PCA Case No. 2019-28

IN THE MATTER OF A DISPUTE CONCERNING THE DETENTION OF UKRAINIAN NAVAL VESSELS AND SERVICEMEN

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

OBSERVATIONS OF UKRAINE ON THE QUESTION OF BIFURCATION

ARBITRAL TRIBUNAL:

Professor Donald McRae (President)
Judge Gudmundur Eiriksson
Judge Rüdiger Wolfrum
Judge Vladimir Golitsyn
Sir Christopher Greenwood

REGISTRY:

The Permanent Court of Arbitration

7 September 2020

INDEX

TABLE OF CONTENTS

I. Introduction

1. On 24 August 2020, the Russian Federation submitted Preliminary Objections in the Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen. Pursuant to Procedural Order No. 1, Ukraine respectfully submits its view that Russia's objections should not be addressed in a preliminary phase.

2. The dispute before the Tribunal is simple and straightforward. It concerns a single incident – Russia's arrest and initial detention of three Ukrainian naval vessels and their crew for allegedly violating Russian law – and the prolonged detention and ongoing criminal prosecutions following from that arrest. Ukraine's legal claims concerning this incident are discrete: Ukraine alleges that Russia has violated the provisions of UNCLOS governing immunity for warships and non-commercial government vessels, as well as its obligations to comply with provisional measures orders and not to aggravate disputes.

3. The Russian Federation's principal objection, invoking the military activities exception under Article 298(1)(b), contradicts the reasoning of the provisional measures order in this case issued by the International Tribunal for the Law of the Sea ("ITLOS").[1] Nor is it appropriate to address Russia's objections at a preliminary phase, because, as explained below, they are not exclusively preliminary in character. Ukraine strongly rejects Russia's characterization of its arrest of the Ukrainian vessels as a military, rather than law enforcement, activity. Contrary to Russia's insistence that the facts are undisputed, Russia's objection relies on factual claims that are very much in dispute. The two parties also clearly have a dispute over the characterization of the facts regarding the arrest of Ukraine's naval vessels. The Tribunal's findings related to these disputed factual questions, and the way in which the arrests should be characterized, must be assessed during a merits phase based on a complete record and after a full hearing. In the *South China Sea* case, the tribunal

[1] For the avoidance of doubt, Ukraine does not agree with Russia's interpretation of the military activities exception, but in this submission Ukraine focuses only on matters relevant to the question of bifurcation.

determined that whether "activities are military in nature" for purposes of Article 298(1)(b) is a "matter best assessed in conjunction with the merits."[2] This Tribunal should reach the same decision.

4. Russia's other objections also do not warrant bifurcated proceedings. Russia argues that Article 32 of the Convention does not provide for an applicable immunity within the territorial sea, but ITLOS has previously treated such an argument as a merits question concerning interpretation of the Convention, not an objection to jurisdiction. Moreover, while Russia alleges that two of the three vessels were arrested within the territorial sea, Ukraine has put forward evidence showing that all three vessels were arrested beyond the territorial sea, in waters where there is no question that Articles 95 and 96 of the Convention provide for immunity. Russia's Article 32 objection therefore depends on a contested view of the facts, and Russia has not at this stage even offered evidentiary support for its factual assertions. Russia's other objections are likewise insubstantial and not exclusively preliminary.

5. Since Russia's jurisdictional objections are closely intertwined with the merits of Ukraine's claims, raise significant factual disputes between the parties, and would risk prejudging elements of the dispute on the merits, they are not of an exclusively preliminary character and should not be addressed in a preliminary phase. Russia's Preliminary Objections should instead be joined to the merits.

II. Russia's Preliminary Objections Are Not Exclusively Preliminary in Character

6. Pursuant to the Rules of Procedure adopted by the Tribunal, Russia's Preliminary Objections should be joined to the merits if they do not "possess an exclusively preliminary character."[3] In applying this standard, the *South China Sea* tribunal considered

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[2] *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility of 29 October 2015 ("*South China Sea*, Award on Jurisdiction"), ¶ 411 **(UAL-5)**.

[3] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, Rules of Procedure (22 Nov. 2019), Art. 11(3).

