its negotiating position throughout UNCLOS III and soon before it made its declaration upon signature, as well as from its choice to opt for Annex VIII arbitration for *all* categories of disputes specified therein and to have recourse to *all* optional exceptions under Article 298.

159. Most enlightening in this regard is the statement of the delegate of the Soviet Union during UNCLOS III:

> "The most effective means of dispute settlement was direct negotiations between the parties concerned. … In the absence of successful negotiations, provision would have to be made for an appropriate *range of dispute settlement procedures* and for the *right of every State Party to* the convention to *choose the procedures it found most suitable. The nature of the procedure, however, should be determined by the nature of the dispute* and the convention should clearly stipulate that, unless otherwise agreed by the Parties, *a dispute* between them *could be settled only by a procedure accepted by the Party against which the proceedings had been instituted*."[305]

160. Russia's declaration pursuant to Article 287 is in line with this understanding. It is clear from Russia's choice that what matters is the nature of the dispute, and that "the consideration of matters relating to fisheries, the protection and preservation of the marine environment, marine scientific research, and navigation, including pollution from vessels and dumping" is reserved for Annex VIII arbitration, in accordance with both the principle *lex specialis derogat legi generali* and the functional approach advocated during UNCLOS III.[306]

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[303] UWO, paras. 172-174.

[304] *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 49 (**RUL-22**); *Aerial Incident of 10 August 1999 (Pakistan v. India), Jurisdiction of the Court, Judgment, I.C.J. Reports 2000*, p. 31, para. 42 (**RUL-64**).

[305] Third United Nations Conference on the Law of the Sea, Fourth Session, *Official Records*, Vol. V, 58th Plenary meeting, 5 April 1976, A/CONF.62/SR.58, pp. 10-11, para. 27 (**RU-52**) (emphasis added). See also, e.g., Third United Nations Conference on the Law of the Sea, Ninth session, Official Records, Vol. XIII, 126th Plenary Meeting, 2 April 1980, A/CONF.62/SR.126, p. 18, para. 110 (USSR) (**RU-10**).

[306] See RPO, para. 207.

161. In the present case Ukraine's claims relating to fisheries, protection and preservation of the marine environment, and navigation can and must be submitted to Annex VIII arbitration and there is no valid reason to bypass this possibility. Again, Ukraine is here seeking to raise spectres of complexity while its Statement of Claim and Memorial outline clear-cut legal and factual issues pursuant to the following allegations:

- "Fisheries Resources"[307] / "Russia's Violations of Ukraine's Rights to Living Resources in the Black Sea, Sea of Azov, and Kerch Strait";[308]

- "Russia Has Violated Ukraine's Rights by Embarking on a Campaign of Illegal Construction in the Kerch Strait that Threatens Navigation and the Marine Environment";[309]

- "Protection and Preservation of the Marine Environment"[310] / "Russia Has Violated Its Duty to Cooperate with Ukraine to Address Pollution at Sea".[311]

162. The only overarching issue, "closely interlinked" with Ukraine's specific claims, is in fact the sovereignty dispute. Ukraine argues that its submissions

> "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 of fisheries, the environment, research, and navigation, and accordingly it is an inquiry reserved for Annex VII tribunals."[312]

For the reasons already explained at length in Russia's Preliminary Objections[313] and Chapter 2 above, such inquiry extends beyond the confines of any arbitration, whether under Annex VII or VIII.

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[307] Statement of Claim, Title B.
[308] UM, Chapter Four, Section II.
[309] UM, Chapter Four, Section III.
[310] Statement of Claim, Title D.
[311] UM, Chapter Four, Section IV.
[312] UWO, para. 177.
[313] See notably RPO, paras. 4, 22 and Chapter 2 generally.

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

163. Even if UNCLOS applies (which is denied for the reasons set out in the previous chapters), the Tribunal lacks jurisdiction over a number of claims submitted by Ukraine[314] since the Parties have agreed to resolve such disputes through negotiations and to exclude recourse to further procedures (including procedures provided by Part XV of UNCLOS).

