PCA Case No. 2017-06

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

before

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

between

UKRAINE

and

THE RUSSIAN FEDERATION

REJOINDER OF UKRAINE ON JURISDICTION

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

REGISTRY
The Permanent Court of Arbitration

28 March 2019

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Chapter One: Introduction

1. In its Written Observations and Submissions on Jurisdiction (the "Observations"), Ukraine showed that the numerous objections advanced by the Russian Federation in an attempt to avoid accountability for its violations of the 1982 U.N. Convention on the Law of the Sea ("UNCLOS" or the "Convention") lacked any foundation in law or fact. Russia's Reply provides the Tribunal with no reason to reach a different conclusion. Unable to refute the arguments advanced by Ukraine, Russia adjusts its own position with regard to certain of its objections, but still fails to establish that the Tribunal lacks jurisdiction over this dispute. As to others, it persists with arguments that Ukraine has already shown to rest on a faulty interpretation of the Convention's provisions or to be otherwise meritless. The Tribunal should accordingly reject all of Russia's objections and proceed to address the merits of Ukraine's claims.

2. With regard to its principal objection, Russia has no response to Ukraine's showing that the claims advanced by Ukraine concern the interpretation or application of UNCLOS. Russia continues to argue, however, that the jurisdiction to resolve such disputes granted to the Tribunal by Articles 286 and 288 of the Convention is defeated by a claim, introduced into these proceedings by Russia, that the status of Crimea has been altered. According to Russia, that claim creates a legal dispute between the Parties, and the true object of Ukraine's case is to resolve that dispute, rather than the numerous issues of interpretation and application of UNCLOS presented in Ukraine's Memorial. In its Reply, Russia now suggests that, however the true issue in dispute is characterized, Ukraine's claims require the Tribunal to resolve a predicate legal issue — the status of Crimea — and that the presence of such a predicate issue alone defeats jurisdiction.

3. These arguments do not avail Russia. As shown in Ukraine's Observations and further demonstrated in **Chapter Two** of this Rejoinder, Russia's claim is neither admissible nor plausible. As such, it cannot be relied upon by the Tribunal as a basis for declining to exercise jurisdiction, for either of the reasons now urged by Russia. An inadmissible and implausible claim is incapable of creating a legitimate predicate legal dispute — or of even potentially supplying the true issue in this case.

4. But, as Chapter Two also explains, even if the Tribunal were to set aside those fundamental problems, the objection would still fail. The fact remains that the weight of the dispute before the Tribunal overwhelmingly concerns the interpretation and application of the Convention. As Russia's Reply does not even attempt to refute, the object of Ukraine's claims is to obtain redress for significant maritime harms, not to seek resolution of a claim

by Russia concerning the status of Crimea that has already been rejected by the international community. As recognized by case law invoked by Russia, the Tribunal has the authority to decide preliminary issues of law necessary to resolve the actual dispute before it where, as here, that dispute concerns interpretation or application of the Convention.

5. Russia's Reply similarly fails to substantiate any of its other objections. Russia fails to explain how its assertion that the Sea of Azov and Kerch Strait are shared internal waters outside the scope of UNCLOS can be reconciled either with the Convention or with the principles governing the few, exceptional situations in which pluri-State internal waters have been recognized. As **Chapter Three** describes, the Sea of Azov is many times larger than the precedents offered by Russia. And Russia's distorted reading of the historical record cannot cure the fact that Russia and Ukraine never came to a final agreement concerning the status and delimitation of those waters. Perhaps most remarkably, Russia's Reply does not address the stark inconsistency between its representation to the Tribunal that the Sea of Azov and Kerch Strait are the "common internal waters" of Ukraine and Russia, and the reality that Russia has sought to exclude Ukraine from these waters, and has interfered with international transit rights and freedom of navigation to and from Ukrainian ports.

6. For its objection under the military activities exception, addressed in **Chapter Four** of this Rejoinder, Russia relies exclusively on an expansive reading of Article 298(1), but neglects to address Ukraine's showing that such a reading is at odds with both the Vienna Convention's interpretive principles and relevant prior decisions interpreting UNCLOS. Russia's other objections under Articles 297 and 298, which are also addressed in Chapter Four, fail for the same reasons as its principal objection and are therefore moot. And, as explained in **Chapter Five**, Russia's arguments that this dispute, or parts of it, should be heard elsewhere pursuant to Article 281 and Annex VIII, similarly defy both a straightforward reading of the relevant provisions and common sense.

7. For each of the above reasons, in **Chapter Six** of this Rejoinder, Ukraine reiterates and renews the submissions and requests for relief contained in its Memorial and Observations.[1]

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[1] In the introduction to its Reply, Russia describes Ukraine's request for costs associated with the jurisdictional phase of these proceedings as "extraordinary." Russia's Reply, ¶ 14. As Ukraine will show at an appropriate stage of the proceedings, such an award is expressly contemplated by Article 25 of the Rules of Procedure and is appropriate here given that several of Russia's jurisdictional objections lack any reasonable legal or factual support.

Chapter Two: The Dispute Before the Tribunal Is Within the Tribunal's Competence Under Articles 286 and 288

8. As set out in Ukraine's Memorial and explained in Chapter Two of Ukraine's Observations, the dispute before this Tribunal concerns Russia's actions at sea. Specifically, it concerns Russia's theft of billions of dollars' worth of sub-soil resources, its usurpation of fishing rights that once supported hundreds of artisanal and industrial fishing enterprises, and its interference with transit through an international strait frequented by almost 20,000 vessels each year.[2] In this arbitration, Ukraine asks the Tribunal to interpret and apply the Convention to determine the legal consequences of Russia's maritime conduct. By the plain terms of Articles 286 and 288, which confer jurisdiction over "any dispute concerning the interpretation or application of the Convention," this Tribunal has the competence to do so.[3]

9. Russia, in its Preliminary Objections, insisted that the dispute before the Tribunal should be differently characterized. Advancing a claim that Ukraine's settled sovereignty over Crimea has been altered, Russia asserted that "sovereignty over land territory is central, is the real dispute, is where the relative weight of the dispute lies (and overwhelmingly so)," and is "the actual objective of Ukraine's claims."[4] In response, Ukraine explained that the real dispute it has brought to this Tribunal concerns Russia's serious breaches of the Convention, and made it clear that its objectives in bringing this arbitration are to redress these serious maritime harms.[5] Russia no longer presses an argument about Ukraine's objectives in its Reply. Instead, Russia shifts emphasis to a more sweeping legal argument: that Russia's mere assertion of sovereignty over Crimea has created a legal dispute that would have to be resolved before consideration of Ukraine's UNCLOS claims, and that the Tribunal is automatically divested of jurisdiction to resolve this maritime dispute because such a predicate dispute over sovereignty exists.[6]

10. Russia's position, as now articulated, is flawed in its premise. The UNCLOS case before the Tribunal presents no "predicate" sovereignty dispute. That is so because Russia's claim that the legal status of Crimea has changed is not admissible before this

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[2] *See, e.g.*, Ukraine's Memorial, ¶¶ 60-64, 76-79, 127, 130.

[3] UNCLOS Articles 286, 288; *see In the Matter of an Arbitration Between Guyana and Suriname (Guyana v. Suriname)*, UNCLOS/PCA Case No. 2004-04, Award of the Arbitral Tribunal of 17 September 2007, ¶ 414 ("[A]ny dispute concerning the interpretation or application of the Convention which is not excluded by the operation of Part XV, Section 3 (Articles 297 and 298) falls under the compulsory procedures in Section 2.") **(UAL-76)**.

[4] Russia's Objections, ¶¶ 25, 42.

[5] Ukraine's Observations, ¶¶ 21-24, 54-58.

[6] Russia's Reply, ¶ 16.

Tribunal. And it is further the case because Russia's claim does not meet the basic threshold requirement of legal plausibility, and therefore it can have no relevance to the Tribunal's assessment of its jurisdiction.

11. Yet even accepting, *arguendo*, Russia's premise that there is a legal dispute over sovereignty that stands as a predicate to Ukraine's UNCLOS claims, such a dispute would not defeat this Tribunal's jurisdiction over those claims. To the contrary, as the *Chagos Marine Protected Area* tribunal recognized, an Annex VII tribunal is permitted to make such predicate "determinations of law as are necessary to resolve the dispute presented to it."[7] The *Chagos* tribunal concluded that this authority should not be exercised in cases where the "weight of the dispute" resides with the sovereignty question, such that an insubstantial law of the sea matter is presented as a mere "pretext" with the "true object" of obtaining resolution of the sovereignty question.[8] But here, the opposite is true — Ukraine's serious maritime claims heavily outweigh any asserted dispute concerning land sovereignty.

12. Thus, for the Tribunal to accept Russia's objection and decline jurisdiction over Ukraine's claims, the Tribunal must conclude: *first*, that Russia's claim regarding the legal status of Crimea is admissible before the Tribunal; *second*, that the claim is plausible and capable of preventing the Tribunal from exercising its otherwise established jurisdiction; and *third*, that the claim, inserted into these proceedings by Russia, is sufficiently weighty to form the principal issue in dispute and the true object of Ukraine's claims, despite Ukraine's formulation of its case and its focus on maritime matters.[9] Russia's claim meets *none* of those requirements — let alone all three, as would be necessary for Russia's objection to prevail.

I. Russia's Claim that the Legal Status of Crimea Has Been Altered Is Inadmissible

13. According to Russia, Ukraine's "claim is predicated on the basis that Ukraine is sovereign over the land territory of Crimea."[10] But Russia has repeatedly and expressly

[7] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, UNCLOS/PCA Case No. 2011-13, Award of 18 March 2015, ¶ 220 (citing *Certain German Interests in Polish Upper Silesia*, Judgment on Preliminary Objections of 25 August 1925, P.C.I.J. Series A, No. 6, p. 4 at p. 18) (**UAL-18**).

[8] *Id.* ¶¶ 211, 219, 230 (quotations and citations omitted).

[9] Even then, Russia's objection would not affect submissions, or parts of submissions, that rely on Ukraine's rights as a flag State or in capacities other than as a coastal State. *See, e.g.*, Ukraine's Memorial, ¶ 265(d), (g), (h), (i), (m), (n), (o), (p), (t).

[10] Russia's Reply, ¶ 16.

"recognized Crimea as a part of the Ukrainian territory *de facto* and *de jure*,"[11] including in treaty commitments that bind it to this day.[12] For there to be a predicate issue of sovereignty capable of displacing this Tribunal's jurisdiction, there would have to be some objective basis to say that the *status quo* has changed, and the settled status of Crimea has been altered. Here, there is no admissible claim before this Tribunal that could put into question whether Ukraine is the coastal State in the areas of sea relevant to this dispute.

14. As Ukraine established in its Observations, Russia's claim that the legal status of Crimea has changed has been soundly and repeatedly rejected by the General Assembly and the international community. Russia cannot and does not rebut the support for Ukraine's position — in particular, that: (i) the U.N. General Assembly has repeatedly stressed the duty not to recognize, or take any action that might be perceived as recognizing, any change in the legal status of Crimea;[13] (ii) the Assembly expressly grounded its calls for non-recognition in binding rules of international law,[14] as well as the Russian Federation's many specific commitments to respect the territorial integrity of Ukraine within its existing borders;[15] and (iii) a wide range of individual States and international organizations have condemned Russia's annexation of Crimea, with many States taking steps to implement the obligation of non-recognition by adopting economic sanctions or other concrete measures.[16]

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[11] *See* Address by the President of the Russian Federation (18 March 2014) **(UA-462)**; Russia's Objections, ¶ 11.

[12] *See infra* ¶ 24.

[13] It did so in three resolutions at the time Ukraine filed its Observations, and in five resolutions as of today. *See* Ukraine's Observations, ¶ 27; *see also* U.N. General Assembly Resolution 68/262, U.N. Doc. No. A/RES/68/262 (27 March 2014), ¶ 6 ("Call[ing] upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol . . . and to refrain from any action or dealing that might be interpreted as recognizing such altered status") **(UA-129)**; U.N. General Assembly Resolution 71/205, U.N. Doc. No. A/RES/71/205 (19 December 2016) **(UA-464)**; U.N. General Assembly Resolution 72/190, U.N. Doc. No. A/RES/72/190 (19 December 2017) **(UA-465)**; U.N. General Assembly Resolution 73/194, U.N. Doc. No. A/RES/73/194 (17 December 2018) **(UA-549)**; U.N. General Assembly Resolution 73/263, U.N. Doc. No. A/RES/73/263 (22 December 2018) **(UA-550)**.

[14] Ukraine's Observations, ¶ 27 (quoting U.N. General Assembly Resolution 68/262, U.N. Doc. No. A/RES/68/262 (27 March 2014), Preamble **(UA-129)**).

[15] Ukraine's Observations, ¶ 27 & n. 22 (describing the General Assembly's invocation of the Helsinki Final Act, the Budapest Memorandum, and the Alma Ata Declaration); *see also infra* ¶ 24.

[16] Ukraine's Observations, ¶¶ 29-31. While Russia emphasizes that it is not a member of the international organizations that have condemned its actions in Crimea, that is true only because two of the relevant organizations (the Parliamentary Assembly of the Council of Europe and the former Group of Eight) suspended Russia's membership as a direct result of its annexation of Crimea. *See* Parliamentary Assembly of the Council of Europe, Reconsideration on Substantive Grounds of the

15. Unable to refute these showings, Russia invites the Tribunal to ignore them. First, Russia seeks to convince the Tribunal that its preliminary objection — which would require the Tribunal to become the first international body to recognize an alteration in the legal status of Crimea — does not conflict with the General Assembly's insistence on non-recognition.[17] Second, Russia summarily dismisses as "political" the actions of both the U.N. General Assembly and the States and international organizations that have refused to recognize Russia's annexation.[18] And third, Russia alleges that the General Assembly's invocation of the principle of non-recognition under international law does not apply to adjudicative bodies like this Tribunal.[19] But the General Assembly's five resolutions on Crimea cannot be so casually put aside. As described below, the Assembly's resolutions are entitled to weight before this Tribunal, and they reflect principles of international law, as well as bilateral and multilateral treaties, that continue to bind Russia to this day.

A. The General Assembly's Five Resolutions on Crimea Apply the International Law Requirement of Non-Recognition and Are Entitled to Weight Before this Tribunal

16. Contrary to Russia's assertions, its objection directly implicates the General Assembly's warning against any action that recognizes or "might be interpreted as recognizing any [. . .] altered status" for Crimea.[20] Russia argues that the General Assembly's call applies only to formal recognition of Russian sovereignty over Crimea, something that Russia states it does not seek in this case.[21] However, the General Assembly did not phrase its call in terms of an obligation not to formally recognize Russian sovereignty over Crimea. It instead referred to a duty "not to recognize *any alteration of the status* of the Autonomous Republic of Crimea and the city of Sevastopol . . . and to refrain from *any action or dealing that might be interpreted as recognizing any such altered status*."[22] This language reflects the broad scope of the underlying obligation of non-recognition in international law, which,

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Previously Ratified Credentials of the Russian Delegation, Resolution 1990 (10 April 2014) (**UA-491**); G-7 Leaders' Statement (2 March 2014) (**UA-551**).

[17] Russia's Reply, ¶ 25.

[18] *Id.* ¶¶ 24, 27.

[19] *Id.* ¶ 24.

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

[21] Russia's Reply, ¶ 25.

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

as explained in the International Law Commission's Articles on State Responsibility, "not only refers to [. . .] formal recognition," "but also prohibits acts which would imply such recognition."[23]

17. Since the dissolution of the Soviet Union in 1991, Crimea has universally been accepted, including by Russia, as a part of Ukraine.[24] It is this unquestioned status that the General Assembly acknowledged in its resolutions, and that its call for non-recognition preserves. Absent recognition of an alteration in Crimea's status as the territory of Ukraine, there can be no question that an Annex VII tribunal has jurisdiction over the UNCLOS violations committed in the areas of the Black Sea, Sea of Azov, and Kerch Strait at issue in this case. Were the Tribunal to nonetheless refuse to exercise jurisdiction based on Russia's territorial claim, the Tribunal would imply that Crimea's legal status has been altered, directly contradicting the General Assembly's resolutions on Crimea. In particular, the Tribunal's decision could be perceived as according legal effect to the view that the status of Crimea has changed from what was previously unquestioned Ukrainian sovereignty to a situation of uncertainty, under which Crimea could be under either Ukrainian or Russian sovereignty.

18. Russia next suggests that it would not matter if this Tribunal were to contravene the General Assembly's resolutions. Describing the General Assembly as a "political body,"[25] it cites authorities stating that the General Assembly lacks the legislative power to vote to adopt new rules of international law,[26] and that the Assembly cannot

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[23] *See* International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2008), Article 41(2) & cmt. ¶ 5 [hereinafter "ILC Articles on State Responsibility"] (**UAL-33**). In *Namibia (South West Africa)*, the Court set out a long and non-exhaustive list of actions that might impermissibly imply recognition of an illegal occupation, including the entry into treaty relations in respect of the occupied territory, the application of existing bilateral treaties to the territory, the dispatch of diplomatic or special missions or consular agents, and even the entry into economic or "other forms of relationship or dealings" — essentially, any action that carried even a risk of "entrench[ing] [the occupant's] authority over the Territory." *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Advisory Opinion of 21 June 1971, ¶¶ 121-124 (**UAL-84**).

[24] *See* Ukraine's Observations, ¶¶ 26; *supra* ¶ 13; *infra* ¶ 24.

[25] Russia's Reply, ¶ 24.

[26] *Id.* ¶ 24 & n. 31 (citing Bruno Simma et al. (eds.), The Charter of the United Nations: A Commentary, Vol. I (3rd ed. 2012) for the proposition that the General Assembly "lack[s] [. . .] a legislative function" (**RUL-71**)).

"coerce[]" States into pursuing particular courses of action.[27] The General Assembly's resolutions on Crimea, however, do not purport to create new rules of law, and this Tribunal is not asked to defer to them in connection with a binding adjudication of either party's rights to land territory. Rather, the General Assembly's five resolutions on Crimea stand as powerful evidence of the consensus of the international community that Ukraine's territorial integrity in its settled borders must be respected; that Russia's actions in Crimea implicate the longstanding *jus cogens* prohibition on the forcible annexation of territory;[28] and that these actions trigger the equally settled obligation of non-recognition.[29] Pursuant to that obligation, Russia's claim that the legal status of Crimea has been altered must be denied any and all legal effect at the international level.[30]

19. The obligation of non-recognition is a self-executing obligation, *i.e.*, it arises in connection with serious breaches of international law without the need for any further action.[31] As explained by Professor Stefan Talmon, while the obligation arises irrespective of General Assembly action, the Assembly — consistent with the powers assigned to it under the U.N. Charter[32] — plays a "coordinat[ing]" role, providing a forum for States to make a

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[27] *See South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase*, ICJ Judgment of 18 July 1966, ¶ 98 **(UAL-85)**. Russia cites this decision for the proposition that General Assembly Resolutions "are not binding." Russia's Reply, ¶ 24 & n. 32.

[28] *See* Ukraine's Observations, ¶ 27; *see*, *e.g.*, U.N. General Assembly Resolution 73/194, U.N. Doc. No. A/RES/73/194 (17 December 2018), Preamble, ¶ 1 (recalling "the temporary occupation of Crimea and the threat or use of force against the territorial integrity or political independence of Ukraine by the Russian Federation" and stressing "that the presence of Russian troops in Crimea is contrary to the national sovereignty, political independence and territorial integrity of Ukraine") **(UA-549)**.

[29] Ukraine's Observations, ¶ 27; *see* ILC Articles on State Responsibility, Art. 41 **(UAL-33)**.

[30] *See* Gaetano Arangio-Ruiz, Fifth Report on State Responsibility, U.N. Doc. A/CN.4/453 and Add.1-3 (12 and 28 May and 8 and 24 June 1993), p. 41, ¶ 158 (explaining that serious breaches of international law are not capable of "producing legal effects at the international level") **(UAL-37)**; *see* Ukraine's Observations, ¶ 30; *supra* ¶ 16.

[31] Stefan Talmon, *The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a* Jus Cogens *Obligation: An Obligation Without Real Substance?* in Christian Tomuschat and Jean-Marc Thouvenin (eds.), The Fundamental Rules of the International Legal Order (2005), p. 113 (citing Ian Brownlie, Principles of Public International Law (6th ed., Oxford 2003), p. 491) ("The obligation and content of non-recognition do not depend upon any action by the appropriate political organs of the United Nations.") **(UAL-86)**; *see also* ILC Articles on State Responsibility, Art. 41 (establishing no procedural precondition for the obligation to apply) **(UAL-33)**; *East Timor (Portugal v. Australia)*, ICJ Judgment of 30 June 1995, dis. op. of Judge Skubiszewski, ¶ 125 ("[T]he obligation not to recognize a situation created by the unlawful use of force . . . is self-executory.") **(UAL-87)**.

[32] *See* U.N. Charter, Arts. 10, 11(2) **(UAL-1)**; *id.*, Art. 14 ("[T]he General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to

collective determination as to whether the obligation has been triggered.[33] General Assembly resolutions that exercise this coordinating function are entitled to substantial normative weight,[34] and international tribunals and jurists have repeatedly relied on such resolutions as evidence of the consensus of the international community.[35]

20. Russia asserts that the international community's consensus as to the non-recognition of its claim to Crimea has no relevance to "adjudicative bod[ies] such as the Tribunal."[36] It argues also that there is no legal basis for reliance on the General Assembly's resolutions on Crimea.[37] But in fact, UNCLOS Article 293 provides for the application in these proceedings of the "Convention and other rules of international law not incompatible

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impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter . . . .").

[33] Stefan Talmon, *The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a* Jus Cogens *Obligation: An Obligation Without Real Substance?* in Christian Tomuschat and Jean-Marc Thouvenin (eds.), The Fundamental Rules of the International Legal Order (2005), p. 113 ("[T]he function of the political organs of the United Nations is one of coordination, rather than creation, of the obligation, as uncoordinated acts of non-recognition by individual States will not usually be very effective.") **(UAL-86)**.