"whether [it] has had the opportunity to examine all the necessary facts to dispose of the preliminary objection," and "whether the preliminary objection would entail prejudging the dispute or some elements of the dispute on the merits."[4] As further explained by the tribunal in *Coastal State Rights*, a tribunal must be cautious of the "risk of . . . considering, and forming a potentially incomplete view of, evidence that is common to jurisdictional and merits questions."[5]

7. Russia is seeking dismissal of Ukraine's claims prior to a hearing on the merits, in which the Tribunal would have an opportunity to assess a complete evidentiary record and hear directly from witnesses. In that circumstance, the Tribunal should take particular care to assure itself that any separate jurisdictional phase of the proceedings would accord "to each party a full opportunity to be heard and to present its case,"[6] without leaving salient facts to be decided on a partial record. That would not be possible if the proceedings were bifurcated here. Russia has raised objections that are heavily fact-dependent and concern the characterization of the events that are central to Ukraine's claims on the merits. Resolving these objections would require the Tribunal to engage prematurely with the same facts and evidence that it will need to assess on the merits, and will require the Tribunal to resolve disputed issues between the parties concerning those facts.

8. Russia appears to accept that it would not be proper to consider its objections in a preliminary phase if doing so required the Tribunal to resolve disputed questions of fact. In arguing that its objections "are exclusively preliminary," Russia insists that "to the extent

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[4] *South China Sea*, Award on Jurisdiction, ¶ 382 **(UAL-5)**; *see also Guyana v. Suriname*, PCA Case No. 2004-04, Order No. 2 dated 18 July 2005 ("*Guyana v. Suriname*, Order No. 2"), ¶ 2 (declining to bifurcate Suriname's objections where "the facts and arguments in support of [the objections were] in significant measure the same as the facts and arguments on which the merits of the case depend") **(UAL-35)**; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait (Ukraine v. The Russian Federation)*, PCA Case No. 2017-06, Award on Preliminary Objections of the Russian Federation of 21 February 2020 ("*Coastal State Rights,* Award on Preliminary Objections"), ¶ 289 **(UAL-25)**.

[5] *Coastal State Rights,* Award on Preliminary Objections, ¶ 289 **(UAL-25)**.

[6] UNCLOS, Annex VII, Art. 5.

the Tribunal must engage in facts they are undisputed."[7] Indeed, throughout its Objections, Russia repeatedly asserts that the facts are "undisputed" or "common ground."[8] Russia protests too much. Its objections rely on factual positions that Ukraine strongly disputes (some of which are elaborated below), which only confirms the risk that "the preliminary objection[s] would entail prejudging the dispute or some elements of the dispute on the merits."[9]

A. Russia's Objection Concerning the Military Activities Exception

9. Russia's principal jurisdictional objection is that the dispute before the Tribunal concerns military activities under the optional exclusion of Article 298(1)(b). The dispute concerns the arrest of three Ukrainian naval vessels and the servicemen on board, the continued detention of both the vessels and the servicemen, and the prosecution of the servicemen for their acts on board the ships. In Ukraine's view, these activities violated the Convention. Russia's objection is premised on a claim that *the same activities* should be classified as military in nature.

10. While this is an objection to the Tribunal's jurisdiction, it is not a *preliminary* objection. As the International Court of Justice has recognized, application of an exception to a State's consent to jurisdiction should not be decided at a preliminary stage when it raises "question[s] concerning matters of substance relating to the merits of the case."[10] That is the situation here. The merits of this case concern Ukraine's claims that its vessels and their

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[7] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, Preliminary Objections of the Russian Federation of 24 August 2020 ("Russia's Preliminary Objections"), ¶ 16.

[8] *See id.*, ¶¶ 3, 16, 26–27, 39, 40–44.

[9] *South China Sea*, Award on Jurisdiction, ¶ 382 **(UAL-5)**; *see also Coastal State Rights,* Award on Preliminary Objections, ¶ 289 (discussing the "risk of the arbitral tribunal considering, and forming a potentially incomplete view of, evidence that is common to jurisdictional and merits questions") **(UAL-25)**.

[10] *See Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, ICJ Judgment of 26 November 1984, p. 425, ¶ 76 (addressing the United States' exclusion from its consent to jurisdiction for disputes concerning multilateral treaties without consent of all affected parties to the treaty) **(UAL-36)**.

crews were arrested and detained, and the service members prosecuted, as a matter of law enforcement, in contravention of UNCLOS provisions providing for immunity. Based on the facts as presented by Ukraine,[11] the subject matter of this dispute does not concern military activities. In its order on provisional measures, ITLOS agreed that this dispute concerns law enforcement and not military activities.[12] Russia is entitled to be heard *on the merits* on its alternative view of the facts and characterization of the dispute, but the questions it raises concerning the nature and characterization of the subject matter of the dispute are not preliminary.