164. Ukraine rightly accepts that pursuant to Article 281 of UNCLOS Russia and Ukraine are entitled to exclude or condition recourse to UNCLOS dispute settlement by agreement. However, Ukraine misconstrues the State Border Treaty and the Azov/Kerch Cooperation Treaty and Article 281 of UNCLOS to claim that no such agreement has been reached. Contrary to Ukraine's submissions, Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty contain an agreement of the Parties on dispute settlement (**Section I**), and this agreement applies to disputes under UNCLOS (**Section II**). Ukraine failed to attempt to settle the dispute by good faith negotiations (**Section III**) and, in any event, recourse to procedures provided by Part XV of UNCLOS was excluded by that same agreement (**Section IV**).

I. Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty contain an agreement to settle disputes by peaceful means

165. Ukraine's primary response to the Article 281 objection is to argue that neither of the provisions relied on by the Russian Federation contains an agreement to settle disputes by peaceful means (i.e. negotiations).[315] Instead, Ukraine says, they reflect the agreement to negotiate some future treaties with respect to the adjacent sea areas and the Kerch Strait.[316] Ukraine's arguments are based on an unduly restrictive and unsupported interpretation of the relevant provisions and therefore should be rejected.

166. Ukraine relies in particular on the context of the State Border Treaty and the Azov/Kerch Cooperation Treaty. However that context does not reduce the relevant provisions into a "record[] [of] the parties' intent to reach a future agreement".[317] While the State Border

[314] Specifically Ukraine's submissions in UM, paras. 265 (a)-(o) and (q)-(t) insofar as they concern the Sea of Azov, the Kerch Strait and adjacent sea areas in the Black Sea.
[315] UWO, para. 148.
[316] *Ibid*.
[317] UWO, para. 150.

Treaty deals primarily with the land boundary, Article 5 is a standalone provision.[318] Nor does that context restrict the questions to be settled by agreement to a "maritime boundary" – contrary to what is suggested by Ukraine.[319] The relevant context demonstrates that for many years Russia and Ukraine discussed a whole range of questions related to their adjacent areas in the Black Sea, the Sea of Azov and the Kerch Strait. The Parties discussed navigation, fishing, law-enforcement, border patrol, protection of the maritime environment, search and rescue operations, etc. In line with this context, Article 5 does not contain any restriction on the scope of the questions "relating to the adjacent sea areas" that must be settled by agreement.

167. The use of the word "questions" rather than "disputes" in the relevant provisions does not restrict them to being an agreement to enter into future treaties. Ukraine's only point is that "questions" and "disputes" are two different words.[320] This does not respond to Russia's argument that "questions" encompasses "disputes" based on the ordinary meaning of the word "questions" («вопросы» ("*voprosi*") in Russian. Nor does Ukraine assert that the word "questions" ("питання" ("*pitannia*")) in the Ukrainian authentic text has a different meaning.[321] Indeed, the declaration lodged by the Ukrainian SSR on its signing of UNCLOS provided that "*for consideration of questions* [«вопросы» ("*voprosi*") in the authentic Russian text] relating to fisheries protection and preservation of marine environment, marine scientific research and navigation … *Ukrainian SSR chooses a special arbitration tribunal* constituted under Annex VIII"[322] thus demonstrating that the word "questions" («вопросы» ("*voprosi*") can and was used to refer to, *inter alia*, disputes.

168. The use of the word "угода" ("*ugoda*") for "agreement" in the Ukrainian authentic text of the relevant provisions does not mean that their scope is limited to the conclusion of

[318] Provision on settlement of questions relating to the Kerch Strait in Article 1 of the Azov/Kerch Cooperation Treaty is similarly not restricted to delimitation or another defined set of issues.
[319] UWO, para. 149.
[320] UWO, para. 152.
[321] Ukraine claims that the word "questions" in English does not "encompass the concept of dispute", because "[d]ispute resolution clauses in English do not generally refer to 'settlement of questions'" (UWO, fn. 249). However, this argument misses the point, the concept of a "question" is broader than that of a dispute and therefore it may indeed be rarely used in dispute settlement clauses; this does not restrict the meaning of the word "question". Indeed, the names of contentious cases before the International Court of Justice frequently use the word "question" to describe a dispute (e.g. *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*).
[322] Declaration of the Ukrainian SSR upon signature of UNCLOS, 10 December 1982, *Law of the Sea Bulletin*, 1985, Vol. 5, p. 23 (**RU-11**) (emphasis added).