[34] The normative value of General Assembly resolutions has been recognized in other contexts, as well. *See, e.g.*, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion of 8 July 1996, ¶ 70 ("The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value.") **(UAL-89)**; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, ICJ Judgment on Jurisdiction and Admissibility of 5 October 2016, dis. op. of Judge Cançado Trindade, ¶¶ 301, 309 ("The distinct series of U.N. General Assembly resolutions on nuclear disarmament over the years . . . are endowed with authority and legal value."; "A small group of States — such as the [nuclear weapons states] — cannot overlook or minimize those reiterated resolutions, extended in time, simply because they voted against them, or abstained. Once adopted, they are valid for all U.N. Member States.") **(UAL-90)**.

[35] *South West Africa*, ICJ Judgment of 18 July 1966, dis. op. of Judge Jessup, p. 441 (explaining that the General Assembly's series of resolutions on South Africa's policy of apartheid "are proof of the pertinent contemporary international community standard" of which apartheid falls short) **(UAL-91)**; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion of 9 July 2004, sep. op. of Judge Al-Khasawneh, ¶ 3 (noting that the General Assembly's resolutions on Palestine "produce legal effects and indicate a constant record of the international community's *opinio juris*") **(UAL-92)**; *id.*, ICJ Advisory Opinion of 9 July 2004, ¶ 117 (recalling the General Assembly's reference to the principle of inadmissibility in regard to Palestine) **(UAL-93)**; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, ICJ Advisory Opinion of 25 February 2019, ¶ 173 (referencing General Assembly resolutions that "require[d] the United Kingdom . . . to respect the territorial integrity of [Mauritius], including the Chagos Archipelago") **(UAL-94)**.

[36] Russia's Reply, ¶ 24.

[37] *Id.* ¶ 22.

with this Convention."[38] That formulation necessarily incorporates the legal principles determined to be applicable by the General Assembly's resolutions on Crimea,[39] including the obligation of non-recognition under international law.

21. Notably, the recent Advisory Opinion of the International Court of Justice on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* confirms that General Assembly resolutions draw weight both from the Assembly's unique role in the U.N. Charter system, and from the legal principles embedded in them. There, the Court concluded that the United Kingdom was bound to "respect the territorial integrity of [Mauritius]" in light of: (i) "obligations arising under international law *and reflected in the resolutions adopted by the General Assembly* during the process of decolonization of Mauritius" and (ii) the special force accorded to General Assembly resolutions relating to decolonization in light of the Assembly's consistent role in overseeing the process of decolonization.[40] Similarly here, the relevance of the General Assembly's resolutions on Crimea results from: (i) the inherent force of the legal principles (including the obligation of non-recognition) that the General Assembly has determined apply to Crimea, and (ii) the General Assembly's role as a forum for coordination of the obligation of non-recognition.

22. Russia's last line of defense is to question the strength of the international consensus on Crimea by arguing that certain States abstained from and, in a small number of cases, voted against the General Assembly's five resolutions on Crimea.[41] Notably, where such States have explained their votes, they have cited reasons that do not undermine the international consensus on non-recognition of Russia's annexation. They have pointed, for

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[38] UNCLOS, Art. 293(1).

[39] *See generally The M/V "Saiga" (No. 2) Case (St. Vincent and the Grenadines v. Guinea)*, ITLOS Case No. 2, Judgment of 1 July 1999, ¶ 155 (applying international law on proportionality in the use of force and observing that, "[a]lthough the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances") **(UAL-28)**; *In the Matter of an Arbitration between Guyana and Suriname*, Award of the Arbitral Tribunal of 17 September 2007, ¶ 425 (considering an "alleged violation of [. . .] obligations under the Convention, the U.N. Charter, and general international law" relating to the use of force) **(UAL-76)**.

[40] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, ICJ Advisory Opinion of 25 February 2019, ¶¶ 167, 173 **(UAL-94)**; *see also Legal Consequences of the Construction of a Wall*, ICJ Judgment of 9 July 1994, sep. op. of Judge Elaraby, p. 252 ("The legal force and effect of a General Assembly resolution adopted by the General Assembly 'within the framework of its competence' is therefore well established in the Court's jurisprudence.") **(UAL-38)**.

[41] Russia's Reply, ¶ 26.

example, to a preference for regional processes[42] or for the use of non-U.N. mechanisms.[43] The overwhelming support behind the General Assembly's repeated calls for non-recognition speaks for itself.

B. The Inadmissibility of Russia's Claim Results Also from Russia's Own Obligations Under International Law

23. As recognized in the *Namibia (South West Africa)* and *Legal Consequences of the Construction of a Wall* cases, collective non-recognition is an obligation not just of third States, but of "*[a]ll* States."[44] This includes "the responsible State," which is "under an obligation not to recognize or sustain the unlawful situation" and cannot seek to "consolidate the situation it has created."[45] Even if it were assumed (as Russia argues) that the obligation of non-recognition does not apply directly to this Tribunal, the Tribunal could not entertain an argument from Russia that violates Russia's *own* international legal obligations.

24. Russia's claim is inadmissible for a further reason, which is reflected by the General Assembly's first resolution on Crimea (but, again, not dependent on that resolution

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[42] Discussion of Draft Resolution A/68/L.39, U.N. Doc. No. A/68/PV.80 (27 March 2014), p. 21 (statement of Egypt that situations like the Russian invasion of Crimea "may be better addressed at the regional rather than the international level") **(UA-467)**.

[43] *See id.* p. 11 (statement of China indicating that a General Assembly resolution would "further complicate the situation," and that China would have preferred the "establishment and implementation of an international coordination mechanism"). Seven of the states that voted against General Assembly Resolution 68/262 issued statements explaining their votes. With the sole exception of the Democratic People's Republic of Korea, not one stated that it recognized Russian sovereignty over Crimea. Rather, the statements generally expressed the view that the situation was complex and politically fraught, and the resolution was not an appropriate vehicle. *See id.* pp. 6-7, 12-13, 20-21, 24-25, 27. Similar generalized statements were made by States that abstained from the resolution. *See generally id.* Russia alleges that the share of abstentions from subsequent General Assembly resolutions concerning the situation of human rights in Crimea constitutes evidence of a "dwindling of support" for non-recognition at the General Assembly. *See* Russia's Reply, ¶ 26; *see also id.* ¶ 26 & n. 42. But, as summarized by the U.N. Secretariat, such votes were principally motivated by "concerns that [. . .] country-specific resolutions clearly show the politicization of human rights and double standards, and only encourage confrontation." *See* United Nations, General Assembly Adopts 16 Texts Recommended by Fifth Committee, Concluding Main Part of Seventy-Third Session (22 December 2018) **(UA-552)**. Similarly, States explaining their decisions to abstain from or vote against the 2018 General Assembly resolution urging the Russian Federation to withdraw its armed forces from Crimea largely raised practical concerns about, for example, interference with the Minsk process. United Nations, General Assembly Adopts Resolution Urging Russian Federation to Withdraw Its Armed Forces from Crimea, Expressing Grave Concern about Rising Military Presence (17 December 2018) **(UA-553)**.

[44] *Legal Consequences of the Construction of a Wall*, ICJ Advisory Opinion of 9 July 2004, ¶ 163 **(UAL-93)** (emphasis added); *see also Namibia (South West Africa),* ICJ Advisory Opinion of 21 June 1971, ¶¶ 118, 133 **(UAL-84)**.

[45] ILC Articles on State Responsibility, Art. 41 & cmt. ¶ 9 **(UAL-33)**.

for its legal force). As recounted in Ukraine's Observations,[46] Resolution 68/262 recognized that Russia is bound by its repeated and specific commitments to respect Ukraine's borders as they stood at the time of its independence.[47] The resolution specifically recalled the Final Act of the Conference on Security and Cooperation in Europe, signed in Helsinki on 1 August 1975 ("Helsinki Final Act");[48] the Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons ("Budapest Memorandum") of 5 December 1994;[49] and the Alma Ata Declaration of 21 December 1991.[50] Each of the foregoing instruments — and others, such as the Agreement Establishing the Commonwealth of Independent States[51] and the Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation of 31 May 1997[52] — reflects Russia's commitment to respect Ukraine's territorial integrity within its borders as they existed at the time, including with respect to Crimea.

25. It is thus not only the principle of non-recognition that binds Russia here, but Russia's continuing treaty commitments. Basic principles of good faith and estoppel preclude Russia from advancing claims inconsistent with its past commitments and

[46] Ukraine's Observations, ¶ 27.

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

[48] The Helsinki Final Act specifically confirmed each member State's respect for the territorial integrity of all other member States. *See* Helsinki Final Act (Helsinki, 1 August 1975), Arts. I, III, IV **(UA-554)**. The Union of Soviet Socialist Republics was an original party to the Helsinki Final Act, and both Ukraine and Russia succeeded, individually, to the USSR's membership in the Conference on Security and Cooperation in Europe (now the Organization for Security and Cooperation in Europe).

[49] Memorandum on Security Assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons, U.N. Doc. A/49/765 and S/1994/1399 (19 December 1994) (reflecting an undertaking from Russia, the United States and the United Kingdom "to respect the independence and sovereignty and the existing borders of Ukraine" as an inducement for Ukraine to relinquish its nuclear weapons) **(UA-463)**.

[50] Declaration of Alma Ata, U.N. Doc. A/47/60 Ann. II (Alma Ata, 21 December 1991) (wherein eleven former Soviet states, including Russia and Ukraine, reaffirmed their recognition and respect for "the territorial integrity of each other and the inviolability of existing borders") **(UA-556)**.

[51] Agreement Establishing the Commonwealth of Independent States, U.N. Doc. A/46/771 Ann. II (Minsk, 8 December 1991), Art. 5 ("The High Contracting Parties acknowledge and respect each other's territorial integrity and the inviolability of the existing borders within the Commonwealth.") **(UA-557)**.

[52] Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation (Kyiv, 31 May 1997), Art. 2 ("In accordance with the provisions of the United Nations Charter and the obligations of the Final Act on Security and Cooperation in Europe, the High Contracting Parties shall honour each other's territorial integrity and shall acknowledge the inviolability of the borders existing between them.") **(UA-558)**.

representations.[53] In the often quoted words of Judge Alfaro in *The Temple of Preah Vihear*, "inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible."[54] Russia, having repeatedly committed itself to respect Ukrainian sovereignty over Crimea, may not before this Tribunal invoke or rely on any claim that contradicts those earlier commitments.

26. For all of these reasons, Russia's claim that Ukraine has lost sovereignty over Crimea must be treated as "null and void" and "non-existent."[55] Ukraine's Observations explained that, in attempting to rely on such an inadmissible claim to defeat the Tribunal's jurisdiction, Russia's objection implicates the Tribunal's inherent power and duty to ensure the integrity of these arbitral proceedings.[56] Contrary to Russia's view, the Tribunal's inherent power is not limited to ordering the particular form of relief at issue in *Northern Cameroons — i.e.*, dismissal of an applicant's affirmative claim.[57] As Russia seems to accept in a separate section of its Reply,[58] tribunals also have the inherent power to reject frivolous, distracting, or abusive arguments, no matter which party raises them.[59] That is precisely the

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[53] Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (1953), pp. 141-142 (a State may not "blow hot and cold") **(UAL-95)**; *see also The Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ Judgment of 15 June 1962, pp. 32-33 (holding Thailand to its prior acceptance of territorial boundaries) **(UAL-96)**.

[54] *The Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ Judgment of 15 June 1962, sep. op. of Vice President Alfaro, p. 40 **(UAL-97)**; *see also id.* p. 39 ("a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation").

[55] *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, ICJ Order on Provisional Measures of 13 September 1993, sep. op. of Judge *ad hoc* Lauterpacht, ¶ 80 ("It is beyond question that territory cannot lawfully be acquired by the aggressive use of force and that such acquisition is in theory null and void unless and until ratified by consent on the part of the State whose territory is thereby attenuated.") **(UAL-98)**.

[56] Ukraine's Observations, ¶ 33 (citing *Northern Cameroons (Cameroon v. U.K.)*, ICJ Judgment of 2 December 1963, p. 29 **(UAL-39)**); *see also* H. Lauterpacht, Recognition in International Law (Cambridge, 1947), p. 421 ("[T]o admit that, apart from well-defined exceptions, an unlawful act, or its immediate consequences, may become *suo vigore* a source of legal right for the wrongdoer is to introduce into the legal system a contradiction which cannot be solved except by a denial of its legal character.") **(UAL-99)**.

[57] Russia's Reply, ¶ 29.

[58] Russia's Reply, ¶ 34.

[59] *See Nuclear Tests (Australia v. France)*, ICJ Judgment of 20 December 1974, ¶ 23 ("The Court possesses an inherent jurisdiction enabling it to take such action as may be required . . . to provide for the orderly settlement of all matters in dispute, to ensure the observance of the inherent limitations on the exercise of the judicial function of the Court, and to maintain its judicial character. Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial

power that the Tribunal should bring to bear here, so as not to allow Russia to strip it of its established jurisdiction by advancing a claim that is inadmissible as a matter of international law.

II. Russia's Claim Is Not Plausible, and thus Cannot Defeat the Tribunal's Jurisdiction

27. Even if Russia's claim were admissible, it still would not establish the existence of a predicate legal dispute concerning land sovereignty that is capable of displacing the Tribunal's jurisdiction. Articles 286 and 288 of UNCLOS assign to this Tribunal the power and duty to hear "any" dispute concerning the interpretation or application of the Convention. Faced with claims that concern maritime conduct and that call for the determination of rights and obligations under the Convention, Russia may not escape its consent to arbitration simply by *asserting* that this dispute is actually about, or would imply a preliminary adjudication of, its claim that the legal status of Crimea has changed.[60] Because Russia's claim is not plausible, it does not give rise to a legal dispute concerning land sovereignty that is capable of altering the nature of the dispute before the tribunal.

A. The Plausibility Test Provides an Appropriate Framework for Identifying Assertions of Sovereignty that Are Incapable of Defeating an UNCLOS Tribunal's Jurisdiction

28. As Ukraine's Observations explained,[61] a respondent's asserted sovereignty claim must have a reasonably arguable legal basis before an UNCLOS tribunal could even *potentially* decide that the dispute before it does not "concern the interpretation or application of the Convention." If a respondent State that is violating the coastal State's UNCLOS rights could defeat the Convention's regime of mandatory dispute resolution simply by advancing a frivolous sovereignty claim, the consent to arbitrate found in Articles 286 and 288 would be illusory, defying the principle of effectiveness in treaty interpretation. The well-established plausibility rule allows the Tribunal to ensure that groundless assertions of sovereignty do not undermine the Convention's regime of mandatory dispute resolution.

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organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.") (internal quotation marks and citations omitted) (**UAL-100**).

[60] Ukraine's Observations, ¶¶ 40-42.

[61] *Id.*, Chapter Two, Section II.B.

29. Russia purports to accept that "a State could not manufacture a territorial dispute to defeat jurisdiction," and that UNCLOS tribunals must be able to reject abusive attempts to undermine their jurisdiction.[62] But in practice, Russia argues for a rule that would achieve the opposite. According to Russia's proposal, a respondent State's assertion of sovereignty over a relevant coastal area always defeats jurisdiction, ***unless*** the claim both (i) post-dates the formal commencement of UNCLOS dispute resolution processes[63] and (ii) has never been articulated by the respondent State outside the context of the arbitration.[64] Russia describes this test as reflecting the "concept" of "abuse of right/process."[65]

30. Such a standard has dangerous implications, and offers a blueprint to any State that wishes to violate a coastal State's maritime rights, and avoid the Convention's regime of mandatory dispute resolution, by insisting that there is a predicate "sovereignty dispute" to be resolved, however frivolous its claim to sovereignty.[66] Ukraine's Observations put forward a hypothetical South China Sea scenario, which showed that China could (on Russia's theory) have avoided jurisdiction simply by inventing a sovereignty claim to portions of the Philippines archipelago.[67] Russia argues that this hypothetical is solved by its "abuse of right/process" test,[68] but it is not. On Russia's view, China could first have announced in the United Nations that it was sovereign over a previously undisputed part of

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[62] Russia's Reply, ¶ 34

[63] Notably, several of the underlying violations at issue in this case do not significantly post-date Russia's asserted claim to sovereignty over Crimea. *See, e.g.*, Ukraine's Memorial, ¶¶ 118-121, 166-168, 174.

[64] Russia's Reply, ¶ 34(a).

[65] *Id.* ¶ 34. These are in fact two different legal doctrines, but Russia does not distinguish between them. *See Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, ICJ Preliminary Objections Judgment of 6 June 2018, ¶ 146 ("In the case law of the Court and its predecessor, a distinction has been drawn between abuse of rights and abuse of process.") **(UAL-101)**.

[66] For its part, Russia raises the exaggerated concern that a State could invoke a frivolous dispute under UNCLOS in order to manufacture jurisdiction over a sovereignty dispute. Russia's Reply, ¶ 35. In such a case, the sovereignty dispute would presumably involve plausible claims, whereas it is the UNCLOS dispute that would fail the test of plausibility — or, at a minimum, fail the balancing inquiry called for under *Chagos*. *See infra* Chapter Two, Section III.

[67] Ukraine's Observations, ¶ 41 ("[I]n Russia's view, China could have abruptly asserted an implausible claim to Luzon, Palawan, or another Philippine island, creating a 'dispute' over territorial sovereignty, and thus creating competing claims of entitlement to the maritime areas at issue in the arbitration. Similarly, in any future case concerning violations of a coastal State's rights, the respondent State accused of breaching UNCLOS could easily nullify its consent to compulsory dispute resolution by asserting a baseless territorial claim, and thereby manufacturing a territorial dispute.").

[68] Russia's Reply, ¶ 33.

the Philippines; then commenced interfering with Philippine offshore petroleum exploration; and still resisted jurisdiction based on a preexisting sovereignty dispute. This outcome defies the text of Articles 286 and 288, denies effect to States Parties' consent to arbitrate, and contravenes the object and purpose of UNCLOS.[69]

31. Unlike Russia's proposal, the plausibility test provides what Articles 286 and 288 require: an objective method of evaluating whether there is a sufficient legal basis for a sovereignty claim, such that it could potentially be the true issue in a maritime dispute, or a real predicate question requiring resolution. As Ukraine has shown, both the International Court of Justice and the International Tribunal for the Law of the Sea have made use of the plausibility test in connection with characterizing disputes before them.[70] In the words of Judge Shahabuddeen, for example, "there is no dispute within the meaning of the law where the claim lacks any reasonably arguable legal basis."[71] Similarly, in the *M/V Saiga* case, the International Tribunal for the Law of the Sea rejected the arguments of a respondent, which had been claimed to defeat the availability of a prompt release proceeding, for failing to meet the "requirements of arguability (or of being of a sufficiently plausible character)."[72]

32. Russia objects that the concept of plausibility is typically used to assess the position of a claimant in an international proceeding; it asserts that there is no support for

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[69] *See* Ukraine's Observations, ¶ 41.

[70] *Id.* ¶ 43.

[71] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Judgment on Preliminary Objections of 12 December 1996, sep. op. of Judge Shahabuddeen, p. 832 **(UAL-52)**; *see also id.* (identifying further support for that proposition in the opinions of, among others, Judge *ad hoc* Barwick in *Nuclear Tests*, Judge Jennings in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, ICJ Judgment of 27 June 1986, and Judge *ad hoc* Spiropoulos in *Ambatielos (Greece v. United Kingdom)*, ICJ Judgment on Preliminary Objections of 1 July 1952); *id.* sep. op of Judge Ranjeva, p. 844 ("That the Parties put forward conflicting propositions is not in itself sufficient to establish the existence of a dispute . . . .") **(UAL-51)**.

[72] *The M/V Saiga (No. 1)*, ITLOS Case No. 1, Prompt Release Judgment of 4 December 1997, ¶ 61 **(UAL-48)**. Russia protests that this passage from *M/V Saiga* "is not concerned with the characterisation of a dispute." Russia's Reply, ¶ 38 & n. 71. To the contrary, the International Tribunal for the Law of the Sea was indeed choosing between two competing characterizations: St. Vincent and the Grenadines alleged that the case concerned an arrest pursuant to Article 73 of the Convention, permitting a prompt release proceeding; Guinea alleged that the case concerned an arrest pursuant to Article 111, for which prompt release is not provided. *M/V Saiga (No. 1)*, Prompt Release Judgment of 4 December 1997, ¶¶ 59-60 **(UAL-48)**. The Tribunal made clear that it was not deciding "the merits of the case," but that it was required to take a preliminary view on whether the allegations on each side were "arguable or of a sufficiently plausible character." *Id.* ¶ 51. It is in this context that the International Tribunal for the Law of the Sea applied the plausibility standard to assess the respondent's framing of the case, concluding that its arguments were "not tenable, even *prima facie*." *Id.* ¶ 61.

extending the use of the plausibility test to claims advanced by respondents.[73] This position disregards *M/V Saiga*, where the International Tribunal for the Law of the Sea plainly questioned whether a claim raised by the respondent State met the "requirement[]" of "being of a sufficiently plausible character."[74] More generally, there is no reason why a plausibility analysis should not be used to assess a legal claim introduced into the proceedings by a respondent. Ukraine has offered ample evidence demonstrating that the dispute before the Tribunal concerns the Convention. Russia now seeks to defeat that jurisdiction on the basis of its own claim, relating to an alleged change in status of Crimea. Nothing in the Convention (or international law generally) permits an unbalanced jurisdictional inquiry in which the claimant is held to objective evidence, but the respondent is simply taken at its word.[75] This would amount to a presumption *against* jurisdiction of the sort that international tribunals have rejected.[76]

33. Moreover, Russia contradicts its own argument that the claim of a respondent cannot be assessed for plausibility. As noted above, Russia proposes that a respondent's sovereignty claim should not defeat jurisdiction if it fails the "abuse of right/process" standard. But that standard, no less than plausibility, is typically applied to the claims of applicants rather than respondents. Indeed, the *Immunities and Criminal Proceedings* case cited by Russia in support of its test concerns an attempt by the respondent to strike, on grounds of abuse of right and abuse of process, claims lodged by the applicant.[77] It is thus common ground between the Parties that a standard typically used to assess the claims of an applicant can appropriately be used to assess claims brought forward by a respondent attempting to avoid adjudication of an UNCLOS dispute. The only question is *which*

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[73] Russia's Reply, ¶¶ 39-40 & nn. 74-77. This, for example, is Russia's sole response to the opinions cited by Ukraine from the International Court of Justice's *Oil Platforms*, *Ambatielos* and *Nuclear Tests*. Ukraine's Observations, ¶¶ 43-46 and accompanying notes.