international treaties. First, Ukraine is wrong to say that "угода" means a "treaty"[323] – it means any agreement; and can be contrasted to the use of the different term "договір" ("dogovir") in the titles of the treaties which is the term used to refer to a treaty.[324] Secondly, Ukraine's argument does not respond to the point made by the Russian Federation: agreement should be the result of the process the Parties are required to undertake to resolve a question, and this requires that Parties should engage in negotiations to reach such an agreement.[325]

169. The Azov/Kerch Cooperation Treaty contains a separate dispute resolution clause, but that does not, contrary to what Ukraine asserts,[326] mean that the provisions relied on by Russia do not contain rules on settlement of disputes. First, Article 4 applies to disputes only and only to disputes concerning the Azov/Kerch Cooperation Treaty; it does not cover the broader category of "questions" covered by Article 1. Secondly, it provides for settlement of disputes by "negotiations" and other means of dispute settlement chosen by the Parties – the same means encompassed by the provision of Article 1. There is no contradiction between the two provisions.

170. Finally, the agreement contained in the State Border Treaty applies to all "adjacent sea areas" of Russia and Ukraine, that is to the Sea of Azov and the maritime areas of the Black Sea under their sovereignty or jurisdiction that are adjacent to each other. Ukraine, in fact, concedes that the provisions relied on by Russia apply to the Sea of Azov, the Kerch Strait and the Black Sea, other than west and south of Crimea. [327] It claims that Article 5 cannot apply to other areas of the Black Sea because they "are not 'adjacent' to any State border reflected in the treaty".[328] There is no support for this restriction in the scope of application in the State Border Treaty.

II. Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty cover UNCLOS disputes

171. Ukraine further asserts that the relevant provisions of the State Border Treaty and the Azov/Kerch Cooperation Treaty do not trigger the application of Article 281 of UNCLOS

[323] UWO, para. 153.
[324] Both the State Border Treaty and the Azov/Kerch Cooperation Treaty. The same word is used in the title of the Vienna Convention on the Law of Treaties in Ukrainian («Віденська конвенція про право міжнародних договорів» ["*Videnska conventsiya pro parvo mizhdunarodnih dogovoriv*"]).
[325] See RPO, paras. 230-231.
[326] UWO, para. 152.
[327] UWO, para. 144.
[328] UWO, para. 144.

because the treaties "do not refer to the resolution of disputes arising under UNCLOS".[329] However, Article 281 of UNCLOS requires only that the disputes under UNCLOS fall within the scope of the provision that provides for other peaceful means of settlement of the dispute. Ukraine cites no authority for the proposition that Article 281 of UNCLOS requires *express reference* to disputes under UNCLOS.

172. Indeed, both the ITLOS in *Mox Plant*[330] and the tribunal in *Southern Bluefin Tuna*[331] were concerned with whether the respective disputes under UNCLOS fell within the scope of the dispute settlement clauses in the OSPAR Convention and CCSBT[332] respectively, not with whether those clauses contain express references to disputes under UNCLOS (neither does).

173. In this case, Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty do not restrict the scope of disputes "relating to the adjacent sea areas" or "relating to the Kerch Strait" falling within their scope. The claims advanced by Ukraine in this arbitration, if they could somehow be said to be claims within Part XV of UNCLOS (they cannot), indisputably relate to such areas.