[74] *The M/V Saiga (No. 1)*, ITLOS Case No. 1, Prompt Release Judgment of 4 December 1997, ¶¶ 51, 61 **(UAL-48)**.

[75] *See Fisheries Jurisdiction*, ICJ Judgment on Jurisdiction of 4 December 1998, ¶¶ 30-31 ("the position of both parties" are to be objectively assessed in light of all available "pertinent evidence") **(UAL-42)**.

[76] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, ICJ Judgment on Jurisdiction and Admissibility of 20 December 1988, ¶ 16 (citing *Factory at Chorzów (Germany v. Poland)*, P.C.I.J. Judgment on Jurisdiction of 26 July 1927, p. 32) (adopting a "preponderan[ce]" standard on the issue of jurisdiction, and rejecting the argument that "in case of doubt the Court should decline jurisdiction") **(UAL-102)**.

[77] *See Immunities and Criminal Proceedings*, ICJ Preliminary Objections Judgment of 6 June 2018, ¶¶ 139-152 (relying on additional cases that arose in the same procedural posture) **(UAL-101)**.

standard, and Russia has no answer to Ukraine's explanation that the plausibility standard best effectuates the text of Articles 286 and 288 and the object and purpose of the Convention.

34. Russia next protests that use of the plausibility test would "advance[] to the jurisdictional phase the consideration of the disputed issue as to territorial sovereignty."[78] This is not the case. Where, as here, an assertion of sovereignty "lacks any reasonably arguable legal basis," is "manifestly frivolous or unsupportable," or is "contrary to the legal norm of positive law,"[1] the Tribunal does not need to resolve any legal dispute concerning territorial sovereignty at *any* stage of the proceedings. There is no such "dispute within the meaning of the law" at all.[79]

35. Moreover, the plausibility test permits tribunals to take a preliminary view of a merits issue that is alleged to fall outside their jurisdiction.[80] In *M/V Saiga*, for instance, the International Tribunal for the Law of the Sea was conscious that "the merits of the case may be submitted to [another] international court or tribunal"; its view that Guinea's arguments lacked plausibility sufficed for the tribunal to order prompt release, but did not prejudice Guinea's ability to press its claim on the merits elsewhere.[81] Likewise here, this Tribunal's eventual award could not prevent Russia from, for example: (i) asserting the validity of its annexation of Crimea before the political organs of the United Nations or diplomatic forums; or (ii) asserting the validity of its annexation of Crimea before the International Court of Justice or any other tribunal the parties might select in the future to resolve the purported territorial dispute.[82] Ukraine has not sought any relief in this proceeding pertaining to Russia's occupation of the Crimean Peninsula.

36. Ultimately, the plausibility standard simply allows the Tribunal to test Russia's argument that there is a predicate legal dispute even potentially capable of

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[78] Russia's Reply, ¶ 31; *see also id.* ¶ 42 (arguing that the Tribunal cannot "engage in [...] a determination of the sovereignty dispute").

[79] *Oil Platforms (Iran v. U.S.)*, ICJ Judgment on Preliminary Objections of 12 December 1996, sep. op. of Judge Shahabuddeen, p. 832 **(UAL-52)**; *Nuclear Tests (Australia v. France)*, ICJ Judgment of 20 December 1974, joint dis. op. of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, p. 364 (where a party has simply "dress[ed] up as a legal claim" a case lacking in "any rational, that is, reasonably arguable, legal basis," that calls into question the legal character of the asserted dispute) **(UAL-54)**; *see supra* ¶ 31.

[80] Ukraine's Objections, ¶ 43 & n. 67.

[81] *The M/V Saiga (No. 1)*, ITLOS Case No. 1, Prompt Release Judgment of 4 December 1997, ¶ 51 **(UAL-48)**.

[82] Of course, Russia would not be successful in such an effort given that it lacks even a plausible claim.

precluding resolution of Ukraine's claims of UNCLOS violations. If Russia's claim to be sovereign in Crimea, as asserted before this Tribunal, fails even the basic test of plausibility, it is not capable of having such an effect.

B. Russia's Claim Is Not Plausible

37. As explained in Ukraine's Observations, the implausibility of Russia's claim to have acquired sovereignty over Crimea is demonstrated both by the evidence establishing the settled consensus of the international community on Crimea,[83] and by the incoherence of Russia's articulated position taken on its own terms.[84]

38. As noted above, the international community has firmly rejected Russia's claim that the legal status of Crimea has changed, a point to which Russia has no meaningful response. Neither does Russia engage with Ukraine's showing that the facts alleged in Russia's Preliminary Objections, even if assumed to be true, do not supply a reasonably arguable legal basis for concluding that the settled status of Crimea as part of Ukraine has changed.[85]

39. In lieu of any attempt to articulate a plausible legal claim, Russia retreats to posing vague "questions" that, according to Russia, might be raised by "a determination of the sovereignty dispute."[86] These are said to include "the circumstances in which Crimea was transferred to Ukraine in 1954"; "Ukraine's proclamation of independence in 1991"; and "the legality of the change of government in Ukraine's capital in February 2014."[87] Such questions are legally irrelevant to Russia's claim to land sovereignty — particularly in light of Russia's unambiguous, repeated, and binding commitments to respect Ukrainian sovereignty over Crimea in numerous international legal instruments.[88]

40. It is thus apparent that Russia has done nothing at all to establish the plausibility of its claim — a point that must count against it.[89] The absence of a plausible

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[83] Ukraine's Observations, ¶ 47; *see also id.*, Chapter Two, Section II.A.

[84] *Id.* ¶¶ 48-50.

[85] *See id.* ¶ 49.

[86] Russia's Reply, ¶ 41.

[87] *Id.* ¶ 41.

[88] *See infra* ¶ 24.

[89] In his Declaration in *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judge Kooijmans noted that the Philippines, which was seeking to intervene in the proceedings, had been "explicitly invited" by counsel to Malaysia to clarify the plausibility of its claim to the Malaysian region of North Borneo. *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, ICJ Judgment of 23 October 2001, decl. of Judge Kooijmans, ¶¶ 8-16 (**UAL-103**). The Philippines

Russian claim means that there is no predicate dispute as to land sovereignty capable of preventing this Tribunal from exercising its jurisdiction over "any dispute concerning the interpretation or application of the Convention," and addressing Russia's serious violations of Ukraine's maritime rights.

III. The Weight of the Dispute Is Overwhelmingly with Issues Arising Under the Convention, and the Tribunal Has Jurisdiction to Make Any Determinations of Law Necessary in Order to Resolve the Dispute

41. Russia's preliminary objection fails also for a third reason. Even assuming, *arguendo*, that there exists a predicate legal dispute as Russia argues, under the present circumstances the Tribunal *does* have jurisdiction to make predicate determinations of law necessary to perform the function assigned to it by the Convention — *i.e.*, to resolve "any dispute concerning the interpretation or application of the Convention."[90]

42. This is reflected by the decision in the *Chagos Marine Protected Area* arbitration. The *Chagos* decision was closely divided between a two-arbitrator dissent and a three-arbitrator majority opinion. The tribunal was unanimous on one point, however: that a respondent State's assertion of a sovereignty claim cannot automatically defeat jurisdiction under Articles 286 and 288, and that, in at least some cases, a tribunal acting pursuant to those articles may resolve a predicate sovereignty dispute. Specifically, "where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it."[91]

43. The issue dividing the dissent and majority was not *whether* a tribunal can address such predicate issues, but when. According to Judges Wolfrum and Kateka, an UNCLOS tribunal may always exercise jurisdiction to resolve an UNCLOS dispute placed before it, even if doing so requires it first to resolve a disputed issue of territorial sovereignty.[92] The majority agreed that, if necessary to decide a real law of the sea dispute, it

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declined to do so and, thus, Judge Kooijmans concluded that its application to intervene could have been rejected by the court on the additional ground of non-plausibility. *Id.* The same reasoning applies to Russia's failure to respond to Ukraine's express invitation to clarify the plausibility of its claims here.

[90] UNCLOS, Arts. 286, 288.

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

[92] *See Chagos Marine Protected Area Arbitration*, Award of 18 March 2015, diss. and conc. op. of Judges James Kateka and Rüdiger Wolfrum, ¶ 45 ("That it will be necessary to consider the sovereignty issue by having recourse to general international law or specific international agreements is anticipated in the Convention. To introduce a new limitation to the jurisdiction of international

could decide matters beyond the law of the sea, but first sought to ensure that the dispute before it really was a law of the sea dispute. The tribunal sought, in other words, to guard against abuse of its jurisdiction through which a dispute dressed up as one concerning the interpretation or application of the Convention could be used as a "pretext" for a tribunal "to assume jurisdiction over matters of land sovereignty."[93]

44. To determine whether a dispute concerns the Convention, or instead concerns land sovereignty brought under the "pretext" of claims concerning the Convention, the *Chagos* majority adopted a "weight of the dispute" test. As explained in a passage from *Chagos* emphasized by Russia in its Preliminary Objections,[94] but not mentioned in its Reply:

> For the purpose of characterizing the Parties' dispute, . . . the Tribunal must evaluate where the relative weight of the dispute lies. Is the Parties' dispute primarily a matter of the interpretation and application of the term "coastal State", with the issue of sovereignty forming one aspect of a larger question? Or does the Parties' dispute primarily concern sovereignty, with the United Kingdom's actions as a "coastal State" merely representing a manifestation of that dispute?[95]

45. The majority's approach reflected not only its reading of Articles 286 and 288, but also its application of principles developed by the International Court of Justice with respect to the characterization of disputes on an objective basis. Contrary to Russia's contentions, in characterizing disputes pending before it the Court has consistently taken the claimant's formulation of the dispute as its starting point;[96] it has consistently required an

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courts and tribunals acting under Part XV of the Convention would change the balance achieved at the Third U.N. Conference on the Law of the Sea in respect of the dispute settlement system. The Tribunal lacks the competence do so.") **(UAL-41)**.

[93] *Chagos Marine Protected Area Arbitration*, Award of 18 March 2015, ¶ 219 **(UAL-18)**.

[94] Russia's Objections, ¶¶ 24-25 & n. 28; *id.* ¶ 42.

[95] *Chagos Marine Protected Area Arbitration*, Award of 18 March 2015, ¶¶ 210-211 **(UAL-18)**.

[96] *Fisheries Jurisdiction*, ICJ Judgment on Jurisdiction of 4 December 1998, ¶ 30-31 ("It is for the Court itself, *while giving particular attention to the formulation of the dispute chosen by the Applicant*, to *determine on an objective basis* the dispute dividing the parties, by examining the position of both parties . . . . [The Court] will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence.") (emphasis added) **(UAL-42)**. Russia takes issue with the idea that *Fisheries Jurisdiction* establishes any "presumption in favour of the claimant's characterisation of a given dispute . . . .". Russia's Reply, ¶ 36. The words chosen by the Court — "particular attention" — are self-explanatory.

objective analysis of "all pertinent evidence";[97] and it has consistently held that — notwithstanding the existence of actual or alleged disagreements on other matters — it will hear a dispute where the acts complained of by the claimant "fall within the provisions of the Treaty" that supplies jurisdiction.[98] These are not controversial principles; Russia itself has cited extensively to a leading case that establishes them.[99]

46. In applying these principles, the *Chagos* tribunal found that the dispute before it primarily concerned issues of land sovereignty. But Ukraine's Observations explained that the *Chagos* tribunal reached its conclusion based on a highly developed record pertaining to the land sovereignty dispute that is not paralleled in this case.[100] In *Chagos*, both Mauritius and the United Kingdom presented and briefed a dense and complex history of conflicting claims. The Tribunal was presented with evidence that Mauritius had consented to the detachment of the Chagos Islands prior to independence.[101] Subsequently, starting in the 1980s and continuing into the 1990s, 2000s, and 2010s, Mauritius sought to alter the status of the Chagos Islands as British territory by retracting its consent to detachment. Mauritius's attempts to alter the status of the Chagos Islands implicated fact-intensive issues related to de-colonization and duress.[102]

47. The *Chagos* tribunal relied heavily on the "extensive record, extending across a range of fora and instruments," concerning the parties' sovereignty dispute over the Chagos Islands.[103] The tribunal emphasized that this sovereignty dispute was accorded significantly greater weight by both parties than their UNCLOS dispute.[104] That was express in the parties' pleadings: Mauritius specifically anticipated that the relief it sought from the Annex VII tribunal would have consequences for the Chagos land territory.[105] Crucially, the tribunal deferred to Mauritius's own formulation of the dispute, stating: "as Mauritius itself

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

[98] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, ICJ Judgment on Preliminary Objections of 13 February 2019, ¶ 36 (**UAL-104**).

[99] Russia's Objections, ¶ 5 (citing the *Fisheries Jurisdiction* case and quoting the same passages quoted above); Russia's Reply, ¶¶ 36-37 (same).

[100] Ukraine's Observations, ¶¶ 51-53.

[101] *See Chagos Marine Protected Area Arbitration*, Award of 18 March 2015, ¶¶ 69-87, 100-125 (**UAL-18**).

[102] *See id.* ¶¶ 393, 428.

[103] *Id.* ¶¶ 211-212.

[104] *Id.* ¶ 211.

[105] *Id.*

has argued its case, the consequences of a finding that the United Kingdom is not the coastal State extend well beyond the question of the validity of the MPA."[106] Against this background, a narrow majority of the Tribunal concluded that Mauritius had brought its UNCLOS claim with the actual objective of improving its position on land.[107]

48. If the decision in *Chagos* was a close call, the correct result here should be readily apparent. Rather than a narrow and pretextual dispute concerning the declaration of a Marine Protected Area, there is a well-evidenced UNCLOS dispute that implicates almost the full breadth of the Convention. The tangible and fundamental interests at stake — relating, among other things, to living and non-living resources, free navigation, and irreplaceable underwater archeological sites — are precisely those the Convention was developed to safeguard.

49. On the other side of the scales, and as explained above, there is no serious issue of land sovereignty to be resolved. Further, as shown in Ukraine's Observations, there is simply no basis to conclude that Ukraine's actual objectives in this case have anything to do with issues of land sovereignty.[108] While Russia previously trumpeted the use of terms like "sovereignty" and "jurisdiction" in Ukraine's Memorial,[109] Russia now acknowledges Ukraine's explanation that these terms are used because they appear in the Convention to describe the coastal State's maritime rights.[110] Moreover, the record of diplomatic exchanges, public statements, and other pertinent evidence — which Russia makes no attempt to supplement in its Reply — confirms that Ukraine's objectives pertain to the law of the sea.[111]

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[106] *Id.*

[107] *See id.*; *South China Sea Arbitration,* Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 153 (explaining that, in *Chagos*, the Tribunal had determined "both that a decision on Mauritius's first and second submissions would have required an implicit decision on sovereignty and that sovereignty was the true object of Mauritius's claims") **(UAL-3)**.

[108] Ukraine's Observations, ¶¶ 55-58.

[109] *See, e.g.*, Russia's Objections, ¶¶ 28-35; *id.* ¶ 36 ("The current claim has thus been presented by Ukraine as a response to alleged Russian aggression, and as aimed at securing the 'restoration' and 'return' of Crimean sovereignty to Ukraine.").

[110] Russia's Reply, ¶ 17; *see* Ukraine's Observations, ¶¶ 54-55. In paragraph 46(c) of its Reply, Russia does briefly revive its misleading claim that "Ukraine has expressly stated that the relief it asks for would vindicate Ukraine's national sovereignty." Russia's Reply, ¶ 46(c) (quoting Ukraine's Memorial, ¶ 264). This canard has already been dealt with, as has Ukraine's use of the word "sovereignty" related to its sovereignty over the territorial sea and sovereign rights in the exclusive economic zone. *See* Ukraine's Memorial, ¶ 264.

[111] Ukraine's Observations, ¶ 56; Ukraine's Memorial, ¶¶ 19-20 & nn. 32-34.

50. The broader setting for the dispute is also entirely reversed. In *Chagos*, the claimant sought to recant its prior recognition of the respondent's sovereignty, and, as noted, it expressly informed the tribunal that it sought relief to change the *status quo* on land.[112] Here, as Ukraine has explained,[113] it has long been settled, and accepted by Russia, that Crimea is part of Ukraine. It is *Russia* that seeks to alter that *status quo*, and Ukraine asks for absolutely no relief relating to the situation on land. Russia offers no response to Ukraine's explanation of these important differences from *Chagos*.

51. There is, in short, no objective support for Russia's argument that "sovereignty over land territory is central, is the real dispute, is where the relative weight of the dispute lies (and overwhelmingly so)," and is "the actual objective of Ukraine's claims."[114] To the contrary, this case concerns the two billion dollars' worth of gas and other hydrocarbons Russia has already stolen, the fisheries now exploited by Russia's trawlers, and the civilian and governmental vessels Russia has prevented from engaging in innocent passage and free navigation (among the many other law of the sea issues set out in Ukraine's Memorial). Even if it were assumed that there is a legal dispute concerning sovereignty over Crimea that would have to be resolved before addressing Ukraine's UNCLOS claims, under the circumstances presented here the Tribunal's jurisdiction "extends" to making any "determinations of law as are necessary to resolve the [UNCLOS] dispute presented to it."[115]

* * *

52. For each of the foregoing reasons — the inadmissibility of Russia's claim, its implausibility, and the clear weight of the dispute residing with issues arising under the law of the sea — the dispute before the Tribunal squarely concerns the interpretation or application of the Convention within the meaning of Articles 286 and 288.

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

[113] Ukraine's Observations, ¶ 58.

[114] *See* Russia's Objections, ¶¶ 25, 42.

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

Chapter Three: UNCLOS Applies to the Sea of Azov and Kerch Strait

53. The Tribunal should reject Russia's preliminary objection challenging the applicability of UNCLOS to the Sea of Azov and Kerch Strait. Russia's claim to "common internal waters" in the Sea of Azov and Kerch Strait finds no support in the Convention, and also does not satisfy the three conditions for pluri-State internal waters claims — conditions that have consistently been met in each of the rare circumstances where such claims have been recognized. Moreover, Russia's Reply does not even attempt to reconcile its claim of "common internal waters" with the host of unilateral actions it has taken over a period of years to impair Ukraine's interests in the Sea of Azov and Kerch Strait. Although Russia's objection therefore can properly be rejected now, it would also be appropriate for the Tribunal to defer consideration of whether the Sea of Azov is a semi-enclosed or enclosed sea and the Kerch Strait is an international strait to the merits phase of the proceedings, as Russia's objection lacks a preliminary character.

I. Russia's Attempt to Treat the Sea of Azov and Kerch Strait as "Common Internal Waters" Is Inconsistent with Both UNCLOS and General International Law

54. As explained in Ukraine's Observations, the Sea of Azov and Kerch Strait do not satisfy the definition of "internal waters" in Articles 8 and 10 of UNCLOS. Article 8 describes internal waters of "*the* State" (*i.e.*, a single State) as waters falling "on the landward side of the baseline of the territorial sea." In the particular case of juridical bays, Article 10 similarly permits a baseline to be drawn across the bay's entrance only where "the coasts of [the bay] belong to a single State." Read together, these articles show that the Convention only contemplates claims of internal waters with respect to a single State, not shared claims among two or more States. As discussed more fully below, the object and purpose of UNCLOS counsels against the recognition of internal waters in circumstances beyond those expressly contemplated by the Convention. Accordingly, as Ukraine explained in its Memorial,[116] applying the plain terms of the Convention, the Sea of Azov is an enclosed or semi-enclosed sea consisting of territorial seas and exclusive economic zones, and the Kerch Strait is an international strait.

55. Only two international tribunals have recognized claims to pluri-State internal waters in bodies of water previously bordered by a single State. As explained in Ukraine's Observations, both of these tribunals addressed narrow and exceptional

[116] Ukraine's Memorial, ¶¶ 3, 22.

circumstances.[117] Each case involved: (1) small bodies of water, which are not large enough to contain an exclusive economic zone, (2) clear agreement between all bordering States to establish a pluri-State internal waters regime, and (3) the absence of prejudice to third States.

56. Russia has argued that these three conditions are not required because neither the *Gulf of Fonseca* decision nor the *Croatia/Slovenia* award explicitly state that they are applying such a test.[118] But all three conditions arise directly from the reasoning of both tribunals,[119] and from the "*sui generis*" facts on which they were asked to rule.[120] Pluri-State internal waters are unusual — the exception, not the rule — and it is significant that Russia can point to *no* claims of such a status that do not satisfy the same three conditions.[121] Permitting pluri-State internal waters claims in bodies of water that do not satisfy these three conditions has no basis in international law, and would open the door to a host of unpredictable and idiosyncratic claims that would erode the UNCLOS regime.

A. Recognizing a Pluri-State Internal Waters Claim in a Body of Water as Large as the Sea of Azov Would Set a Dangerous New Precedent at Odds with the Overarching Objective of UNCLOS

57. As shown in Ukraine's Observations and as is undisputed by Russia, the Gulf of Fonseca and the Bay of Piran are dramatically smaller than the Sea of Azov, and neither is large enough to contain exclusive economic zones.[122] The same is true of every other

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[117] Ukraine's Observations, ¶¶ 70-71.

[118] Russia's Reply, ¶ 75. Moreover, while Russia cites several authorities in support of its argument on pluri-State internal waters, those authorities at most suggest that such claims are possible, without actually addressing the conditions under which such claims can arise. *Id.* ¶¶ 62-65.

[119] *See* Ukraine's Observations, ¶¶ 71, 77, 89; *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, ICJ Judgment of 11 September 1992, ¶¶ 383, 394, 401, 405, 412 (emphasizing, respectively, (i) that "[t]he Gulf of Fonseca is a relatively small bay with an irregular and complicated coastline in its inner part, a large number of islands, islets and rocks"" (ii) "[a]ll three coastal States continue to claim" that its waters are internal; and (iii) the continued "acquiescence on the part of other nations," whose navigational rights were protected) [hereinafter "*Gulf of Fonseca*"] **(UAL-58)**; *In the Matter of an Arbitration Under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, Signed on 4 November 2009 (Croatia v. Slovenia)*, PCA Case No. 2012-04, Final Award of 29 June 2017, ¶ 882 (relying on the *Gulf of Fonseca* decision) [hereinafter "*Croatia v. Slovenia*"] **(UAL-61)**.

[120] *See Gulf of Fonseca*, ICJ Judgment of 11 September 1992, ¶ 412 (describing the situation in the Gulf of Fonseca as "*sui generis*") **(UAL-58)**.

[121] *See also infra* ¶ 57 & n. 124 (discussing the Rio de la Plata).

[122] Britannica Online Encyclopedia, Gulf of Fonseca (2017) (describing the size of the Gulf of Fonseca as 1,800 square kilometers) **(UA-507)**; *Croatia v. Slovenia*, Final Award of 29 June 2017, ¶ 872

example of pluri-State internal waters Russia relies on in its submissions: the Rovuma Bay and the Bay of Oyapock would be entirely covered by the territorial seas of the coastal States.[123] While Russia also refers to the Rio de la Plata estuary, that body of water has been claimed (as its name suggests) as a river mouth governed by the specific provisions of UNCLOS Article 9.[124]

(describing the Bay of Piran's area as approximately 18.2 square kilometers) **(UAL-61)**; Britannica Online Encyclopedia, Sea of Azov (2009) (describing the size of the Sea of Azov as nearly 40,000 square kilometers) **(UA-508)**.

[123] *See* Figure 1.

[124] Argentina and Uruguay have claimed the mouth of the Rio de la Plata as internal waters under Article 13 of the 1958 Convention on the Territorial Sea and the Contiguous Zone ("1958 Convention") and Article 9 of UNCLOS. *See, e.g.*, United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, Limits in the Seas No. 123, Uruguay's Maritime Claims (27 November 2000), p. 5 ("Argentina and Uruguay did not assert an historic claim to these waters, but rather their claim took into account the provisions of Article 13 of the 1958 Convention on the Territorial Sea and the Contiguous Zone regarding river closing lines.") [hereinafter "Limits in the Sea No. 123"] **(UA-560)**. Unlike Articles 8 and 10, Article 9 on the drawing of baselines across river mouths is not limited to bodies of water bordered by a single State. *See* Convention on the Territorial Sea and the Contiguous Zone (1958), Art. 13 ("If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide line of its banks.") **(UAL-106)**; UNCLOS, Art. 9 ("If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-water line of its banks."). Notwithstanding this, States have protested Uruguay and Argentina's claim to shared internal waters in the Rio de la Plata estuary, including the United States, the United Kingdom, and the Netherlands. United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, Limits in the Seas No. 112, United States Responses to Excessive Maritime Claims (9 March 1992), p. 13 **(UA-561)**; Limits in the Sea No. 123, p. 5 (explaining that the U.S. protested this claim because the river mouth does not flow directly into the sea, as is required under the 1958 Convention and UNCLOS, and because "more than one state borders th[e] body of water" the river flows into) **(UA-560)**.

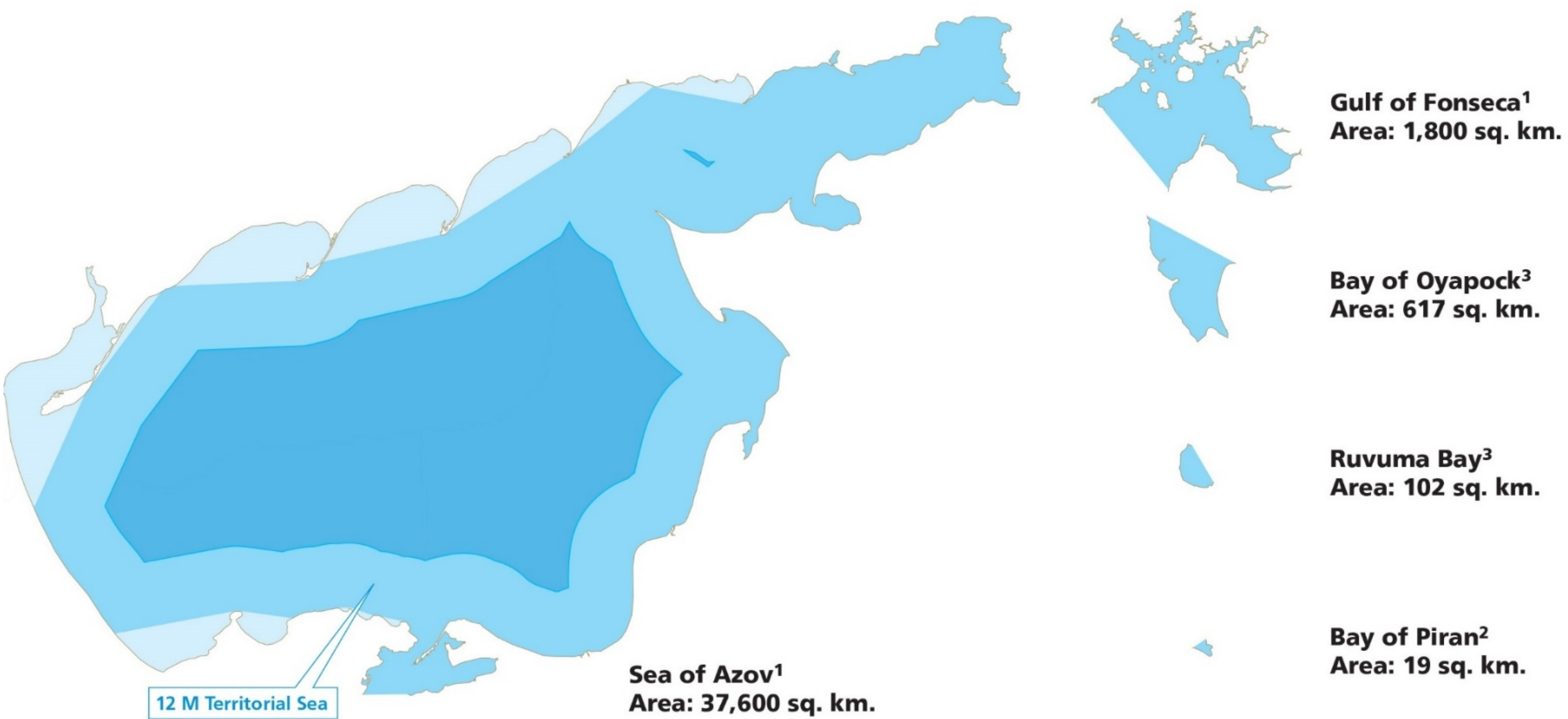

Figure 1

58. Expanding this narrow exception so that it applies to bays tens or even thousands of times larger[125] than those in connection with which it was developed would be unprecedented. Doing so also would conflict with the text of UNCLOS, which renders invalid any claim to sovereignty over areas that would otherwise be subject to the regime of the exclusive economic zone and/or the high seas.[126]

59. Russia's position would also significantly undermine the object and purpose of the Convention. States Parties adopted the Convention against the backdrop of a phenomenon of "creeping jurisdiction" — increasingly expansive and diverse assertions of jurisdiction over maritime areas by coastal States.[127] Such claims not only increased the risk of conflict between coastal States with overlapping maritime claims, but also hampered the ability of third States to fully exercise their maritime rights. One important aim of UNCLOS was to systemize the zones over which coastal States could assert jurisdiction, striking a careful balance between the rights of coastal States and those of third States.[128] As the President of the Third U.N. Conference on the Law of the Sea explained in 1982: "The Convention will promote the maintenance of international peace and security because it will replace a plethora of conflicting claims by coastal States with universally agreed

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[125] The Gulf of Fonseca is 21 times smaller than the Sea of Azov, and the Bay of Piran is 2,000 times smaller. Britannica Online Encyclopedia, Gulf of Fonseca (2017) (describing the size of the Gulf of Fonseca as 1,800 square kilometers) **(UA-507)**; *Croatia v. Slovenia*, Final Award of 29 June 2017, ¶ 872 (describing the Bay of Piran's area as approximately 18.2 square kilometers) **(UAL-61)**; Britannica Online Encyclopedia, Sea of Azov (2009) (describing the size of the Sea of Azov as nearly 40,000 square kilometers) **(UA-508)**.

[126] *See* UNCLOS, Art. 89 ("No State may validly purport to subject any part of the high seas to its sovereignty."); *id.*, Art. 58 (applying Article 89 to the regime of the exclusive economic zone). These provisions reflect that a claim to sovereignty over the exclusive economic zone and the high seas entirely changes the character of those waters from waters that are a shared resource for all states (subject only to specific coastal State rights set out in UNCLOS Part V concerning the exclusive economic zone) to waters that are under the sovereignty of a single State. In contrast, the territorial sea is already under the sovereignty of a single State pursuant to Article 2 of the Convention, and so claims of internal waters in the territorial sea do not change the nature of the applicable regime in the same fundamental way.

[127] Donald R. Rothwell, et al. (eds.), The Oxford Handbook of the Law of the Sea (2015), pp. 27-28 **(UAL-107)**; *see also id.* pp. 10-11 (discussing increasingly expansive coastal State claims after World War II); *id.* p. 294 ("Post World War II, coastal States became more prominent in the law of the sea. This process—often called 'creeping coastal State jurisdiction'—involved a seaward expansion of coastal State maritime zones as well as an expansion of their substantive rights and jurisdiction within these zones. While coastal States initially focused on maximizing authority within a relatively narrow zone along their coasts, they subsequently claimed specific, exclusive resource-related rights in much larger adjacent areas.").

[128] *Id.*

limits . . . ."[129] To allow idiosyncratic and unpredictable claims to pluri-State internal waters would contradict this goal, and would result in a constant churn of conflicts and side deals between individual littoral and user States of many different bodies of water. Permitting claims to pluri-State internal waters otherwise large enough to contain an exclusive economic zone also would disturb the careful balance that the Convention strikes between coastal State jurisdiction and third-State rights. Among other things, recognizing such claims would deprive third States of navigational rights that they would otherwise enjoy, as well as rights to harvest any surplus of the coastal State's allowable catch (see Article 62), and to conduct marine scientific research projects for peaceful purposes (see Article 246).

60. In light of the exceptional nature of pluri-State internal waters, there can be no justification for recognition of such a status in an area as large as the Sea of Azov. Russia's objection can be rejected on this basis alone.

B. Ukraine and Russia Did Not Reach Agreement on Any Proposed Internal Waters Status for the Sea of Azov and Kerch Strait

61. Upon the dissolution of the Soviet Union, the Sea of Azov ceased to be surrounded by a single State. Even if the coastal States could in theory have agreed to adopt a new status of pluri-State internal waters, in fact they did not do so. To the contrary, Ukraine immediately declared its intent to treat the Sea of Azov as containing its territorial sea and exclusive economic zone. And while Ukraine was willing to accommodate Russia by entering into negotiations on an internal waters regime, Ukraine insisted that any internal waters would have to be delimited — not held in "common" — and those negotiations never produced a final agreement. It cannot possibly be the case that the Sea of Azov has acquired the status of "common internal waters" over the objections of one of the two coastal States, *i.e.*, Ukraine.

62. Russia nonetheless challenges Ukraine's argument that, legally, all bordering States must agree to an internal waters status and that, factually, Ukraine and Russia never agreed to a shared internal waters status in the Sea of Azov and Kerch Strait. Russia's challenges both fail. Successor States do not, as Russia alleges, *automatically* hold formerly internal waters of a single State as joint, pluri-State internal waters, even without the consent of all bordering States. And, as a factual matter, Ukraine and Russia did not agree to establish a shared internal waters status in these bodies of water.

[129] Tommy T. B. Koh, A Constitution for the Oceans (1982), p. 1 **(UAL-108)**.

1. All States Bordering Bodies of Water Previously Surrounded by a Single State Must Agree to a Pluri-State Internal Waters Regime for Such a Regime to be Created

63. In its Reply, Russia argues that, when a body of water previously surrounded by a single State comes to be bordered by more than one State, that body of water is forever internal waters unless all bordering States agree otherwise.[130] This position is unfounded. Indeed, Russia's own authorities contradict its position, by acknowledging that successor States may only create a pluri-State internal waters regime "if they are so agreed."[131]

64. The requirement of agreement by successor States in the State dissolution context is confirmed by the decision of the International Court of Justice in *Gulf of Fonseca*. The Court specifically based its decision that the waters of the Gulf were internal waters on the *affirmative agreement* of the three coastal States that the waters had that status. The Court explained:

> This unanimous finding that the Gulf of Fonseca is an historic bay with the character of a closed sea presents now no great problem. All three coastal States continue to claim this to be the position . . . . *If all the bordering States act jointly to claim historic title to a bay*, it would seem that in principle what has been said above regarding a claim to historic title by a single State would apply to this group of States.[132]

65. It was thus necessary, according to the Court, for the bordering States to "act," and to do so "jointly" — in other words, to reach an affirmative agreement. Were Russia's view accepted, pluri-State internal waters in the Gulf of Fonseca would have been the result even if the bordering States had *not* "acted jointly."

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[130] Russia's Reply, ¶¶ 81-83.

[131] *Id.* ¶ 65 n. 107 (quoting Charles Hyde, International Law Chiefly as Interpreted and Applied by the United States, Vol. I (2d ed., 1945), p. 475 ("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." (emphasis added) **(RUL-47)**); George Grafton Wilson (Reporter), *Draft Convention on Territorial Waters*, Am. J. Int'l L, Vol. 23 (1929), Art. 6 ("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.") (emphasis added) **(RUL-43)**).

[132] *Gulf of Fonseca*, Judgment of 11 September 1992, ¶ 394 (internal quotation marks and citations omitted) **(UAL-58)**.

66. The *Gulf of Fonseca* decision further confirms that, contrary to Russia's suggestion,[133] the internal status of a body of water cannot automatically be transferred under principles of State succession. In that case, the Court did not reference principles of State succession in connection with its ruling that the Gulf of Fonseca constituted an area of internal waters, only relying on such principles in connection with a separate issue, the regime of use in such internal waters.[134]

67. The nature of the Soviet Union's claim to internal waters in the Sea of Azov confirms the inapplicability of the principles of State succession on which Russia relies. Under the Soviet Union, and the Russian Empire before it, the Sea of Azov could be classified as internal waters because it qualified as a single-State juridical bay, rather than on the basis of historic title. Customary international law has long recognized that States can claim as internal waters bays with narrow mouths, generally ranging from six to twelve miles across, so long as those bays are entirely surrounded by a single State.[135] As the entrance to the Sea of Azov — the Kerch Strait — ranges from only six to ten miles across,[136] the Soviet Union claimed the Sea's waters as internal on this basis alone.[137] It makes no sense to speak of a claim to a single-State juridical bay persisting through principles of State succession, when the essential condition for such a claim — a bay surrounded by a single State — no longer

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[133] Russia's Reply, ¶ 82.

[134] *Gulf of Fonseca*, Judgment of 11 September 1992, ¶ 405 ("*As to the character of rights in the waters of the Gulf*: . . . They were, during the colonial period, and even during the period of the Federal Republic of Central America not divided or apportioned between the different administrative units which at that date became the three coastal States of El Salvador, Honduras and Nicaragua . . . . A joint succession of the three States to the maritime area seems in these circumstances to be the logical outcome of the principle of *uti possidetis juris* itself.") (emphasis added) **(UAL-58)**.

[135] *See e.g.*, *Historic Bays: Memorandum by the Secretariat of the United Nations*, U.N. 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) (24 February to 27 April 1958), ¶ 9 (tracing the origin of allowing single States to enclose narrow-mouthed bays as internal waters to at least the nineteenth century, and setting forth various options for the required narrowness of the mouth as anywhere from six to twelve miles apart) **(UA-547)**.

[136] Ukraine's Memorial, ¶190, Map 11.

[137] In the 1934 seminal work on the law of the sea by Gilbert Gidel, who is credited with establishing the concept of historic bays, the Sea of Azov is described as a bay often incorrectly called a historic bay, as its waters qualified as internal under the ordinary international law of the sea. Gilbert Gidel, Le Droit International Public de la Mer, Vol. III (1934), p. 663 ("We have omitted from the above description of historical waters a certain number of bodies of water that are sometimes listed as historical waters but should not be included in that category since, under the rules of common international maritime law, they are inland waters. Examples include the Sea of Azov (the Kerch Strait is 10 miles wide) . . . .") **(UAL-109)**.

exists.[138] In other words, when a single State bordering a bay breaks up, its waters are no longer internal by virtue of being a juridical bay, so it is not possible for the successor States to inherit the juridical bay entitlement.

68. The practice of Latvia and Estonia in the Gulf of Riga further supports the conclusion that pluri-State internal waters cannot be created by passive operation of State succession principles, without the affirmative agreement of littoral States. Russia notes that, immediately post-dissolution, Latvia sought to have the waters declared joint internal waters.[139] However, Russia omits to mention that Latvia affirmatively sent Estonia a "proposal to declare the Gulf of Riga a historic bay" with the status of joint internal waters, reflecting a recognition that any such status required the affirmative agreement of both States.[140] Russia's own source for this episode recounts that Estonia "vetoed Latvia's endeavours," which was possible because "each of the new coastal States needs to recognise the continuous historical status of the bay."[141] Again, as with the Gulf of Fonseca, the precedent put forward by Russia refutes its notion that pluri-State internal waters may be created by inaction as a default rule, or unilaterally by a single State.

69. Further, in relying on the *Croatia/Slovenia* award, Russia entirely ignores the unique terms of the arbitration agreement governing that tribunal's mandate in that case. As Ukraine previously noted, that agreement specifically barred the tribunal from considering post-1991 practice as legally relevant.[142] In other words, the terms of the arbitration

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[138] The basis of the Soviet Union's claim to an internal waters status in the Sea of Azov also distinguishes the Sea of Azov from the Gulf of Fonseca. Unlike the Sea of Azov, the internal waters status of the Gulf derived from historic title to the waters. *See supra* ¶ 64. When bordered by only the Spanish, the Gulf would not have qualified geographically as a juridical bay.

[139] Russia's Reply, ¶ 78 n. 141.

[140] Alexander Lott, The Estonian Straits: Exceptions to the Strait Regime of Innocent or Transit Passage (Brill Nijhoff, 2018), p. 128 (**UAL-110**).

[141] *Id.* p. 129; *see also* Erik Franckx, *Two New Maritime Boundary Delimitation Agreements in the Eastern Baltic Sea*, Int'l J. of Marine and Coastal L., Vol. 12 (August 1997), pp. 367-368 (discussing the Gulf of Riga and whether Estonia and Latvia could claim it as internal waters post-dissolution of the Soviet Union, and stating that "[t]he fundamental question therefore arose whether both parties were to continue this practice. *An essential element in such a juridical construction appears to be the consent of all the parties involved.* And even though Latvia definitely saw some merit in this particular approach, this line of thought was abandoned at an early stage because of fundamental Estonian objections.") (emphasis added) (**UAL-111**).

[142] *Croatia v. Slovenia*, Final Award of 29 June 2017, Annex, Arbitration Agreement Between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, Art. 5 (**UAL-61**). The Arbitration Agreement also permitted the Tribunal to rely on "equity and the principle of good neighborly relations," rather than being strictly confined to applicable principles of international law. *Id.*, Art. 4.

agreement prevented the tribunal from taking account of events following the dissolution of Yugoslavia as a single State, rendering the issue of post-dissolution agreement among successor States non-applicable in that case — and in that case alone.

70. Russia suggests that a 1965 article by Professor Yehuda Blum, a delegate to the Third U.N. Conference on the Law of the Sea, is consistent with the idea that internal waters status transfers automatically. But that article in fact supports Ukraine's position. As Professor Blum explains, "[w]ater areas surrounded by the territory of a single coastal State, and thus having the status of 'closed seas,' which subsequently, because of political changes resulting in the establishment of more than one state on their shores, become multinational in character, generally have come to be regarded as essentially parts of the high seas . . . ."[143] Professor Blum did observe in the same article that "[t]he 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."[144] The arrangements Professor Blum refers to, however, pre-date both the 1958 Convention on the Territorial Sea and the Contiguous Zone and UNCLOS. It is hardly surprising that, prior to these conventions, specific agreements would have been used to clarify the rights and responsibilities of littoral and other States in connection with a transition from internal waters to a new regime. Moreover, Professor Blum's statement merely describes "general[]" practices at the time, and does not suggest that the special treaty arrangements he refers to were *necessary* to change the status of the waters at issue. The precedents discussed above make this point clear.

71. Russia's related renunciation of rights argument — that the waters of the Sea of Azov must have remained internal post-dissolution because Russia never expressly or unequivocally stated it was waiving this status[145] — presupposes precisely what Russia must (and cannot) prove. As Ukraine has explained, Russia had no right, and certainly no unilateral right, to create a pluri-State internal waters status for the Sea of Azov at the time

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[143] Yehuda Z. Blum, Historic Titles in International Law (1965), p. 279 (quoting Charles B. Selak, Jr., *A Consideration of the Legal Status of the Gulf of Aqaba*, Am. J. Int'l L., Vol. 52 (1958), p. 693) (**UAL-56**).

[144] *Id.* p. 279.

[145] Russia's Reply, ¶ 67.

the Soviet Union dissolved. Therefore, there was nothing for Russia to waive, and the rules on waiver and renunciation do not apply.[146]

72. In sum, there is no default rule according to which successor States *automatically* hold formerly internal waters of a single State as joint, pluri-State internal waters, even over the objections of one of the coastal States. To the contrary, in light of the exceptional nature of pluri-State internal waters, the desire of all affected coastal States to create such a regime must be unmistakable. As such, the Sea of Azov cannot constitute internal waters today absent explicit agreement between Ukraine and Russia following the dissolution of the Soviet Union.