174. Ukraine's assertion that a reference to a specific dispute settlement mechanism is necessary for Article 281 of UNCLOS[333] does not advance its case either. First, there is no requirement for such specificity. Indeed, in the *Southern Bluefin Tuna* the tribunal held Article 281 of UNCLOS to be applicable while finding that the relevant clause

> "is not 'a' peaceful means; it provides a list of various named procedures of peaceful settlement, adding 'or other peaceful means of their own choice'. No particular procedure in this list has thus far been chosen by the Parties for settlement of the instant dispute."[334]

175. Secondly, as explained in Russia's Preliminary Objections, consent to settle disputes "by agreement" necessarily requires settlement of disputes by negotiations.[335] Even if

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[329] UWO, para. 156.
[330] *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 106, paras. 48-52 (**UAL-17**).
[331] *Southern Bluefin Tuna (Australia and New Zealand v. Japan),* Award on Jurisdiction and Admissibility, 4 August 2000, *UNRIAA*, Vol. XXIII, p. 42, paras. 53-54 (**RUL-24**).
[332] Convention for the Conservation of Southern Bluefin Tuna, 10 May 1993, *UNTS,* Vol. 1819, p. 360 (**RU-60**).
[333] UWO, para. 157.
[334] *Southern Bluefin Tuna (Australia and New Zealand v. Japan),* Award on Jurisdiction and Admissibility, 4 August 2000, *UNRIAA*, Vol. XXIII, p. 42, para. 55 (**RUL-24**).
[335] RPO, paras. 229-231.

Ukraine's "particular procedure" test applies, the relevant provisions of Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty satisfy it.

III. Ukraine failed to attempt to settle the dispute by good faith negotiations

176. Notably, Ukraine has chosen not to present any additional evidence as to its alleged attempt to settle the dispute by negotiations, i.e. to supplement the four documents it relied on in the Memorial. Nor does it respond to Russia's argument in this regard, particularly, that: (i) the documents Ukraine relies on deal with the dispute concerning sovereignty over Crimea rather than the law of the sea;[336] (ii) the allegations made in them were so generic as to make it impossible for Russia to reply;[337] (iii) at the only meeting between the Parties, Ukraine did not engage in good faith negotiations and, even though negotiations were possible, that same day Ukraine announced it had "just completed pre-court consultations with RF…..Next – arbitration #UNCLOS".[338]

177. Ukraine cannot demonstrate that it engaged in good faith negotiations by "confirm[ing] that, as made clear in its Memorial, Ukraine sought in good faith to exchange views on and settle the current dispute."[339] This is an issue to be decided by the Tribunal based on the record which demonstrates that Ukraine failed to attempt to settle the dispute by negotiations.[340]

178. The fact that "Ukraine launched this arbitral process in September 2016, more than two years after" Russia allegedly violated UNCLOS[341] does not prove that Ukraine engaged in good faith negotiations. Settlement of the dispute by negotiations is different from a cooling-off period; it is not enough for a State to simply wait for a period of time, without attempting to negotiate. In fact, the long period between the time when the dispute allegedly arose and the time Ukraine commenced arbitration demonstrates that Ukraine had ample time and opportunities to engage in negotiations that Ukraine chose to ignore.

IV. Exclusion of the Part XV of UNCLOS procedures

179. Both Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty provide that the questions are to be settled "by agreement". This provision excludes

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[336] RPO, paras. 234-237.
[337] RPO, paras. 238-240.
[338] RPO, paras. 242-250 quoting Ukraine's Foreign Minister tweet after the conclusion of the meeting (**RU-42**).
[339] UWO, para. 162.
[340] RPO, paras. 232- 252.
[341] UWO, para. 163.

settlement of the same question by a third-party dispute settlement body; the decision of such body cannot replace Parties' agreement. Hence the cited provisions of the treaties exclude recourse to dispute settlement procedures provided in Part XV of UNCLOS.

180. Ukraine claims that such exclusion needs to be expressly stated, but finds no support for that proposition within UNCLOS. It has chosen not to respond to Russia's position that Article 281 of UNCLOS does not contain any requirement of an express statement of exclusion, unlike other provisions of UNCLOS.[342] Nor does Ukraine respond to the holding by the *Southern Bluefin Tuna* tribunal that the express statement requirement would be inconsistent with the subsequent practice of States Parties to UNCLOS that entered into numerous treaties lacking such an express exclusion.[343] These arguments still stand and support Russia's interpretation of Article 281 of UNCLOS: no express exclusion is required.