2. Ukraine and Russia Never Reached Agreement on a Present Internal Waters Status for the Sea of Azov and Kerch Strait

73. Russia's insistence on a legally erroneous default rule is revealing, because it highlights the weakness of Russia's factual argument that there was an agreement on a "common internal waters" status for the Sea of Azov and Kerch Strait following the dissolution of the Soviet Union. As explained in Ukraine's Observations, immediately following the dissolution of the Soviet Union, Ukraine announced its position that the Sea of Azov was subject to the normal rules of the international law of the sea by depositing "baselines for measuring the width of the territorial sea, exclusive economic zone, and continental shelf of Ukraine in the Black Sea and the Sea of Azov."[147] This deposit was in response to an invitation from the U.N. Secretary-General in anticipation of the imminent entry into force of UNCLOS.[148] Russia conspicuously omits any reference to Ukraine's deposit in its selective and misleading account of Ukraine's practice in the Sea of Azov and Kerch Strait following the dissolution of the Soviet Union. Ukraine again raised those

[146] Even if principles of waiver and renunciation could be relevant, account would have to be taken of *Ukraine*'s position, not just Russia's. Even if it could be said that Ukraine had the option to acquire sovereignty over part or all of the Sea of Azov by operation of State succession principles, it was certainly not required to do so. And, in fact, Ukraine promptly declared its intent to treat the Sea of Azov as containing territorial sea and exclusive economic zone. Ukraine's Observations, ¶ 78. Russia has no authority to conscript Ukraine into a "common internal waters" regime against its will.

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

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

baselines in negotiations with Russia in 2002, as well as taking other actions consistent with this position.[149]

74. Russia, in contrast, argued that UNCLOS should not apply, in an effort to escape the normal operation of the law of the sea. In response to Russian pressure, Ukraine was willing to consider Russia's preference for an internal waters status for these bodies of water, but would only agree to such a status if the Sea of Azov and Kerch Strait were also delimited.[150]

75. Russia insists that the Parties in fact reached agreement "that the Sea of Azov constituted internal waters of the two States," and that although Ukraine "wanted the two Parties to establish a delimitation line," the two points were not connected.[151] In other words, Russia maintains that Ukraine conceded Russia's principal demand (an internal waters status) at "the starting point" of negotiations, without securing in return any commitment at all on Ukraine's principal demand (delimitation). On its face this is an implausible account of any negotiation, and it is not supported by the negotiating record here.

76. Russia relies heavily on statements from ongoing negotiations between the parties concerning the related issues of the legal status of the Sea of Azov and Kerch Strait, and delimitation of those bodies of water. Consistent with the explanation Ukraine has previously provided, these statements reflect Ukraine's willingness to treat the Sea of Azov and Kerch Strait as internal waters as part of a broader settlement that also addressed delimitation. But, because Russia never acceded to Ukraine's requirement that these waters be delimited — a fact Russia does not contest — Ukraine and Russia never reached a final agreement to apply an internal waters regime in these bodies of water. The statements cited by Russia prove nothing more than that the two States were provisionally aligned on

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[149] Minutes of the Fifteenth Meeting of the Delegations of Ukraine and the Russian Federation on the Issues of *Delimitation* (the position of the Ukrainian Side) and *Determination of Legal Status* (the Position of the Russian Side) of the Sea of Azov and the Kerch Strait (16-17 December 2002) ("The Ukrainian side announced the approval of geographical coordinates of the baselines for calculation of the breadth of the territorial sea of Ukraine in the Azov Sea and justified the necessity of its delimitation in accordance with the norms of international law.") (**UA-514**); *see also* Ukraine's Observations, ¶ 86 and sources cited therein.

[150] Ukraine's Observations, ¶ 79.

[151] Russia's Reply, ¶ 93.

claiming internal waters *if* delimitation of those waters could be negotiated — which, ultimately, it could not.[152]

77. As Ukraine has already shown, the minutes of negotiating sessions previously cited by Ukraine, and the text of the Sea of Azov Treaty, make the linkage between an internal waters status and delimitation explicit.[153] To provide yet another example, in 2001, at the Eleventh 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 Delimit the Maritime Spaces in the Black Sea, the Head of the Ukrainian delegation, Ambassador Yuri Kostenko, explained that "the Ukrainian side proceeds from the need to secure for the Sea of Azov the status of internal waters of Ukraine and the Russian Federation *while simultaneously* determining the sovereign boundaries of our states."[154] This linkage of status with delimitation, many years into the negotiation process, refutes Russia's insistence that Ukraine immediately and finally agreed to Russia's demand "that the Sea of Azov constituted internal waters of the two States," wholly irrespective of Ukraine's demand for delimitation.[155]

78. In nonetheless seeking to portray various negotiating statements as expressions of final agreement on the question of status, Russia fails to address the jurisprudence cited by Ukraine establishing that statements, or even provisional agreements, offered during inconclusive negotiations that fail to resolve interrelated issues cannot be

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[152] Russia claims that the 1998 summit and 2001 exchange of letters between the Presidents of Ukraine and Russia constitute final agreements on the status of the Sea of Azov and Kerch Strait. *Id.* ¶ 90. This is incorrect; like the rest of Russia's evidence, these were simply agreements to a proposal in the context of broader, ongoing negotiations. That these events were not a final agreement as Russia claims is shown by the facts that: (i) negotiations over the status of the Sea of Azov and Kerch Strait continued after 1998 and after 2001, *see* Ukraine's Observations on Jurisdiction, ¶¶ 79-85, and (ii) in 2002, Ukraine again communicated to Russia its baselines for measuring the breadth of the territorial sea in the Sea of Azov. *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-446-1375 (25 June 2002) (**UA-513**); Minutes of the Fifteenth Meeting of the Delegations of Ukraine and the Russian Federation on the Issues of *Delimitation* (the position of the Ukrainian Side) and *Determination of Legal Status* (the Position of the Russian Side) of the Sea of Azov and the Kerch Strait (16-17 December 2002) (**UA-514**).

[153] Ukraine's Observations, ¶¶ 79-80.

[154] Speech of Ukrainian Delegation Chairman Yu. V. Kostenko at the 11th 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 Delimit the Maritime Spaces in the Black Sea (8 February 2001), p. 2 (emphasis added) (**UA-562**).

[155] Russia's Reply, ¶ 93.

treated as binding.[156] In the *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, the International Tribunal for the Law of the Sea refused to accept as binding on Myanmar an "Agreed Minutes" document reflecting an apparent agreement between the parties on a boundary in the territorial sea. As the tribunal observed: "[f]rom the beginning of the discussions Myanmar made it clear that it did not intend to enter into a separate agreement on the delimitation of territorial sea and that it wanted a comprehensive agreement covering the territorial sea, the exclusive economic zone and the continental shelf."[157] The Permanent Court of International Justice has similarly held that "the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement."[158]

79. Just like the negotiating statements on which Russia relies, the 2003 Sea of Azov Treaty did not embody mutual consent to establish an "internal waters" status. As explained in Ukraine's Observations, the Treaty was concluded as part of an effort to ease tensions resulting from Russia's unilateral attempt to construct a dam linking Ukraine's Tuzla Island to Russia's Taman Peninsula in the Kerch Strait.[159] Negotiated quickly in response to this crisis, the Treaty served principally as a framework for future agreement on the proper treatment of the Sea of Azov, while acknowledging its history. The text of the Treaty, and the negotiations on the status of the Sea of Azov that continued between Ukraine and Russia in its aftermath, make this clear.

80. As an initial matter, Russia now appears to have abandoned its incorrect translation of the Treaty, conceding that the correct translation of Article 1 is Ukraine's — the "Sea of Azov and Kerch Strait historically constitute internal waters" of Ukraine and Russia, *not* the Sea of Azov and Kerch Strait "shall be historical internal water bodies."[160]

81. Russia's only argument based on Ukraine's correct translation is that "constitute" is in the present tense, and therefore Article 1 must be read to establish a present

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[156] *See, e.g.*, Ukraine's Observations, ¶ 85 n. 140.

[157] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar)*, ITLOS Case No. 16, Judgment of 14 March 2012, ¶¶ 93, 98 (**UAL-63**).

[158] *Case Concerning the Factory at Chorzów (Germany v. Poland)*, P.C.I.J. Judgment of 13 September 1928, p. 51 (**UAL-27**).

[159] Ukraine's Observations, ¶ 80.

[160] Russia's Reply, ¶¶ 94, 100.

historical internal waters status for these bodies of water. However, this argument ignores the fact that the adverb "historically" modifies "constitute," not "internal waters."[161] The use of "historically" therefore identifies the historical fact that these waters in the past were internal waters of Russia and Ukraine as republics of the Soviet Union.[162] If the Treaty had intended to provide that these waters presently constitute historical internal waters, as Russia claims, Article 1 would have been written as "constitute historical internal waters."[163]

82. Notably, Russia is compelled to acknowledge that its reading of the Treaty is contradicted by a prominent Russian expert in international maritime law, Professor Alexander Skaridov, who shares Ukraine's view that Article 1 of the Treaty describes a historical fact rather than adopts a present and future legal regime.[164] Moreover, Russia's interpretation would place the 2003 Treaty in conflict with UNCLOS[165] — a result the parties cannot be presumed to have intended (and one that this Tribunal could not, in any event, apply in these proceedings[166]).

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[161] In the Russian and Ukrainian texts, the Russian adverb "исторически [*istoricheski*, historically]" and Ukrainian adverb "історично [*istorychno*, historically]" respectively modify the Russian verb "являются [*iavliaiutsia*, constitute]" and Ukrainian verb "є [*ye*, constitute]." If the Russian and Ukrainian texts intended to provide that these waters presently constitute historical internal waters, the Russian and Ukrainian text would have used the following texts: "являются историческими внутренними водами [*iavliaiutsia istoricheskimi vnutrennimi vodami*]" or "є історичними внутрішніми водами [*ye istorychnymy vnutrishnimy vodamy*]," both of which translate to "constitute historical internal waters."

[162] Ukraine's Observations, ¶ 81.

[163] The 29 July 2015 Ukrainian *Note Verbale* that Russia claims is a "notable example" of Ukrainian practice inconsistent with its position in these proceedings is actually entirely consistent with the correct understanding of the text of the 2003 Sea of Azov Treaty. Russia's Reply, ¶ 108. The Note conspicuously avoids referring to the Sea of Azov and Kerch Strait as "historical internal waters," and instead paraphrases the 2003 Sea of Azov Treaty text in stating that "[t]he Sea of Azov and the Kerch Strait are historically defined as internal waters of Ukraine and Russia . . . ." *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 610/22-110-1132 (29 July 2015) **(UA-233)**.

[164] Russia argues that Professor Skaridov translates Article 1 differently from Ukraine's certified translation. Russia's Reply, ¶ 102. The fundamental point remains that he also does not read the Treaty as creating a present legal status for the Sea of Azov and Kerch Strait. Alexander Skaridov, *The Sea of Azov and the Kerch Straits* in David D. Caron and Nilufer Oral (eds.), Navigating Straits: Challenges for International Law (2014), p. 234 **(UA-528)**.

[165] *See supra* ¶¶ 57-58 (discussing UNCLOS Articles 8, 10, and, in particular, 89).

[166] UNCLOS, Art. 293(1) (other rules of international law may be applied only when "not incompatible with th[e] Convention"); *see also* UNCLOS, Art. 311(3) ("Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided . . . that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.").

83. The December 2003 Joint Statement of the Presidents of Ukraine and Russia confirms that the Sea of Azov Treaty was not intended as a final statement on the legal status of these waters. As Ukraine has explained, while the statement affirmed that "*historically* the Sea of Azov and the Strait of Kerch are inland waters of Ukraine and Russia,"[167] it spoke in different terms about the *current* status of the waters, stating only that "the Azov-Kerch area of water is preserved as an integral economic and natural complex used in the interests of both states."[168] Again, there is no explanation for the notably ambiguous language used by the parties — except that they had not yet reached final agreement.[169]

84. Further, as Ukraine previously observed, Ukraine and Russia continued to include agenda items on "determining the legal status of the Azov-Kerch waters" in their negotiations following the Sea of Azov Treaty.[170] There would of course have been no reason for the parties to continue negotiating "the legal status" of these waters if they considered the treaty a complete and final agreement about that legal status. Russia's only response to this revealing fact is to assert that one set of minutes also describes the negotiations as "based on" the Sea of Azov Treaty, which Russia reads to imply that the legal status was already settled by the Sea of Azov Treaty. In fact, the Sea of Azov Treaty contemplated future attempts to reach agreement, so it is unsurprising that further dialogue would be "based on" that Treaty. If Russia's position were correct, the negotiations on "legal status" referred to in the minutes would have been entirely unnecessary.

85. Turning to more recent practice, Russia mischaracterizes the import of a 2018 Decree issued by Ukrainian President Poroshenko and the Law of Ukraine "On

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[167] The Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch (24 December 2003), as published in United Nations Division for Ocean Affairs and the Law of the Sea, Law of the Sea Bulletin No. 54 (2004), p. 131 (emphasis added) **(UA-530)**.

[168] *Id.*

[169] In addition to citing the 2003 Joint Statement, Russia cites three earlier draft statements between the presidents of Ukraine and Russia. Russia's Reply, ¶ 91 & n. 166 (citing **RU-69**, **RU-71**, and **RU-74**). If anything, these draft statements only make the conscious ambiguity of the 2003 Joint Statement more notable.

[170] 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)**; Minutes of a Meeting of the Working Group on the Issues of Environmental Protection in the Framework of the 18th Round of the Ukrainian-Russian Negotiations on the Issues of Determination of the Legal Status of the Azov Sea and the Kerch Strait (25-26 March 2004), p. 1 (referring to "the 18th round of the Ukrainian-Russian negotiations on the issues of determination of the legal status of the Azov Sea and the Kerch Strait") **(UA-532)**.

Imposition of Martial Law in Ukraine" approving the Decree.[171] Russia highlights one sentence of the Decree, asserting that it "refers to the Sea of Azov as internal waters."[172] As a threshold point, the Decree on its face is an internal communication from one part of the Ukrainian government to another, at most contemplating some future action.[173] It is not an act of the Ukrainian government with any relevance at the international level. But in any event, Russia ignores the fact that several other sections of the Decree refer specifically to Ukraine's territorial sea and exclusive economic zone in the Sea of Azov, and that the Decree directs the Cabinet of Ministers of Ukraine "to ensure, in accordance with the obligations of Ukraine as a coastal state, as defined by the 1982 United Nations Convention on the Law of the Sea, provision of information in accordance with the established procedure about the dangers to navigation in the territorial sea and internal waters of Ukraine in the Black Sea, the Sea of Azov and the Kerch Strait."[174] While the single sentence of the Decree to which Russia cites is ambiguous, it cannot be read as designating the bodies of water to which it refers as internal waters: the cited sentence refers not just to the Sea of Azov and Kerch Strait, but also to the Black Sea, which no party contends has the status of internal waters.[175] Setting this one ambiguous sentence aside, the Decree taken as a whole is consistent with Ukraine's position that the Sea of Azov contains a territorial sea, continental shelf, and exclusive economic zone, and that activities in the Sea of Azov are governed by UNCLOS.

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[171] Russia's Reply, ¶¶ 51, 112.

[172] *Id.* ¶ 112(a).

[173] Decree of the President of Ukraine "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'," No. 320/2018 (12 October 2018), ¶ 2.4 (communication from the President of Ukraine to the Ministry of Foreign Affairs of Ukraine concerning "mak[ing] public" to the Secretariat of the United Nations and the Russian Federation" certain coordinates) (**RU-80**). Russia does not suggest that the coordinates referred to in the Decree have in fact been publicized.

[174] *See id.* ¶ 1.6; *see also id.* ¶ 1.1(d) (referring to areas of "internal sea waters and territorial sea, continental shelf, [and] exclusive (maritime) economic zone," including in connection with the coasts of Donetsk and Zaporozhye in the Sea of Azov); *id.* ¶ 1.3(a) (calling for the "submission to the Verkhovna Rada of Ukraine of draft laws of Ukraine on internal waters, territorial sea and the adjacent zone of Ukraine with the determination of the coordinates of the median line").

[175] In particular, the cited provision of the Decree directs the Ministry of Foreign Affairs to make public "the determined coordinates of the median line in the Sea of Azov, Kerch Strait *and the Black Sea* . . . [to] be the line of delimitation, i.e. the line of the state border between Ukrainian and Russian internal waters." Decree of the President of Ukraine "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'," No. 320/2018 (12 October 2018), ¶ 2.4 (emphasis added) (**RU-80**).

86. This reading of the Decree is supported by the Law of Ukraine "On Imposition of Martial Law in Ukraine" approving the Decree. Russia falsely implies that this Law treats the entirety of the Sea of Azov and Kerch Strait as internal waters.[176] In fact, the Law simply notes that martial law shall apply in internal waters areas of the Sea of Azov and Kerch Strait (which of course exist as areas landward of Ukraine's baselines), without specifying what areas in particular are internal waters.[177]

87. Finding little support for its position in the formal acts and statements of Ukraine, Russia turns to a remark made by the President of Ukraine during a television interview.[178] But that statement never even uses the term internal waters, instead using "Ukrainian water[s],"[179] which is a common (if colloquial) manner of referring to a State's territorial sea or exclusive economic zone.[180] More relevant than a television interview is President Poroshenko's formal statement to the U.N. General Assembly addressing recent events in the Sea of Azov and Kerch Strait, in which he stated unambiguously that UNCLOS applies to these waters.[181]

88. Though Russia's attempts to identify perceived inconsistencies in Ukraine's position are unavailing, there are serious inconsistencies between *Russia*'s arguments in this

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[176] Russia's Reply, ¶ 112(b).

[177] Law of Ukraine "On Approval of the Decree of the President of Ukraine 'On Imposition of Martial Law in Ukraine'" (26 November 2018) **(RU-82)**.

[178] Russia's Reply, ¶ 112(c).

[179] Interview of President Petro Poroshenko, *Fox News* (8 December 2018) (referring to the Sea of Azov and Kerch Strait as "Ukrainian water" or "both Ukrainian and Russian water," but not using the term "internal waters") **(RU-84)**.

[180] *See, e.g.*, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, ICJ Memorial of the Government of Nicaragua (28 April 2003), ¶ 2.222 (stating that "on 14 December 2002 the fishing boat *Churly Junior*, was captured in *Nicaraguan waters* located at 14°52'00" and longitude 081°28'00"," a point Nicaragua claimed was within its exclusive economic zone) (emphasis added) **(UAL-112)**.

[181] Statement by the President of Ukraine During the General Debate of the 73rd Session of the United Nations General Assembly (26 September 2018) ("After occupation of Crimea, [Russia] aims now at occupation of the Sea of Azov between Ukraine and Russia. Having illegally constructed a bridge across the Kerch Strait, Russia launched a systematic disruption of freedom of international navigation through the Kerch Strait for Ukrainian and foreign ships. Such brutal actions must be rejected as illegal, *including under the UN Convention on the Law of the Sea*.") (emphasis added) **(UA-563)**. Russia also relies on a press report that includes a quote from a Ukrainian diplomat, who in turn reportedly paraphrases the Agent of Ukraine as "stat[ing] that the actions of Russia in the Sea of Azov did not contradict the 'canons of international law of the sea'" and that "the 'question of Azov' is 'an artificially created aggravation in the information field.'" Russia's Reply, ¶ 118. This plainly is not Ukraine's position and, in any event, the statement does not suggest that the Sea of Azov and Kerch Strait are internal waters, despite Russia's implication to the contrary. *Id.*

arbitration and its actual conduct in the Sea of Azov and Kerch Strait. Russia fails to respond to Ukraine's argument that Russia has, since 2014, behaved in a manner entirely at odds with its claim before this Tribunal that the Sea of Azov and Kerch Strait are common internal waters. Ukraine's Memorial catalogues numerous unilateral actions taken by Russia that are inconsistent with common sovereignty in these waters. These include seizing Ukrainian gas fields in the Sea of Azov, nullifying Ukrainian licenses for these gas fields, building a bridge, cables, and pipeline across the Kerch Strait without the consent of Ukraine, and limiting the dimensions of vessels that may pass through the Strait.[182] More recently, as described in Section I.C below, Russia has begun unilaterally stopping vessels transiting the Kerch Strait *en route* to and from Ukraine's Sea of Azov ports. To justify these stoppages, the Russian Federation has even declared that the Kerch Strait is "under the full sovereignty of Russia."[183] All of this is in direct contradiction of Russia's representations to this Tribunal that it treats these waters as common internal waters. Russia's conduct alone provides a sufficient basis to reject Russia's hollow insistence that the practice of both States reflects an agreement to treat the Sea of Azov and Kerch Strait as shared waters not subject to UNCLOS.

C. Third States are Prejudiced by Russia's Claim to Shared Internal Waters in the Sea of Azov and Kerch Strait

89. As described in Ukraine's Observations, third States have been significantly prejudiced by Russia's claim of internal waters, and its related actions in the Sea of Azov and Kerch Strait. Russia has treated the claimed internal waters status of the Sea of Azov and Kerch Strait as a license to exercise unilateral control to the detriment of vessels not just from Ukraine, but also from dozens of other States, despite the fact that any reasonable understanding of such a status would necessarily involve shared control between Ukraine and Russia. Russia's conduct starkly illustrates the risks that expansive claims to pluri-State internal waters pose to the freedom of navigation.

90. Since at least April 2018, Russia has engaged in stoppages of vessels transiting the Kerch Strait or in the Sea of Azov *en route* to and from Ukraine's ports.[184] Numerous stopped vessels were flagged to third States.[185] As Ukraine noted in its Observations, Russia escalated this campaign on 25 November 2018 by completely closing the Kerch Strait for

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[182] *See* Ukraine's Memorial, ¶¶ 122, 136, 189-194, 196-201.

[183] Foreign Ministry: Kyiv's Draft Law on the Maritime Territory Is Not Applicable to the Sea of Azov, *RIA News* (15 November 2018) (quoting an official statement of Russia's Foreign Ministry) **(UA-541)**.

[184] Ukraine's Observations, ¶ 90.