181. Ukraine seeks to distinguish *Southern Bluefin Tuna* by pointing out that Article 16 of the CCSBT made recourse to arbitration or the International Court of Justice subject to "consent in each case of all parties to the dispute"[344]. However, this is a matter of wording – there is no magic formula that Article 281 of UNCLOS requires Parties to use. The relevant provisions of the State Border Treaty and the Azov/Kerch Cooperation Treaty require the questions to be resolved "by agreement" which naturally makes recourse to an arbitral tribunal or the International Court of Justice (that are not even mentioned) impossible without the consent of both Parties.

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[342] RPO, para. 261.

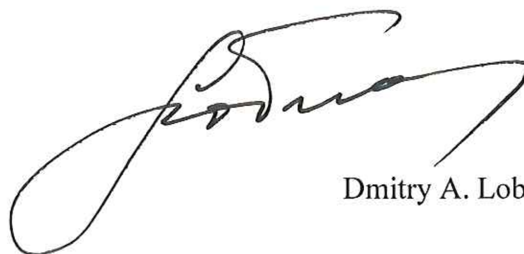
[343] *Southern Bluefin Tuna (Australia and New Zealand v. Japan),* Award on Jurisdiction and Admissibility, 4 August 2000, *UNRIAA*, Vol. XXIII, pp. 45-46, para. 63 (**RUL-24**); See further RPO, para. 262.

[344] *Southern Bluefin Tuna (Australia and New Zealand v. Japan),* Award on Jurisdiction and Admissibility, 4 August 2000, *UNRIAA*, Vol. XXIII, p. 43, para. 57 (**RUL-24**) partially quoted in UWO, para. 158.

CHAPTER 8
SUBMISSION

182. For the reasons set out in the Preliminary Objections of the Russian Federation and this Reply, the Russian Federation requests the Tribunal to dismiss the Submissions of Ukraine made in its Written Observations of 27 November 2018 and to adjudge and declare that it is without jurisdiction in respect of the dispute submitted to this Tribunal by Ukraine.

Moscow, 28 January 2019



Dmitry A. Lobach

Agent of the Russian Federation

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Appendix I

ANNEXES: EXHIBITS

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RU-1 Constitution of the Union of the Soviet Socialist Republics, 21 January 1924 (excerpt)

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

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

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

RU-5 *Historic Bays: Memorandum by the Secretariat of the United Nations,* doc. A/CONF.13/1, extract from the *Official Records of the United Nations Conference on the Law of the Sea,* Vol. I (Preparatory Documents), 30 September 1957 (excerpts)

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

RU-7 Third United Nations Conference on the Law of the Sea, Fourth session, *Official Records*, Vol. V, 59th Plenary Meeting, 5 April 1976, A/CONF.62/SR.59 (excerpts)

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

RU-9 Third United Nations Conference on the Law of the Sea, Fourth session, *Official Records*, Vol. V, 61st meeting, 6 April 1976, A/CONF.62/SR.61 (excerpts)

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

RU-11 Declarations of the USSR and of the Ukrainian SSR upon signature of UNCLOS, 10 December 1982, *Law of the Sea Bulletin,* 1985, Vol. 5, p. 23

RU-12 Declaration of the USSR 4450 containing list of geographical coordinates defining the position of the baselines, 25 January 1985 (excerpts)

RU-13 Agreement between the Government of the United Republic of Tanzania and the Government of the People's Republic of Mozambique regarding the Tanzania/Mozambique Boundary, Maputo, 28 December 1988

RU-14 Declaration of Austria upon ratification of UNCLOS, 14 July 1995, *Law of the Sea Bulletin*, 1995, Vol. 29, p. 6

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

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

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

RU-18 Order of the Ministry of Transport of Ukraine No. 721, Rules of Navigation by Ships through the Kerch-Enikalskiy Channel and the Approach Channels to It, 9 October 2002 (excerpts)