[185] *Id.*

navigation by all vessels, and preventing Ukrainian vessels from transiting the strait.[186] Russia's Minister of Foreign Affairs went so far as to assert — again using language completely inconsistent with its submissions here — that the Kerch Strait "is a Russian strait" and "is not subject to any regulation by international law."[187]

91. Other littoral States on the Black Sea — Turkey, Romania, and Bulgaria (the latter two through the European Union) — have protested Russia's discriminatory stoppages of ships traveling to and from Ukraine's ports in the Sea of Azov as an unwarranted interference with third-State navigational rights.[188] So too have the United States and the European Union.[189] In its 17 December 2018 resolution on Crimea, moreover, the U.N. General Assembly:

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

[187] Ministry of Foreign Affairs of the Russian Federation, Foreign Minister Sergey Lavrov's Remarks and Answers to Media Questions at a Joint News Conference Following Talks with Italian Minister of Foreign Affairs and International Cooperation Enzo Moavero Milanesi, Rome (23 November 2018) ("Let me also remind you that the Kerch Strait is not subject to any regulation by international law. It is a Russian strait.") **(UA-470)**; *cf.* Statement of the Ministry of Foreign Affairs of the Russian Federation, No. 2215-21-11-2018 (21 November 2018) ("T*he 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.") (emphasis added) **(RU-81)**. As the 23 November 2018 statement makes clear, however, the 21 November 2018 statement is in fact inconsistent with Russia's actual practice, under which only Russian vessels enjoy the freedom of navigation in the Kerch Strait and Sea of Azov.

[188] *See* Ukraine's Observations, ¶ 91. Russia claims that the 25 October 2018 resolution of the European Parliament "correctly states in its preamble" that the Sea of Azov Treaty defines the status of the Sea of Azov and Kerch Strait as internal waters. Russia's Reply, ¶ 117. While the resolution acknowledges the existence of the Sea of Azov Treaty, it omits the critical language from Article 1 stating that these waters "*historically constitute* internal waters." *See* 2003 Sea of Azov Treaty, Art. 1 **(UA-19)**; European Parliament, Resolution of 25 October 2018 on the Situation in the Sea of Azov (2018/2870(RSP)), ¶ A **(UA-544)**. More critically, the Resolution specifically invokes UNCLOS and transit passage as relevant to the situation in the Kerch Strait, indicating that the European Parliament does not understand these waters as having a present internal waters status. *Id.* ¶¶ A, G(3)-(4).

[189] *See* Ukraine's Observations, ¶¶ 91-92; *see also* United Nations, General Assembly Adopts Resolution Urging Russian Federation to Withdraw Its Armed Forces from Crimea, Expressing Grave Concern about Rising Military Presence (17 December 2018) (noting that the representative from the European Union stated that "the European Union calls 'strongly' on the Russian Federation . . . to ensure free and unhindered access through the Kerch Strait in accordance with international law") **(UA-553)**. The Czech Republic also recently protested Russia's actions as "a violation of unhindered and free navigation through the Kerch Strait and in the Sea of Azov." Ministry of Foreign Affairs of the Czech Republic, MFA Statement on the 5th Anniversary of the Illegal Annexation of Crimea (16 March 2019) ("The ongoing militarization of the territory of Crimea, as well as a violation of

> call[ed] upon the Russian Federation to refrain from impeding the lawful exercise of navigational rights and freedoms in the Black Sea, the Sea of Azov and the Kerch Strait, in accordance with applicable international law, *in particular provisions of the 1982 United Nations Convention on the Law of the Sea.*[190]

92. In short, multiple States have indicated a clear expectation of free passage through the Kerch Strait — an expectation that is inconsistent with Russia's asserted internal waters claim.

93. Russia's main response is to dismiss these protests as "clearly politically inspired" and to note that, up until these protests, no State had protested Russia's claim to shared internal waters.[191] Russia's attempt to impugn the motives of the third States that have protested its actions in the Kerch Strait is inappropriate and ignores the very real hardship hundreds of third State vessels have faced in their transits.[192] Freedom of navigation is not a mere "political" issue but one of the foundational principles of the law of the sea.

94. Russia also seeks to assign significance to the fact that third States only lodged protests to Russia's claim of shared internal waters in the past year. This, however, is hardly surprising. Until Russia embarked on its harassment campaign last year, third States enjoyed and regularly exercised the right to transit the Kerch Strait into and out of the Sea of Azov. Once Russia began implementing its vision of internal waters by impairing third State navigational rights, however, third States promptly protested. States are not obligated to protest harms to their rights before those harms have even occurred.[193]

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unhindered and free navigation through the Kerch Strait and in the Sea of Azov, represent yet another blatant breach of international law.") **(UA-564)**.

[190] U.N. General Assembly Resolution 73/194, U.N. Doc. No. A/RES/73/194 (17 December 2018) (emphasis added) **(UA-549)**. After voting for this resolution, the Republic of Singapore also emphasized that "[a]ll Member States must uphold the right of freedom of navigation as set out in the Convention on the Law of the Sea." United Nations, General Assembly Adopts Resolution Urging Russian Federation to Withdraw Its Armed Forces from Crimea, Expressing Grave Concern about Rising Military Presence (17 December 2018) **(UA-553)**.

[191] Russia's Reply, ¶¶ 115-116.

[192] *See, e.g.*, European Parliament, Resolution of 25 October 2018 on the Situation in the Sea of Azov (2018/2870(RSP)), ¶ D ("[W]hereas Russia frequently and in an abusive manner blocks and inspects ships going through the Kerch Strait sailing to or from Ukrainian ports; whereas these procedures cause delays of up to one week and result in a decrease in cargo flows and tangible financial losses for the local economy in Ukraine and merchants whose vessels are subject to this regime . . . .") **(UA-544)**.

[193] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, ICJ Judgment of 23 May 2008, ¶ 121 (in discussing whether inaction or silence amounts to acquiescence, emphasizing that "silence may also speak, *but only if the conduct of*

95. The absence of prior protests is particularly unsurprising because third States would not until recently have appreciated that Russia claimed the rights it now asserts — a point that even Russia appears to acknowledge in its Reply.[194] As described above, the only public statements or agreements touching on the status of the Sea of Azov and Kerch Strait — the Sea of Azov Treaty and the Joint Statement — do not establish a present internal waters status for these bodies of water. Moreover, of these two documents, only the Joint Statement was circulated officially to all United Nations members.[195] As previously noted, that statement is devoid of legal terms, and its description of the present status of these waters is, at best, ambiguous. None of this is a sufficient basis on which to infer acquiescence, estopping States from protesting now that Russia is taking overt steps in the Kerch Strait and the Sea of Azov in violation of the law of the sea.

II. Russia's Claim to Historic Title Does Not Bar the Tribunal's Jurisdiction

96. Ukraine argued in its Observations that Russia's objection under the historic title clause of Article 298(1)(a) overlaps completely with its internal waters objection.[196] In its Reply, Russia does not contest this aspect of Ukraine's argument.[197] This objection therefore also must fail because, for the reasons set out above, the Sea of Azov and Kerch

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the other State calls for a response") (emphasis added) **(UAL-113)**; *compare The Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ Judgment of 15 June 1962, p. 23 ("*[I]t is clear that the circumstances were such as called for some reaction, within a reasonable period*, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced.") (emphasis added) **(UAL-96)**; *see also* Nuno Sérgio Marques Antunes, *Acquiescence*, Max Planck Encyclopedia of Public International Law (September 2006), ¶ 21 ("Acquiescence only emerges where it refers to facts that are (or ought to be) known by the acquiescing State (notoriety), *where such facts are of direct interest for the acquiescing State (interest)*, when these facts have existed for a significant period (lapse of time) without significant change of context and the meaning conveyed (consistency), and in cases in which the conduct is attributable to a relevant representative of the State (provenance).") (emphasis added) **(UAL-114)**.

[194] Russia's Reply, ¶ 116 ("The terms used [in the recent statements of the European Commission and Parliament, and from the Foreign Ministries of the United States and Turkey] 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.") (emphasis added).

[195] Ukraine's Observations, ¶ 82.

[196] Ukraine's Observations, ¶¶ 94-96.

[197] Russia's Reply, ¶¶ 119-121. Instead, Russia argues only that Ukraine's argument that Russia's objection based on "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" is itself incorrect because the waters are internal. *Id.* ¶ 119.

Strait do not in fact have the status of internal waters, as a matter of historic title or otherwise.

97. Even if Russia's main additional argument in its Reply were considered — that, because Ukraine lodged a declaration under Article 298(1)(a), that declaration means Ukraine has implicitly acknowledged the existence of historic title in the Sea of Azov and Kerch Strait — Russia's objection would still fail.[198] As explained in Ukraine's Observations, Ukraine's declaration paraphrases Article 298(1)(a)(i), which encompasses both "disputes relating to sea boundary delimitations" *and* "disputes involving historic bays or titles . . . ."[199] Ukraine's decision to paraphrase this language cannot be taken as evidence that Ukraine thereby implicitly acknowledged the existence of historic title in the Sea of Azov and Kerch Strait.

III. Russia's Objection Relating to the Status of the Sea of Azov and Kerch Strait Is Not Exclusively Preliminary in Character

98. As Ukraine demonstrated in its Observations, there are numerous grounds upon which the Tribunal could properly defer consideration of Russia's arguments relating to the Sea of Azov and Kerch Strait to the merits phase, if it does not simply reject them in this preliminary stage of the proceedings.[200] Russia does nothing in its Reply to rebut those grounds.

99. First, Russia offers no response to Ukraine's argument that the question of whether the Sea of Azov is internal waters requires the Tribunal to interpret and apply provisions of the Convention.[201] Russia does not respond to the analogous decision of the *South China Sea* tribunal deferring consideration of a similar issue to the merits stage. The tribunal held that China's assertion of historic rights in the South China Sea "require[d] the Tribunal to consider the effect of any historic rights claimed by China . . . and the interaction of such rights with the provisions of the Convention."[202] Consequently, the tribunal

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[198] *Id.* ¶ 120.

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

[200] Ukraine's Observations, ¶¶ 98-100.

[201] *Id.* ¶ 98.

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

determined that the "dispute concern[ed] the interpretation and application of the Convention," and thus "[t]he nature and validity of any historic rights claimed by China *is a merits determination*."[203]

100. Second, Russia's argument that the Tribunal has already rejected Ukraine's arguments that Russia's preliminary objections are not exclusively preliminary mischaracterizes the Tribunal's Procedural Order No. 3.[204] At the time that Order issued, the question before the Tribunal was whether to have a bifurcated preliminary objections phase at all. Having decided that question in the affirmative, however, the Tribunal can still, consistent with the Order, decide with the benefit of a more complete factual record and arguments, that some of Russia's objections are not exclusively preliminary in character and should be deferred to the merits.[205]

101. Finally, the fact that Russia has behaved entirely inconsistently with its claimed common internal waters status in the Sea of Azov and Kerch Strait provides yet another reason that Russia's objection cannot be accepted at this early stage of the proceedings. As discussed in Parts I.B and I.C above, Russia has engaged in a long string of actions inconsistent with its claim to common internal waters. Many of the areas in which Russia has behaved inconsistently with its current position overlap with Ukraine's claims on the merits, including Russia's actions in unilaterally seizing and exploiting Ukrainian gas fields, unilaterally constructing numerous structures across the Kerch Strait, and unilaterally limiting the dimensions of vessels that can now transit the Kerch Strait. The Tribunal cannot uphold Russia's objection based on its claim of shared internal waters status without first ascertaining whether, as a factual matter, Russia's actual conduct is inconsistent with that claim. That determination is properly made in the merits phase of this proceeding.

102. Thus, at least to the extent the Tribunal does not immediately reject Russia's claims concerning the Sea of Azov and Kerch Strait as legally invalid and inconsistent with UNCLOS, it should defer consideration of Russia's second preliminary objection to the merits phase.

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

[203] *Id.* (emphasis added).

[204] Russia's Reply, ¶¶ 123-126.

[205] Procedural Order No. 3, Regarding Bifurcation of the Proceedings (20 August 2018) ("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.").

Chapter Four: Russia's Objections Under Articles 297 and 298 Each Fail

103. Russia raises four objections to the Tribunal's jurisdiction under Articles 297 and 298. Ukraine's Observations demonstrated that three of these objections — Russia's objections under the fisheries disputes provision of Article 297(3)(a) and the law enforcement clause of Article 298(1)(b), and its objection under the delimitation clause of Article 298(1)(a)(i) — are entirely dependent on Russia's specious claim that the legal status of Crimea has changed. They fail for the same reasons as Russia's principal objection. As for Russia's fourth objection — under the military activities clause of Article 298(1)(b) — Russia raises arguments that no tribunal or acknowledged authority has ever embraced. Russia's objections under Articles 297 and 298 are without merit and must be rejected.

I. Russia's Fisheries and Law Enforcement Objections Depend on Its First Preliminary Objection and Should Be Rejected for the Same Reasons

104. Ukraine's Observations demonstrated that Russia can assert objections under Article 297(3) and the law enforcement clause of Article 298(1)(b) only to the extent it enjoys an exclusive economic zone extending from the Crimean coast.[206] Russia does not seriously contest this fact, which renders its fisheries and law enforcement objections dependent on its first preliminary objection relating to its claim that the legal status of Crimea has been altered. Russia does argue that it can raise its Article 297(3) and Article 298(1)(b) law enforcement objections in areas where it enjoys overlapping entitlements with Ukraine.[207] That is not correct — the relevant jurisdictional exceptions apply only in areas that have been determined to form part of the exclusive economic zone of the respondent State.[208] But even

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[206] *See* Ukraine's Observations, ¶¶ 104-106.

[207] *See* Russia's Reply, ¶ 129. Russia's fisheries and law enforcement objections relate only to four of Ukraine's submissions. *See* Russia's Objections, ¶¶ 152, 189, 194 (referring only to Ukraine's submissions (f), (g), (h), and (i)).

[208] Specifically, by their terms, these articles only apply with respect to a coastal State's exercise of "*its* sovereign rights." UNCLOS, Art. 297(3)(a) (emphasis added). Thus, for these articles to apply, the Tribunal must determine that the respondent actually has sovereign rights that it is exercising. *See* Ukraine's Observations, ¶¶ 103-104, 106-107. Indeed, the authorities Russia relies on in its Preliminary Objections each make clear that Article 297(3)(a) is relevant only in cases in which another State has challenged a coastal State's sovereign rights within an area established or assumed to be the coastal State's own exclusive economic zone. *See Southern Bluefin Tuna Case*, Award on Jurisdiction and Admissibility of 4 August 2000, ¶¶ 61-62 **(RUL-24)**; *Arbitration between Barbados and the Republic of Trinidad and Tobago Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf Between Them*, UNCLOS/PCA Case No. 2004-02, Decision of 11 April 2006, ¶ 276 **(RUL-28)**; *see also Chagos Marine Protected Area Arbitration*, Award of 18 March 2015, ¶ 293 (explaining that Mauritius's Fourth Submission involved consideration of whether the

if Russia's argument were correct, that would hardly assist it: the only entitlements Russia has asserted in its submissions in this arbitration extend from Crimea.[209] Russia's objections under Articles 297(3) and the law enforcement clause of Article 298(1)(b) should, therefore, be rejected on the same bases as its first preliminary objection.

105. In its Reply, Russia seeks to turn to its benefit Ukraine's decision to focus in its Observations on the dependence between Russia's Article 297 and Article 298(1)(b) law enforcement objections and Russia's first preliminary objection. Specifically, Russia asserts that Ukraine has "fail[ed] to address Russia's case."[210] Ukraine has focused on the dependence between Russia's objections because, standing alone, it provides sufficient reason to dispense with Russia's Article 297 and Article 298(1)(b) law enforcement objections. For the avoidance of doubt, however, Ukraine in no way subscribes to Russia's distorted reading of those provisions.

106. First, even if Russia's conduct had taken place within areas determined to be part of its exclusive economic zone, Articles 297(3) and 298(1)(b) would, by their terms, apply only to Russia's exercise of "sovereign rights with respect to the living resources" of the exclusive economic zone and to its enforcement of its fisheries laws.[211] This language does not shield from scrutiny Russia's harassment of civilian and governmental navigation or its violations of the Convention's environmental provisions. And, contrary to Russia's assertions,[212] Russia's interference with the navigation of Ukrainian vessels — including not just fishing vessels, but also other civilian vessels and even Ukrainian coast guard vessels — has nothing to do with the enforcement of fisheries regulations and so does not implicate the law enforcement clause of Article 298(1)(b).

107. Second, Russia is incorrect when it asserts that Article 297(3) and the law enforcement clause of Article 298(1)(b) apply not only in the exclusive economic zone but also in the territorial sea.[213] Russia's argument contradicts the express language of Articles

United Kingdom, acting as coastal State, had "due regard to the rights and duties of other States") (**UAL-18**).

209 *See infra* ¶¶ 110-112.

210 Russia's Reply, ¶ 8.

211 UNCLOS, Art. 297(3)(a).

212 *See* Russia's Objections, ¶ 152.

213 *See id.* ¶¶ 153, 195.

297(3) and 298(1)(b), which conspicuously omits any mention of the territorial sea.[214] Accordingly, Russia's objections cannot affect the Tribunal's consideration of Russia's conduct in the Kerch Strait, or within twelve miles of coastal baselines in the Black Sea or the Sea of Azov.

108. Setting aside these defects in Russia's argument, the basic point remains: Russia's fisheries and law enforcement objections wholly depend on its claim that the legal status of Crimea has been altered; its objections should fail for that reason alone.

II. Russia's Article 298(1)(a) Delimitation Objection Also Depends on Its Claim that the Legal Status of Crimea Has Been Altered

109. As Ukraine previously explained, and the *South China Sea* tribunal has recognized, there must be overlapping entitlements for the delimitation exception to apply. The question of "the *existence* of an entitlement" is not within the delimitation exception.[215]

110. In its Preliminary Objections, Russia appeared to premise its delimitation objection on the assumption that it is entitled to a territorial sea, exclusive economic zone, and continental shelf extending from Crimea.[216] Russia's Reply has now expressly confirmed that this is the basis of its delimitation objection. Specifically, Russia asserts that "it has entitlements extending from the coast of Crimea" and that the "Tribunal simply *cannot* decide on Ukraine's case" because the tribunal would necessarily "need to apply Articles 15, 74, or 83 from the Crimean (Russian) baselines" to do so.[217]

111. In clarifying its delimitation objection, Russia provides no response to the central point made by Ukraine in its Observations: that Russia's delimitation objection is

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[214] *See* UNCLOS, Art. 297(3) ("[T]he coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise . . . ."); *id.*, Art. 298(1)(b) (referring to "disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3").

[215] *South China Sea Arbitration,* Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 156 (noting specifically that "a dispute concerning the *existence* of an entitlement to maritime zones is *distinct* from a dispute concerning the delimitation of those zones") (emphasis added) (**UAL-3**). Russia has identified no authority contradicting the *South China Sea* tribunal's unambiguous holding.

[216] *See* Russia's Objections, ¶¶ 154-175; *see also* Ukraine's Observations, ¶¶ 117-118 (rejecting Russia's reliance on such entitlements). Even if successful, Russia's delimitation objection would apply only to some, but not all, of Ukraine's submissions. *See supra* ¶ 12 n. 9.

[217] Russia's Reply, ¶ 131 (emphasis added); *see also id.* ¶ 129 (Russia asserts that the Tribunal does not have jurisdiction "since here the allocation of rights under the Convention is far from being unequivocal" and "at the very least" involve "potentially overlapping entitlements").

subsumed within its first preliminary objection related to sovereignty.[218] As Russia's first preliminary objection must be rejected, so too must its objection under Article 298(1)(a)(i).

112. Russia's acknowledgment that its delimitation objection depends on the recognition of entitlements extending from Crimea renders its points about the proper interpretation of Article 298 academic. These points are, however, also incorrect.

113. First, Russia argues that Article 298(1)(a)(i) applies not just to disputes calling for delimitation pursuant to Articles 15, 74, or 83, but also to an ill-defined category of disputes "implying a determination based on these Articles."[219] Russia claims to find support for its argument in the *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia* ("*Timor-Leste*").[220] But the passages of the *Timor-Leste* decision cited by Russia deal with a different issue entirely. They indicate only that the phrase, "disputes concerning the interpretation or application of articles 15, 74 and 83," encompasses disputes concerning the interpretation and application of Articles 74(3) and 84(3),[221] which provide for the establishment of "provisional arrangements of a practical nature" pending delimitation.[222] The *Timor-Leste* panel's straightforward determination in no way supports Russia's expansive reading of Article 298(1)(a)(i). Rather, it is consistent with Ukraine's view that the delimitation exception only applies in connection with disputes that require the interpretation or application of the three specific articles enumerated in Article 298(1)(a)(i).

114. Second, while Russia argues that Ukraine's interpretation of Article 298(1)(a) deprives the phrase "relating to sea boundary delimitations" of effectiveness,[223] that also is not correct. That phrase clarifies the scope of the exception's application and serves to exclude from the exception, among other things, disputes about whether the preconditions to a delimitation exercise are met.[224] In short, even if Russia's delimitation objection were not

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[218] Ukraine's Observations, ¶¶ 118-119.

[219] *See* Russia's Reply, ¶¶ 132-133.

[220] *Id.* (citing *Conciliation between The Democratic Republic of Timor-Leste and The Commonwealth of Australia*, PCA Case No. 2016-10, Decision on Australia's Objections to Competence of 19 September 2016 ¶¶ 93, 94, 97 (**UAL-119**)).

[221] *Timor-Leste*, Decision on Australia's Objections to Competence of 19 September 2016, ¶¶ 95-97 (**UAL-119**).

[222] *Id.* ¶ 16.

[223] Russia's Reply, ¶ 134.

[224] For example, a dispute could arise about whether "an agreement in force" exists, within the meaning of Articles 74(4) and 83(4), so as to preempt the need for a delimitation exercise under those

entirely dependent on its flawed first preliminary objection, Russia still would have no basis to invoke Article 298(1)(a)(i).

III. This Dispute Does Not Concern Military Activities

115. Russia's final objection under section 3 of UNCLOS Part XV fares no better than its others. Its military activities objection rests on an extreme interpretation of what it means for a dispute to "concern" military activities. And Russia also puts forward a definition of the term "military activity" that is entirely lacking in support.

A. Russia's Expansive Reading of Article 298(1)(b)'s Military Activities Clause Is Unprecedented and Incorrect

116. In its Preliminary Objections, Russia advanced two bases for the applicability of the military activities exception to this case. First, it made the unprecedented argument that any claim that is causally connected in any way to a prior military activity — in this case, Russia argues, its invasion and occupation of Crimea — falls within the scope of the exception.[225] Second, it argued that the specific maritime activities on which Ukraine bases its claims — including drilling for hydrocarbons, fishing, and underwater archaeology — are military in nature because they are supported by an armed Russian presence in the waters at issue.[226]

117. In its Observations, Ukraine explained why both Russian arguments must fail. First, Ukraine demonstrated that the military activities exception in Article 298(1)(b) applies, by its terms, only to "disputes *concerning* military activities" and not to disputes that merely have an alleged "causal link" to such activities.[227] Second, Ukraine demonstrated that none of the specific maritime activities on which Ukraine bases its claims are military in nature.[228]

118. In its Reply, Russia shifts position. It no longer argues that the specific activities that Ukraine complains of are military in nature, and instead acknowledges that "Ukraine is indeed asserting alleged violations of its economic, navigational, environmental,

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Articles. Such a dispute would arise under Articles 74 and 83 but would not itself "relat[e] to sea boundary delimitations."

[225] *See, e.g.*, Russia's Objections, ¶¶ 144, 146.

[226] *See id.* ¶ 147.

[227] *See* Ukraine's Observations, ¶¶ 124-128.

[228] *See id.* ¶¶ 129-138.

and cultural rights under UNCLOS."[229] Russia now rests its entire argument on its first ("causal link") argument, asserting that the military activities exception applies in this case because Ukraine "cites Russia's alleged unlawful use of force as the starting point of the dispute and the reason why its maritime jurisdiction must be upheld."[230] These statements are yet another mischaracterization of Ukraine's submissions.

119. As stated in its Observations, Ukraine has explained, by way of background, that Russia's UNCLOS violations occurred "in the period following" Russia's invasion of the Crimean peninsula.[231] However, as shown in Ukraine's Observations and also in Chapter Two, above, Russia's invasion of the peninsula is not itself the subject of any of Ukraine's claims, and thus is not what this dispute "concerns."[232] Moreover, Ukraine's claims do not call for a ruling on the legality of Russia's military conduct in 2014.[233]

120. Ukraine's reading of the military activities exception as applying only to disputes that "concern" military activities follows from the ordinary meaning of the Convention's text, and is identical to that adopted by the *South China Sea* tribunal.[234] In

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[229] Russia's Reply, ¶ 141.

[230] *See id.* ¶ 141; *see also id.* ¶¶ 137-139 (asserting that "Ukraine's case comes down to a claim that Russia has taken Crimea through unlawful use of force"). Russia does argue in its Reply that it "does not bear the burden of proving that Ukraine's claims concern military activities." Russia's Reply, ¶¶ 143-145. This is incorrect. In the *Border and Transborder Armed Actions Case* on which Russia relies, the International Court of Justice stated that: (i) there is no burden of proof on the ultimate legal question of the Court's jurisdiction to hear a case (*i.e.*, each party's contentions on jurisdiction are placed on the same footing) but (ii) jurisdictional issues must be determined "in the light of the relevant facts" which do "raise questions of proof" for the parties. *Border and Transborder Armed Actions (Nicaragua* v. *Honduras),* ICJ Judgment on Jurisdiction and Admissibility of 20 December 1988, p. 76, ¶ 16 (emphasis added) **(UAL-102)**. Here, Russia has offered no factual proof that any of the activities complained of are military in nature. *See* Ukraine's Observations, ¶¶ 129-138.

[231] Ukraine's Observations, ¶ 124 (quoting from Russia's Objections, ¶ 144, which quoted from Ukraine's Statement of Claim, ¶ 2). For the distinction between the dispute and its broader factual context, see *Fisheries Jurisdiction,* ICJ Judgment on Jurisdiction of 4 December 1998, ¶¶ 34-35 (noting that the "filing of the Application was occasioned by specific acts of [the respondent state] which [the claiming state] contend[ed] violated its rights under international law" and that those "specific acts" "should be considered" in light of, but as distinct from, the underlying factual "context") **(UAL-42)**.

[232] *See* Ukraine's Observations, Chapter Two, Section I; *id.* ¶¶ 134-138; *infra* ¶¶ 120-122.

[233] *See* Ukraine's Memorial, ¶ 265; Ukraine's Observations, ¶¶ 134-138. *Cf.* Russia's Reply, ¶¶ 137, 139, 149. While Ukraine does ask this Tribunal to take account of the international community's application of the principle of non-recognition to Russia's claim to have annexed Crimea, nothing in this argument calls for an independent adjudication of Russia's invasion of the peninsula. *See generally supra* Chapter Two.

[234] *South China Sea Arbitration*, Award of 12 July 2016, ¶ 1158 ("[T]he Tribunal notes that Article 298(1)(b) applies to '*disputes concerning* military activities' and not to 'military activities' as such.

contrast, Russia's argument that any causal link between a specific claim and past military activity is sufficient to activate the Article 298(1)(b) exception is incorrect as a matter of law. As explained in Ukraine's Observations, the text of the treaty does not support such an expansive reading when interpreted according to the principles set out in the Vienna Convention. Instead, the ordinary meaning of "concerning" in Article 298(1)(b) limits the exception's application to disputes "about" military activities.[235]

121. Russia does not respond to Ukraine's argument about the ordinary meaning of Article 298(1)(b); nor does it address the *South China Sea* tribunal's conclusion that the military activities exception should be read as Ukraine has proposed in the current proceedings.[236] And it finds no support in other authorities for its contrary interpretation. Instead, it asks the Tribunal to draw broad inferences from Argentina's unexplained decision to withdraw its optional reservation to jurisdiction in 2012, and it cites an outdated article by Professor Natalie Klein that does not in fact support its argument.[237] Simply put, there is no support for Russia's attempt to apply the military activities exception to this case.

Accordingly, the Tribunal considers the relevant question to be whether the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute.") (emphasis in original) **(UAL-11)**.

[235] *See* Ukraine's Observations, ¶¶ 124-128 (also noting that the drafters could have, but did not, use broader terms, such as "arising from" or "in connection with").

[236] While ignoring *South China Sea*'s actual conclusion concerning the scope of the exception, Russia seeks to distinguish the case based on China's non-invocation of the military activities exception in support of the conclusion that Russia's decision to avail itself of the defense in this case deprives the Tribunal of the ability to "delve into the facts." Russia's Reply, ¶ 147. This is an incorrect reading of the case. In analyzing the military activities exception, the *South China Sea* tribunal took account of (and, ultimately, deferred to) official Chinese statements of policy, made outside the context of the UNCLOS arbitration, that certain of its activities were not military in nature. *South China Sea Arbitration*, Award of 12 July 2016, ¶ 938 ("The Tribunal will not deem activities to be military in nature when China itself has consistently and officially resisted such classifications and affirmed the opposite at the highest levels.") **(UAL-11)**. Nothing in the reasoning of that award provides support for Russia's position that it can, on the one hand, loudly disclaim having undertaken any activities that are military in nature while, on the other, inconsistently insist that it is entitled to the protection of the military activities exception.

[237] Russia's Reply, ¶ 140, (citing Natalie Klein, Dispute Settlement in the UN Convention on the Law of the Sea (Cambridge, 2005), p. 285). Professor Klein, however, argues only that a dispute arising directly "out of the context of an armed conflict" — and not, as here, a dispute concerning ongoing violations of UNCLOS continuing beyond the conclusion of the conflict — would trigger the military activities exception. Natalie Klein, Dispute Settlement in the UN Convention on the Law of the Sea (Cambridge, 2005), p. 285 **(RUL-65)**. In any event, Professor Klein has subsequently acknowledged that her expansive approach to the military activities exception finds no support in "actual decisions" made by courts and tribunals applying UNCLOS. *See* Natalie Klein, *The Vicissitudes of Dispute Settlement under the Law of the Sea Convention*, Int'l J. of Marine and Coastal L., Vol. 32 (June 2017), pp. 334, 358-359 **(UAL-115)**.

122. While Russia's prior argument concerning the military nature of the specific activities underpinning Ukraine's claims was intertwined with the merits, that is not true of its remaining argument discussed above concerning the asserted causal connection between this case and Russia's invasion of the Crimean peninsula. Russia's "causal link" argument can and should be rejected *now*, as a matter of treaty interpretation, at the preliminary objections phase.

B. Russia's Attempt to Broadly Define the Term "Military Activities" Is Wrong and, in Any Case, Irrelevant

123. Russia argues that the term "military activities" should be given an expansive interpretation.[238] The Tribunal need not reach that interpretive question now that Russia no longer argues that the specific activities Ukraine complains of are military in nature.

124. For the avoidance of doubt, however, Russia's conception of the breadth of the military activities exception is incorrect,[239] and is not supported by the scholars Russia cites. Specifically, Russia again refers to Professor Natalie Klein; but, again, Professor Klein in fact contradicts Russia's view that "military activities" should be read to encompass "any activity conducted by the armed forces of a State or paramilitary forces."[240] And, while Russia cites to Professor John King Gamble, Jr. for the proposition that "states can define military matters as broadly as they wish,"[241] Professor Gamble made that statement in connection with describing the "considerable room for abuse" in a 1975 draft text prepared by an informal working group on dispute settlement.[242] In Professor King's view, the risk

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[238] *See, e.g.*, Russia's Reply, ¶ 140 ("Military activities span a vast spectrum . . . .").

[239] *Compare South China Sea Arbitration*, Award of 12 July 2016, ¶ 1158 ("[T]he Tribunal considers the relevant question to be whether the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute.") **(UAL-11)** *with* Russia's Objections, ¶ 139 (arguing that the military activities exception "can be triggered by the mere involvement of the military forces").

[240] Russia's Reply, ¶¶ 140, 142; *cf.* Natalie Klein, Dispute Settlement in the U.N. Convention on the Law of the Sea (2005), pp. 312-313 ("It is difficult to assert that the right of hot pursuit and the right of visit are not law enforcement activities . . . . *The mere fact that these rights are exercised by military and government vessels does not justify a characterization of 'military activities'* for the purposes of Article 298.") (emphasis added) **(UAL-79)**.

[241] Russia's Reply, ¶ 142 (quoting John King Gamble Jr., *The Law of the Sea Conference: Dispute Settlement in Perspective*, Vanderbilt J. Int'l L., Vol. 9 (Spring 1976), p. 331 **(RUL-52)**).

[242] John King Gamble Jr., *The Law of the Sea Conference: Dispute Settlement in Perspective*, Vanderbilt J. Int'l L., Vol. 9 (Spring 1976), pp. 325 n. 5, 331 **(RUL-52)**. As reflected in the date of the article Russia cites (1976) and noted therein, Gamble was not commenting on the final text of UNCLOS but rather on a differently worded draft. *Id.* p. 325 n. 5.

that the draft text could be read to incorporate broad and self-judging exceptions of the sort Russia advocates for here was nothing short of "disturbing."[243]

125. Thus, even if it were not moot, Russia's broad reading of the term "military activities" could not be accepted, and could not support its attempt to invoke the military activities clause of Article 298(1)(b).

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[243] *Id.* p. 331.

Chapter Five: An Annex VII Tribunal Is the Appropriate Forum for this Dispute

126. Ukraine and Russia have both consented — by joining UNCLOS and through their declarations under Article 287 — to the Tribunal's jurisdiction over this case. Contrary to Russia's assertions, the Parties to this dispute have not agreed, pursuant to Article 281, to resolve this dispute under the auspices of any other treaty. And the Convention does not provide for the single, integrated dispute between Ukraine and Russia presented in Ukraine's Memorial to be subdivided for resolution by multiple Annex VII and Annex VIII tribunals. Russia's attempts to avoid the holistic resolution of this dispute in the normal manner established under UNCLOS Part XV — *i.e.*, through the present Annex VII proceedings — must, therefore, be rejected.

I. Article 281 Is Not Relevant to the Resolution of this Dispute

127. Article 281 could only limit or condition the Tribunal's jurisdiction if Ukraine and Russia had elsewhere agreed to seek settlement of this dispute through specific alternative dispute resolution procedures. There is nothing whatsoever to suggest they have done so, and Russia's Article 281 objection must fail.

A. Article 5 of the State Border Treaty and Article 1 of the Sea of Azov Treaty Do Not Address the Settlement of Disputes and Do Not Engage Article 281

128. In its Reply, Russia persists in arguing that Article 5 of the State Border Treaty and Article 1 of the Sea of Azov Treaty are dispute resolution clauses. Specifically, Russia argues that it and Ukraine have, through these articles, "agreed to resolve [. . .] disputes through negotiations and to exclude recourse to further procedures (including procedures provided by Part XV of UNCLOS)."[244] Russia maintains that these asserted dispute resolution clauses apply to "the Sea of Azov, the Kerch Strait," and other "adjacent sea areas" that Russia still has not clearly defined.[245]

129. As Ukraine showed in its Observations, this is a peculiar argument. To see why, the Tribunal need only consider the language of the articles cited by Russia.[246] Neither

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[244] Russia's Reply, ¶ 163.

[245] *Id.* ¶ 163 & n. 314. Russia states that the relevant "adjacent sea areas" are areas of the Black Sea "under [Ukrainian or Russian] sovereignty or jurisdiction that are adjacent to each other." *Id.* ¶ 170. As Ukraine showed in its Observations, however, the term "adjacent sea areas" appears in the State Border Treaty and can apply only to areas directly adjacent to the border defined in that treaty. *See* Ukraine's Observations, ¶ 144.

[246] Article 5 of the State Border Treaty — a treaty that defines the land border between Ukraine and Russia — reads as follows: "Settlement of questions relating to the adjacent sea areas shall be effected

of the provisions that Russia points to refer to "disputes," or to the dispute resolution procedures in UNCLOS Part XV. This is because, as previously shown,[247] they are not dispute resolution clauses at all. Rather, their purpose is to record the parties' shared desire to negotiate future treaties on, respectively, (i) sea areas adjacent to the Ukrainian–Russian land border east of Mariupol and (ii) the Kerch Strait.

130. To support its contrary reading of the two articles, Russia deviates from accepted principles of treaty interpretation in two critical ways. First, Russia seeks to distort the ordinary meaning of the relevant articles and their individual terms. For example, whereas Ukraine has noted that the articles refer to "questions" and do not use the Russian or Ukrainian words for "disputes" or "dispute resolution,"[248] Russia argues that the word "questions" ("вопросы [*voprosy*]" in Russian, "питання [*pytannia*]" in Ukrainian) was intended to encompass the concept of a future legal dispute.[249] As Ukraine has already explained, however, this is not a natural reading of the word "questions" in Russian and Ukrainian, just as it would not be in English.[250]

131. Russia also distorts the ordinary meaning of the Ukrainian word used to refer to the term "treaty." Specifically, Russia responds to Ukraine's showing that Article 1 of the Sea of Azov Treaty uses a term — "угода [*uhoda*]" — that specifically refers to treaties rather

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by agreement between the Contracting Parties in accordance with international law." State Border Treaty, Art. 5 (**UA-529**). Article 1 of the Sea of Azov Treaty — a treaty that, as Russia acknowledges, contains an actual dispute resolution clause at Article 4 — states in relevant part: "Settlement of questions relating to the Kerch Strait area shall be effected by agreement by the Parties." *See* Russia's Objections, ¶ 223 (citing "Azov/Kerch Cooperation Treaty, Article 1" (**RU-20**)). As it did in its Observations at paragraph 150 and note 247, Ukraine again relies on Russia's translation here for convenience, but continues to maintain that its translation of the treaty (**UA-19**) is the correct one. The divergence in translations is not material here.

[247] *See* Ukraine's Observations, ¶¶ 146-154.

[248] *See id.* ¶ 152.

[249] Russia's Reply, ¶ 167.

[250] *See* Ukraine's Observations, ¶ 152. Russia argues that the use of the word "questions" in the Ukrainian Soviet Socialist Republic's declaration upon signature of UNCLOS "demonstrat[es] that the word 'questions' (‹‹вопросы›› ("voprosi") [*sic*] can and was used to refer to, *inter alia*, disputes." Russia's Reply, ¶ 167. The relevant sentence in that declaration in fact refers to "disputes [i.e., 'споры [*spory*]' in Russian] concerning the interpretation or application of the Convention" in respect of "questions relating to" the subjects listed in Annex VIII. Declaration of Ukraine Upon Ratification of UNCLOS (26 July 1999) (**UA-8**). Accordingly, and contrary to Russia's implication, the word "questions" ("вопросы [*voprosy*]" in Russian) is not used as a substitute for the word "disputes" ("споры [*spory*]" in Russian). 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-11**).

than to negotiated agreements to settle a dispute.[251] It does so by stating that "Ukraine is wrong to say that 'угода [*uhoda*]' means a 'treaty' — it means any agreement."[252] Russia fails, however, to address Ukraine's reference to a leading legal dictionary, which establishes that in the international legal context the term specifically denotes a treaty.[253] Moreover, even if Russia's interpretation of the term "угода [*uhoda*]" were correct, that could not change the fact that the provisions do not deal with disputes, but instead with future "agreements" to be negotiated by the parties.

132. Second, Russia continues to ignore the context provided by the remaining provisions of the State Border Treaty and Sea of Azov Treaty. Remarkably, Russia argues that the relevant context is *not* to be found in the text of the treaties, but rather in Russia's unsupported assertion 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."[254]

133. Russia's attempt to sidestep the context supplied by the treaties themselves only highlights just how damaging that context is for Russia's position. Among other things, Russia has no answer to the fact that the parties used a specific term to refer to "disputes" ("споры [*spory*]") in Article 4 of the Sea of Azov Treaty (which both parties agree actually concerns the resolution of disputes), but, as noted, employed a different word — "questions" ("вопросы [*voprosy*]" in Russian, "питання [*pytannia*]" in Ukrainian) — in the provisions that Russia relies on for its Article 281 objection.[255] Russia also fails to explain why, under its reading of Article 1 of the Sea of Azov Treaty as a dispute resolution provision, Article 4 of that treaty would be necessary at all. Indeed, Russia argues that Article 1 is simply a broader

[251] *See* Ukraine's Observations, ¶ 153.

[252] Russia's Reply, ¶ 168.

[253] *See* Ukraine's Observations, ¶¶ 153-154 (quoting V.I. Karaban, Ukrainian-English Law Dictionary (2003), pp. 214, 893 (**UAL-80**)). Russia's statement that the title of the Sea of Azov Treaty uses another word — "договір" — is beside the point. Russia's Reply, ¶ 168. UNCLOS itself uses the word "Convention" in its title, but also uses a different word, treaty, to refer to the concept of treaties more generally. *See* UNCLOS, Arts. 92, 110(1), 116, 146, 305.

[254] Russia's Reply, ¶ 166. This argument is, of course, contradicted by the definition of "context" in Article 31(2) of the Vienna Convention on the Law of Treaties, which refers to the treaty's "text, including its preamble and annexes," as well as instruments concluded or agreed to between the parties in connection with the conclusion of the treaty. *See* Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (**UAL-43**).

[255] *See* 2003 Sea of Azov Treaty, Art. 4 (**UA-19**); Ukraine's Observations, ¶ 152.

and more all-encompassing version of Article 4.[256] Russia's reading, therefore, would deprive Article 4 of effectiveness and contradict accepted principles of treaty interpretation.

134. Read in context as required by the Vienna Convention, it is apparent that the "questions" referred to in Article 5 of the State Border Treaty and Article 1 of the Sea of Azov Treaty are not disputes, but rather outstanding questions on which the parties had yet to reach agreement and which they were thus deferring for subsequent negotiations and agreements.

135. Since Russia's reading of these provisions is inconsistent with this context and with the ordinary meaning of the provisions — and, indeed, defies common sense — Russia's position must be rejected.

B. Even If the Articles in Question Could Be Considered Dispute Resolution Provisions, They Would Not Satisfy the Requirements of Article 281

136. As Ukraine showed in its Observations, Article 281 is only engaged by dispute resolution clauses that (1) refer to disputes concerning the interpretation or application of UNCLOS itself and (2) prescribe procedures to be followed in addition to, or in lieu of, those set out in UNCLOS Part XV.[257] Moreover, (3) to "exclude [. . .] further procedure" within the meaning of the final clause of Article 281(1), dispute resolution clauses must include express exclusionary language.[258] Russia questions the basis for the three requirements set out in Ukraine's Observations. As has already been explained, however, these requirements are firmly grounded in the text of the treaty, and in prior awards and decisions.[259] Russia's responses to these authorities are unconvincing.

137. First, Russia argues that there was no express reference to UNCLOS disputes in the dispute resolution clauses at issue in the *Mox Plant* and *Southern Bluefin Tuna* cases.[260] To the extent Russia's point is that an implicit reference to UNCLOS should suffice, that argument (whether or not correct) can hardly assist it, as the language of the State Border Treaty and the Sea of Azov Treaty does not contain even such an implicit reference.

138. Nor do the *Mox Plant* and *Southern Bluefin Tuna* cases support Russia's argument in any other way. In *Mox Plant*, the tribunal was not interpreting or applying

[256] Russia's Reply, ¶ 169.

[257] Ukraine's Observations, ¶¶ 155-157, 159.

[258] *Id.* ¶¶ 155, 158-159.

[259] *See id.* ¶¶ 151-159.

[260] Russia's Reply, ¶ 171-172 (emphasis in original).

Article 281; rather, it was dealing with the provisions on "general, regional or bilateral agreements" under Article 282. Articles 281 and 282 are worded differently and have entirely different functions.[261] The *Mox Plant* tribunal's interpretation of Article 282 therefore is not relevant here.

139. In *Southern Bluefin Tuna*, the tribunal rested its award primarily on the observation that the dispute before it predominantly concerned not UNCLOS, but a different treaty.[262] The tribunal's interpretation of Article 281 was a secondary aspect of its reasoning, and has been heavily criticized by Professor Alan Boyle, writing in the Max Planck Encyclopedia, as well as by other jurists and scholars.[263] *Southern Bluefin Tuna* is not, in other words, a reliable guide to the ordinary meaning of Article 281.