RU-19 Treaty between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, 28 January 2003 (without Annexes)

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

RU-21 Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch, 24 December 2003, *Law of the Sea Bulletin*, 2004, Vol. 54, p. 131

RU-22 United Nations General Assembly, Sixty-first session, 68th Plenary Meeting, 7 December 2006, A/61/PV.68 (excerpts)

RU-23 United Nations General Assembly, Sixty-third session, 62nd Plenary Meeting, 4 December 2007, A/63/PV.62 (excerpts)

RU-24 United Nations General Assembly, Sixty-second session, 65th Plenary Meeting, 10 December 2007, A/62/PV.65 (excerpts)

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RU-27 "Right-Wing Thugs Are Highjacking Ukraine's Liberal Uprising", *Time.com,* 28 January 2014

RU-28 Speech by the Russian Foreign Minister, Sergey Lavrov, during the high-level segment of the 25th session of the United Nations Human Rights Council, Geneva, Ministry of Foreign Affairs of Russia official website (http://www.mid.ru/en), 3 March 2014

RU-29 "Far-right party jeopardises Ukraine's path to democracy", *The Conversation,* 7 March 2014

RU-30 Statement by the Russian Ministry of Foreign Affairs regarding the adoption of the Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol, Ministry of Foreign Affairs of Russia official website (http://www.mid.ru/en), 11 March 2014

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RU-32 "All-Russia People's Front: High voter turnout points to legitimacy of Crimea referendum", *Tass Russian News Agency,* 17 March 2014

RU-33 Resolution "On the Independence of the Crimea" taken at an extraordinary plenary session of the Supreme Soviet of the Autonomous Republic of Crimea on 17 March 2014

RU-34 "Agreement on the accession of the Republic of Crimea to the Russian Federation signed", President of Russia official website (http://en.kremlin.ru), 18 March 2014

RU-35 Speech by Russia's Permanent Representative to the United Nations, Vitaly Churkin, at the session of the UN General Assembly, New York, Ministry of Foreign Affairs of Russia official website (http://www.mid.ru/en), 27 March 2014

RU-36 Communication from the Government of the Russian Federation, circulated by IMO Circular Letter No. 3471, 7 July 2014

RU-37 Notices to Mariners No. 43/2014, 25 October 2014 (excerpts)

RU-38 "President: We will do everything to return Crimea via international legal mechanisms", President of Ukraine official website (http://www.president.gov.ua/en) 6 December 2015

RU-39 *Maritime Claims Reference Manual*, issued by the U.S. Department of Defense Representative for Ocean Policy Affairs (excerpts)

RU-40 *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-194/510-1654, 14 July 2016

RU-41 Transcript of the Russian-Ukrainian Consultations on the United Nations Convention on the Law of the Sea, Minsk, 11 August 2016

RU-42 Minister of Foreign Affairs of Ukraine's official twitter account (https://twitter.com/PavloKlimkin/status/763724030943821824), 11 August 2016

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

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RU-45 "President instructed Foreign Ministry to file a lawsuit against Russia to international arbitration", President of Ukraine official website (http://www.president.gov.ua/en), 14 September 2016

RU-46 President of Ukraine's Facebook page (https://www.facebook.com/petroporoshenko/), 23 December 2016

RU-47 Certificate of registration No. 67410 of the Treaty between Ukraine and the Russian Federation of the Ukrainian-Russian State Border of 28 January 2003, Secretariat of the United Nations, 26 January 2017

RU-48 Ozhegov S.I., Tolkovyi slovar' russkogo jazyka, 28-e izd. (Moskva, 2018) [Ozhegov S.I., Dictionary of the Russian Language, 28th ed. (Moscow, 2018)] (excerpt)

RU-49 Statement of the Delegation of Ukraine at the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, Permanent Mission of Ukraine to the United Nations in New York official website (http://ukraineun.org/en), 20 February 2018

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

RU-51 Treaty between Uruguay and Argentina concerning the Rio de la Plata and the Corresponding Maritime Boundary, Montevideo, 19 November 1973 (excerpts)

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Appendix II

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