140. Second, Russia questions the need for dispute resolution clauses to prescribe alternate procedures to those in UNCLOS Part XV.[264] Russia again seeks support in the *Southern Bluefin Tuna* case, but finds none. As described in the block quote from the award that Russia itself relies on at paragraph 174 of its Reply, the dispute resolution clause at issue in *Southern Bluefin Tuna* specified a whole "list of various named procedures of peaceful settlement."[265] No parallel can be drawn with the asserted dispute resolution clauses here and their bare references to future agreement of the parties. Moreover, the requirement for dispute resolution clauses to specify alternate procedures is set out in multiple additional authorities beyond *Southern Bluefin Tuna*.[266]

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[261] Article 281 allows the parties to bilaterally exclude mandatory dispute resolution. Article 282 simply permits referral of disputes to binding dispute resolution before regional tribunals or other tribunals beyond those specifically listed in Part XV. *See Southern Bluefin Tuna Case*, Award on Jurisdiction and Admissibility of 4 August 2000, sep. op. of Justice Sir Kenneth Keith, p. 54, ¶¶ 18-20 (contrasting Articles 281 and 282 and noting that Article 282 only applies in connection with procedures that "entail[] a binding decision") **(UAL-68)**.

[262] *Southern Bluefin Tuna Case*, Award on Jurisdiction and Admissibility of 4 August 2000, ¶¶ 48-54 **(UAL-68)**.

[263] Alan Boyle, *Southern Bluefin Tuna Cases*, Max Planck Encyclopedia of Public International Law (July 2008) ("Art. 281 [of UNCLOS] was never intended to have the meaning attributed to it in this case.") **(UAL-116)**; *see also* Igor V. Karaman, Dispute Resolution in the Law of the Sea (2012), p. 260 (noting that, with respect to the *Southern Bluefin Tuna* tribunal's interpretation of Article 281, "the latter tribunal's reasoning is hardly convincing") **(UAL-117)**.

[264] *See* Russia's Reply, ¶¶ 175-176; Ukraine's Observations, ¶¶ 155-159 and accompanying citations.

[265] Russia's Reply, ¶ 174 (citing to *Southern Bluefin Tuna Case*, Award on Jurisdiction and Admissibility of 4 August 2000, p. 42, ¶ 55 **(UAL-68)**).

[266] *See Arbitration between Barbados and the Republic of Trinidad and Tobago Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf Between Them*, UNCLOS/PCA Case No. 2004-02, Decision of 11 April 2006, ¶ 200 (describing Article 281 as "intended primarily to cover the situation where the Parties have come to an *ad hoc* agreement *as to*

141. Lastly, Russia argues that, even if a requirement to specify alternate procedures did exist, the words "by agreement" should — standing alone — be read to constitute an alternative dispute resolution procedure.[267] This argument is made without support, and is facially incorrect. Russia's further argument that the words "by agreement" should be understood to exclude further procedure under UNCLOS Part XV also makes no sense.[268] For this latter proposition, Russia — yet again — relies on *Southern Bluefin Tuna*, but yet again that case does not avail it. In concluding that the treaty before it excluded recourse to UNCLOS Part XV, the *Southern Bluefin Tuna* tribunal relied on the fact that the treaty: (i) permitted mandatory dispute resolution only by agreement of the parties and (ii) stated that if the parties did not agree to mandatory dispute resolution, they should "continu[e] to seek to resolve [their] dispute" through specified means set out in the treaty (which did not include UNCLOS Part XV).[269] Even if that tribunal's reasoning were to be adopted,[270] there is here no comparable language to exclude the use of UNCLOS Part XV.

142. For these reasons, Article 5 of the State Border Treaty and Article 1 of the Sea of Azov Treaty — even if somehow considered to be dispute resolution clauses — do not

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the means to be adopted to settle the particular dispute which has arisen") (emphasis added) **(UAL-118)**; Virginia Commentary, ¶¶ 281.4-281.5 (Article 281 contemplates that the parties will "agree[] to resort to a *particular procedure*" that is different from UNCLOS dispute settlement) (emphasis added) **(UAL-35)**; *see also Timor-Leste*, Decision on Australia's Objections to Competence of 19 September 2016, ¶ 64 ("Nor does the Commission consider that an agreement not to pursue any means of dispute settlement can reasonably be considered a dispute settlement means of the Parties' own choice. Accordingly, the Commission concludes that CMATS is not an agreement pursuant to Article 281 that would preclude recourse to compulsory conciliation pursuant to Article 298 and Annex V.") **(UAL-119)**.

[267] Russia's Reply, ¶ 175.

[268] *Id.* ¶ 179.

[269] *See* Ukraine's Observations, ¶ 158 and especially nn. 261-262; *Southern Bluefin Tuna Case*, Award on Jurisdiction and Admissibility of 4 August 2000, p. 43, ¶ 57 (finding that the named procedures in a treaty amount to an "express obligation") **(UAL-68)**.

[270] The *Southern Bluefin Tuna* tribunal's ruling on exclusion of further procedure drew a strong dissent from Justice Sir Kenneth Keith, who explained, among other things, that the ordinary meaning of Article 281 requires "strong and particular wording" and "clear wording to exclude obligations to submit to the UNCLOS binding procedure." *See Southern Bluefin Tuna Case*, Award on Jurisdiction and Admissibility of 4 August 2000, sep. op. of Justice Sir Kenneth Keith, pp. 51-54, ¶¶ 8-23 **(UAL-68)**; *see also South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 223 ("The Tribunal thus shares the views of . . . the separate opinion of Judge Keith in *Southern Bluefin Tuna* that the majority's statement in that matter that 'the absence of an express exclusion of any procedure . . . is not decisive' is not in line with the intended meaning of Article 281.") **(UAL-3)**.

satisfy *any*, much less *all*, of the established requirements to trigger an Article 281 jurisdictional objection.

C. If the State Border Treaty and Sea of Azov Treaty Could Somehow Be Read to Impose an Obligation to Negotiate, Ukraine Has Satisfied It

143. In its Preliminary Objections, Russia launched an assortment of misleading criticisms of Ukraine's approach to pre-dispute consultations in this case.[271] Ukraine's Observations objected to these mischaracterizations — and, more importantly for the Tribunal's purposes, showed them to be legally irrelevant.[272] In particular, as Ukraine explained in its Observations, because the treaty provisions that Russia has identified do not deal with the resolution of disputes, they cannot be read to imply any requirement that the parties consult with one another or negotiate before pursuing a formal dispute resolution process.[273]

144. Russia has done nothing in its Reply to rehabilitate the relevance of its various attempts to impugn Ukraine's good faith approach to bilateral consultations. As made clear in its Memorial,[274] and in its Observations,[275] Ukraine repeatedly sought to exchange views on and settle the current dispute, only to have Russia ignore the actual substance of that dispute. The record speaks for itself. Given this, the renewed misstatements in Russia's Reply do not merit any new response.

145. In light of the foregoing, Russia's Article 281 objection must fail. The clauses Russia cites as the basis of its objection are not dispute resolution provisions; even if they were, they would not be capable of engaging Article 281; and even if they did engage Article 281 and impose an obligation to negotiate on the parties, Ukraine has satisfied that obligation.

II. This Dispute Is Not Suitable for an Annex VIII Tribunal

146. Russia's final attempt to avoid the holistic resolution of this dispute is to seek to have it dissected into multiple parts, some to be heard by this Tribunal and others by up to three Annex VIII tribunals. Russia's attempt to subdivide this dispute is inconsistent with the Convention, and with both parties' declarations under Article 287.

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[271] Russia's Objections, ¶¶ 232-252.

[272] Ukraine's Observations, ¶¶ 161-163.

[273] *See id.* ¶¶ 161-163.

[274] *See* Ukraine's Memorial, ¶¶ 18-21.

[275] *See* Ukraine's Observations, ¶¶ 161-163.

A. The Convention Does Not Permit this Dispute to Be Subdivided for Resolution in Multiple Forums

147. In its Reply, Russia accepts that this dispute, as formulated and submitted by Ukraine, cannot be heard *as a whole* by an Annex VIII tribunal.[276] In particular, it concedes that "Annex VIII Tribunals may hear only limited categories of disputes" and not complex and multi-faceted disputes like this one.[277]

148. However, Russia continues to insist that the dispute submitted by Ukraine should be divided into multiple arbitrations, spanning both an Annex VII tribunal and one or more Annex VIII tribunals.[278] Specifically, Russia persists in its attempt to sever pieces of Ukraine's submissions (f), (g), (m), (n), (o), and (p) from the remainder of Ukraine's case, assertedly for those submissions to be resolved pursuant to Annex VIII.[279] Notably, this is an attempt that Russia commenced only in its Preliminary Objections, and only after appointing an Annex VII arbitrator and agreeing to a process to constitute the remainder of the Tribunal.

149. Russia's belated position that the parties should also have constituted one or more Annex VIII tribunals is at odds with the language, context, and object and purpose of the Convention, and with any sensible approach to the administration of justice. The Convention does not contemplate that a dispute that is only partially related to issues within the scope of Annex VIII should be artificially subdivided and placed into separate and distinct proceedings. To the contrary, the Convention provides that such a dispute must be heard by a single, competent tribunal — here, this Annex VII Tribunal.

150. In particular, Article 286 of the Convention provides that "any dispute concerning the interpretation or application of this Convention shall . . . be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction." And Article 287 states that "[i]f the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure." Article 287 continues by specifying that "[i]f the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex

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[276] *See* Russia's Reply, ¶¶ 150-151.

[277] *Id.* ¶ 151 (quoting Ukraine's Observations, Chapter Five, Section II.A).

[278] *See* Russia's Reply, ¶ 150 (quoting Ukraine's Observations, ¶ 164) ("This Tribunal cannot rule on Ukraine's claims *related to fisheries, protection and preservation of the marine environment or navigation.*") (emphasis added); *id.* ¶ 153 (contending that the Convention requires tribunals to "'dissect' and 'separate' issues, even though they can be closely interlinked").

[279] *See* Russia's Objections, ¶ 213; Russia's Reply, ¶¶ 150-151, 155.

VII."[280] Articles 286 and 287 thus contemplate that a single "dispute" will be submitted, as a whole, to "the court or tribunal" that has jurisdiction over it. They make no provision for a dispute to be subdivided after it is submitted.

151. As explained in Ukraine's Observations,[281] subdividing a single dispute into multiple parts would also be inconsistent with the object and purpose of UNCLOS: to create "a legal order for the seas and oceans," including by establishing procedures for the efficient and orderly resolution of disputes.[282] The fragmentation of a single dispute risks giving rise to inconsistent decisions and expensive duplication of effort.[283]

152. Here, as Ukraine's Observations demonstrated, Ukraine has brought before the Tribunal a single, integrated dispute.[284] Ukraine alleges that Russia has engaged in a course of conduct — a campaign of exclusion, exploitation, and usurpation in the Black Sea, Sea of Azov, and Kerch Strait — that has resulted in extensive violations of Ukraine's UNCLOS rights.[285] The specific submissions Russia seeks to extract from this dispute and place in up to three Annex VIII arbitrations are factually and legally interlinked with Ukraine's remaining submissions.[286]

153. Russia's argument to the contrary is fatally undermined by: (i) its acceptance that, in connection with Ukraine's submissions (f) and (g), the Tribunal's ruling on Ukraine's

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[280] Here, the relevant "dispute" is the entire, integrated dispute brought by Ukraine before this Tribunal. International tribunals have consistently held that "particular attention" must be given to the claimant's formulation of what constitutes the relevant dispute. *See, e.g.*, *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, ICJ Preliminary Objections Judgment of 6 June 2018, ¶ 48 **(UAL-101)**; *Chagos Marine Protected Area Arbitration*, Award of 18 March 2015, ¶ 208 **(UAL-18)**.

[281] *See* Ukraine's Observations, ¶ 179.

[282] UNCLOS, Preamble; *see also* Virginia Commentary" ¶ XV.6 (quoting Third United Nations Conference on the Law of the Sea, Memorandum by the President of the Conference on Document A/CONF.62/WP.9, U.N. Doc. A/CONF.62/WP.9/Add.1 (31 March 1976), ¶ 6) ("Effective dispute settlement would also be the guarantee that the substance and intention within the legislative language of the convention will be interpreted both consistently and equitably.") **(UAL-35)**; *id.* ¶ 297.6 (quoting Third United Nations Conference on the Law of the Sea, 58th Meeting, U.N. Doc. A/CONF.62/SR.58 (5 April 1976), ¶ 12) (discussing the goal that "no significant problem of interpretation could long remain without a final and authoritative ruling").

[283] Contrary to Russia's suggestion at paragraph 153 of its Reply, fragmentation is not required to give effect to Annex VIII. States have frequently engaged in narrow disputes concerning navigation, the environment and, in particular, fisheries.

[284] *See* Ukraine's Observations, ¶ 176.

[285] *See* Ukraine's Memorial, ¶¶ 8-13.

[286] *See* Ukraine's Observations, ¶ 177.

coastal State rights under Articles 2 and 56 will affect not just issues of fisheries, the environment, research, and navigation, but also other aspects of the dispute submitted by Ukraine;[287] and (ii) its failure to engage with Ukraine's showing that Ukraine's submissions (m), (n), (o), and (p) call for determinations that flow directly out of the Tribunal's assessment of Russia's overall course of conduct.[288]

154. Russia's position is also without any support in law. Even if credited, the widely criticized[289] decision of the *Southern Bluefin Tuna* tribunal, which Russia quotes for the proposition that "UNCLOS falls significantly short of establishing a truly comprehensive regime,"[290] can hardly be taken as support for the idea of disaggregating disputes that *do* fall within the scope of the Convention.

155. Russia's use of the *travaux préparatoires* is equally unconvincing. Russia selectively quotes the Virginia Commentary's discussion of Article 287's drafting history for the proposition that "questions were raised about likely difficulties with respect to fitting a particular dispute within a particular category [of Annex VIII]."[291] Yet Russia has omitted the broader context of that quote, which reads in full:

> As a result of the discussion at the fourth session of the Conference (1976), a fourth choice was added entailing a system of special procedures for four categories of disputes: those relating to fisheries, [marine] pollution, scientific research and navigation. *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). As no solution could be agreed upon, *the choice seemed to belong to the applicant party*, subject to the power of the chosen court or tribunal to determine whether the dispute, in whole or in part, was within its jurisdiction.[292]

156. Taken as a whole, the passage underscores that broad disputes extending beyond the confines of an Annex VIII tribunal are not suitable for Annex VIII procedures. It

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[287] Russia's Reply, ¶ 162 (quoting Ukraine's prior argument to this effect). Russia of course argues that these issues are all beyond the scope of UNCLOS, an argument that Ukraine addresses in Chapter Two.

[288] *See id.* ¶¶ 161-162; Russia's Objections, ¶ 213.

[289] *See supra* ¶ 139 & n. 263.

[290] Russia's Reply, ¶ 153 (citing *Southern Bluefin Tuna,* Award on Jurisdiction and Admissibility of 4 August 2000, ¶ 62 (quotations omitted) (**RUL-24**)).

[291] Russia's Reply, ¶ 153 (citing Virginia Commentary, ¶ 287.3 (quotations omitted) (**RUL-14**)).

[292] Virginia Commentary, ¶ 287.3 (emphasis added and internal citations omitted) (**RUL-14**).

also demonstrates that the claimant's choices in framing the dispute are entitled to deference. In other words, when quoted in context rather than selectively, the *travaux préparatoires* support the Tribunal's exercise of jurisdiction in this case.

157. Law of the sea scholars agree that UNCLOS does not provide for the fragmentation of disputes between multiple tribunals. Writing in the *Proelss Commentary*, Richard Caddell, who has undertaken an extensive analysis of Annex VIII and its *travaux préparatoires*, explains that it is doubtful whether the special arbitration process could be validly invoked in connection with disputes that are not "strictly confined to the issues specified in Annex VIII."[293] Dr. Caddell thus observes that, "it may be considered that Annex VIII jurisdiction is intended to be viewed narrowly," noting that "[t]here are strong policy grounds upon which to advance a naturally conservative approach" to Annex VIII jurisdiction.[294]

158. In short, Russia finds no support for its objection in the language, context, object and purpose, or *travaux préparatoires* of the Convention. On the contrary, these means of interpretation squarely support Ukraine's reading: that this dispute cannot be subdivided into separate Annex VII and Annex VIII arbitrations.

B. Both Parties Have Consented to Annex VII Jurisdiction Over Disputes of this Nature — and Ukraine Has *Not* Consented to Annex VIII Jurisdiction in this Type of Dispute

159. This dispute cannot be fragmented and partially sent to an Annex VIII tribunal for another reason: both Ukraine and Russia have agreed to Annex VII jurisdiction, and Ukraine's limited consent for Annex VIII jurisdiction does not encompass this dispute.

160. In its Reply, Russia alludes to what it describes as its "qualified consent to [Annex VII] jurisdiction."[295] Russia's preliminary objection, however, raises no genuine issue of consent to Annex VII arbitration. To the contrary, the Parties' declarations affirmatively select the Annex VII process for disputes such as this one.

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[293] Richard Caddell, *Annex VIII Special Arbitration* in Alexander Proelss, et al., United Nations Convention on the Law of the Sea: A Commentary (2017), p. 2496 **(UAL-82)**.

[294] *Id.* These policy considerations include the fact that the Annex VIII process is uniquely suited to specialized technical disputes, and presents no practical advantage in the resolution of more complex disputes such as this one.

[295] Russia's Reply, ¶ 151.

161. As Ukraine has explained,[296] arbitration pursuant to Annex VII is the default method of dispute settlement under UNCLOS Part XV.[297] It is also the method chosen by both Ukraine and Russia for the resolution of all but a limited set of UNCLOS disputes. The first sentence of Ukraine's declaration reads: "Ukraine declares that, in accordance with article 287 of the United Nations Convention on the Law of the Sea of 1982, it chooses as the *principal means* for the settlement of disputes concerning the interpretation or application of this Convention an arbitral tribunal constituted in accordance with Annex VII."[298] And the first sentence of Russia's declaration reads: "The Union of Soviet Socialist Republics declares that, under article 287 of the United Nations Convention on the Law of the Sea, it chooses an arbitral tribunal constituted in accordance with Annex VII as the *basic means* for the settlement of disputes concerning the interpretation or application of the Convention."[299]

162. Ukraine and Russia's mutual consent to Annex VII arbitration is preempted only to the extent *both* States have agreed, through overlapping declarations, to some other procedure.[300] Ukraine's Observations showed — through textual analysis of Ukraine's declaration and its selection of Annex VII arbitration as the principal means for the settlement of disputes — that Ukraine has never consented to the arbitration of complex and multi-faceted disputes, like this one, through Annex VIII proceedings.[301]

163. Unable to respond to this analysis, Russia instead offers unsupported speculation as to what Ukraine "presumably" intended when it narrowed the language of its declaration between signature of the Convention and ratification.[302] Notwithstanding these speculative arguments, however, it remains the case that the plain language of Ukraine's

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[296] *See, e.g.*, Ukraine's Observations, ¶ 170.

[297] *See* Ciarán Burke, *Annex VII Arbitration* in Alexander Proelss, et al., United Nations Convention on the Law of the Sea: A Commentary (2017), p. 2466 ("Annex VII arbitration is the default procedure, should a State not exercise its right to declare a preferred mode of dispute settlement under Art. 287(1), or should there be disagreement as to the mode of settlement.") **(UAL-82)**.

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

[299] Declaration of the Ukrainian Soviet Socialist Republic Upon Signature of UNCLOS (10 December 1982) (emphasis added) **(UA-8)**.

[300] UNCLOS, Art. 287(3)-(5).

[301] *See* Ukraine's Observations, ¶¶ 170-173.

[302] *See* Russia's Reply, ¶ 156.

declaration extends only to disputes that concern exclusively questions relating to fisheries, the environment, marine scientific research, and navigation.[303]

164. Russia also seeks support in its own subjective intentions, and "reticence with respect to general compulsory arbitration," at the Third U.N. Conference on the Law of the Sea.[304] What is relevant, however, is Russia's decision to accede to UNCLOS, including the procedures in Part XV, and to expressly select Annex VII as the "basic" means for the settlement of UNCLOS disputes. Moreover, Russia's own practice — consistent with that of many other States — reflects that Russia has consistently viewed Annex VIII as a mechanism for the resolution of disputes primarily concerning technical and scientific issues (*i.e.*, disputes quite unlike this one).[305]

165. As such, far from requiring a fragmentation of the dispute into multiple arbitrations, the parties' declarations — and the text, object, and purpose of the Convention — mandate that this dispute be heard before an Annex VII tribunal.

[303] *See* Ukraine's Observations, ¶ 173 ("A complex dispute that raises overarching questions, and which is not narrowly focused on fisheries, the environment, marine scientific research, and navigation, cannot fairly be characterized as being a dispute 'in respect of questions relating to' those subjects.").

[304] *See* Russia's Reply, ¶¶ 158-159.

[305] In particular, the lists of Annex VIII experts submitted by Russia and by other States parties to UNCLOS principally consist of scientific and technical experts. Russia's current nominees are: (i) two officials from its fisheries services, in connection with fisheries disputes; (ii) one official from the ministry responsible for environmental protection, in connection with environmental disputes; and (iii) two officials from its Ministry of Transport, in connection with navigational disputes. *See* List of Experts for the Purposes of Article 2 of Annex VIII (Special Arbitration) of the United Nations Convention of the Law of the Sea in the Field of Fisheries (communicated on 12 January 2017) **(UA-565)**; List of Experts in the Field of Protection and Preservation of the Marine Environment Maintained by the United Nations Environment Programme (communicated on 8 November 2002) **(UA-566)**; List of Experts Nominated in the Field of Navigation, Including Pollution from Vessels and By Dumping (as at 11 March 2016) **(UA-567)**.

Chapter Six: Submissions

166. For the foregoing reasons, Ukraine reiterates and renews the submissions and requests for relief contained in Chapter Seven of its Memorial and Chapter Six of its Written Observations on Jurisdiction.

Kyiv, Ukraine, 28 March 2018

Ms. Olena Zerkal
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