11. In any event, even if Russia's objection could be said to be preliminary in nature, it is not *exclusively* preliminary. The facts the Tribunal will have to examine in its merits and jurisdictional inquiries are the same. If the proceedings were bifurcated, the Tribunal would have to consider — twice — the same facts of Russia's arrest and initial detention of the Ukrainian naval vessels and servicemen: first, at the jurisdictional stage, to determine whether these activities were military in nature, and second, at the merits stage, to determine whether they violated provisions of UNCLOS.[13] Similarly, the Tribunal would have to consider — twice — the same facts surrounding Russia's criminal prosecution of Ukraine's servicemen and detention of the naval vessels as evidence in a criminal case: first, at the jurisdictional stage, because Russia's application of its civilian criminal regime to the

[11] *Cf. Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, ICJ Judgment of 12 December 1996, Separate Opinion of Judge Higgins, p. 856, ¶ 32 (explaining that the Court "accept[s] *pro tem* the facts as alleged by [the Applicant]" for purposes of addressing an exception to the Court's jurisdiction *ratione materiae*) **(UAL-37)**.

[12] *See Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, ITLOS Case No. 26, Provisional Measures, Order of 25 May 2019 ("ITLOS Provisional Measures Order"), ¶ 72 (Russia's arrest of the three Ukrainian vessels "not military in nature") **(UAL-2)**; *id.* ¶¶ 73–74 (concluding that the "sequence of events" in which "the vessels were stopped and arrested" appeared to be "in the context of a law enforcement operation") **(UAL-2)**.

[13] *See, e.g.*, *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, Memorial of Ukraine of 22 May 2020 ("Memorial of Ukraine"), ¶¶ 33–37, 77–78, 126–129, 131–132.

events in question is inconsistent with its invocation of the military activities exception,[14] and second, at the merits stage, because those acts contribute to Russia's UNCLOS violations and are relevant to Ukraine's demand for reparation.[15] There is thus no doubt that bifurcation would risk "prejudging the dispute or some elements of the dispute on the merits."[16] As was the case in *Guyana v. Suriname*, in which bifurcation was rejected, the "facts" relevant to the preliminary objections "are in significant measure the same as the facts" that comprise the merits.[17] Accordingly, Russia's objection is not exclusively preliminary in character, and the Tribunal will be better placed to decide it upon a full evidentiary record following a hearing on the merits.

12. The example of the *South China Sea* arbitration is illustrative. Russia quotes extensively from that tribunal's ultimate conclusion, "[o]n the basis of the record" before it, that an episode at the Second Thomas Shoal was a "military situation[] involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another."[18] Russia alleges that a similar situation was present here.[19] Ukraine strongly disputes this contention, but the critical point at present is that the *South China Sea* tribunal reached its conclusion in the Award *on the merits*. The tribunal had previously chosen to bifurcate the proceedings, but in its Award on Jurisdiction determined that the military activities objection did "not possess an exclusively preliminary character": "The Tribunal considers the specifics of China's activities in and around Second Thomas

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[14] *See, e.g.*, ITLOS Provisional Measures Order, ¶ 76 ("The subsequent proceedings and charges against the servicemen further support the law enforcement nature of the activities of the Russian Federation.") **(UAL-2)**.

[15] *See, e.g.*, Memorial of Ukraine, ¶¶ 59, 79–84, 91, 134–135, 137–138, 142.

[16] *South China Sea*, Award on Jurisdiction, ¶ 382 **(UAL-5)**.

[17] *Guyana v. Suriname*, Order No. 2, ¶ 2 **(UAL-35)**.

[18] Russia's Preliminary Objections, ¶ 53 (quoting *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award of 12 July 2016 ("*South China Sea*, Award on the Merits"), ¶ 1161 **(UAL-7)**).

[19] *See* Russia's Preliminary Objections, ¶¶ 53–54.

Shoal and whether such activities are military in nature to be a matter best assessed in conjunction with the merits."[20] The same is true in this case.

13. In fact, here it is arguably even clearer that the military activities objection is not exclusively preliminary in character because relevant facts common to both jurisdiction and the merits are disputed between the parties. Russia understands that bifurcation would be inappropriate if resolution of factual disputes were necessary, so it insists that the "critical facts" relevant to its military activities objection "are common ground."[21] A few, non-exhaustive examples suffice to show that Russia's premise is mistaken, and that the "critical facts" are indeed in dispute:

- Russia asserts that "it is undisputed that when the Ukrainian Military Vessels ignored the Russian order to stop the Ukrainian military and the Russian military were arrayed in opposition to each other."[22] Russia does not cite Ukraine's Memorial, any of Ukraine's evidence, or even its own evidence as support for this "undisputed" fact, but instead the separate opinion of one ITLOS judge.[23] In any event, this view of the facts is not undisputed. According to witness testimony submitted by Ukraine, the Russian vessels communicated an order to stop after the Ukrainian vessels had left the area of the Kerch Strait, when they were "transit[ing] back to Odesa," and were being "followed" by the Russian vessels which claimed they were enforcing Russian law.[24] Thus, while Russia may claim that its vessels issued an order to stop while "arrayed in opposition" to the Ukrainian vessels, Ukraine disputes that claim, and contends that the vessels were not so arrayed, and the Russian vessels were instead following the Ukrainian vessels in a law enforcement pursuit.[25]

- Russia contends that there was a "prolonged stand-off between the Ukrainian military force and the Russian combination of military and paramilitary

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[20] *South China Sea,* Award on Jurisdiction, ¶ 411 **(UAL-5)**; *see also id.*, ¶ 409 (finding that "the specifics of China's activities on Mischief Reef and whether such activities are military in nature to be a matter best assessed in conjunction with the merits") **(UAL-5)**.

[21] Russia's Preliminary Objections, ¶ 26.

[22] *Id.* ¶ 43.

[23] *Id.* ¶ 43 & n.69 (citing ITLOS Provisional Measures Order, Separate Opinion of Judge Gao, ¶ 24 (**RUL-32**)).

[24] Witness Statement of Captain of the Second Rank Denys Volodymyrovych Hrytsenko (6 May 2020) ("Hrytsenko Statement"), ¶ 19; *see, e.g.*, Witness Statement of Captain Lieutenant Bohdan Pavlovych Nebylytsia (13 May 2020) ("Nebylytsia Statement"), ¶ 14 ("As we returned to Odesa, we were being followed by Russian FSB coast guard and military vessels. After some time, the Russian FSB coast guard ordered us to stop and said we had violated Russian law.").

[25] Memorial of Ukraine, ¶ 34.

forces."[26] Ukraine disputes this claim as well. Russia appears to be referring to the period of several hours during which Ukrainian vessels were waiting in an anchorage area as directed by the Kerch Traffic Control authorities.[27] As an initial matter, Ukraine disputes the relevance of events during this time period, since Ukraine's claims concern instead the later arrest of the vessels as they were attempting to return to their home port. In any event, Ukraine also disputes that this earlier episode was a "stand-off": according to Ukraine's evidence, the Ukrainian vessels communicated with and followed the instructions of Kerch Traffic Control as they waited to transit the Strait; received clearance from Kerch Traffic Control to wait at the anchorage point; were "periodically" requested by Russian coast guard vessels to "leave the Kerch Strait and go beyond the 12-mile zone"; and, upon confirmation that the Kerch Strait was closed to navigation, departed the area as they had been requested to do.[28]

- Russia draws the Tribunal's attention to a "[c]hecklist" on board one of the Ukrainian vessels, which referred to "covert[]" actions and "secrecy," and draws the inference that the mission of the Ukrainian vessels therefore raised "national security interests."[29] According to Ukraine, however, Russia misunderstands this document. Ukraine's evidence shows that the language highlighted by Russia is "standard language in orders issued by the Ukrainian Navy for warships when at sea," and that the Ukrainian vessels did not intend to transit surreptitiously, but instead openly "communicated [their] intentions to transit the Strait to the Russians."[30] Russia's presentation of the facts also conflicts with the conclusions of ITLOS, which examined the same document and concluded that "a non-permitted secret incursion by the Ukrainian naval vessels, as alleged by the Russian Federation, would have been unlikely under the circumstances of the present case."[31] Ukraine and Russia are thus in dispute about the character and meaning of this document.

14. In addition to these (and other) clear factual disputes, the Russian Federation largely disregards evidence that Ukraine regards as "critical facts." As just one example, Ukraine has shown that when the Russian vessels pursued the Ukrainian vessels and demanded that they stop, the reason they gave was that the Ukrainian vessels "had violated Russian law."[32] It is unclear whether Russia disputes that enforcement of domestic law was

[26] Russia's Preliminary Objections, ¶ 43.

[27] Hrytsenko Statement, ¶ 16.

[28] *Id.* ¶¶ 16–18.

[29] Russia's Preliminary Objections, ¶ 45.

[30] Hrytsenko Statement, ¶ 8.

[31] ITLOS Provisional Measures Order, ¶ 70 (internal quotes omitted) **(UAL-2)**; *see also id.*, ¶¶ 51, 62 **(UAL-2)**.

[32] Nebylytsia Statement, ¶ 14; *see also* ITLOS Provisional Measures Order, ¶ 41 (quoting the Federal Security Service of the Russian Federation, Press Service Statement on Acts of Provocations by Ukrainian Naval Ships (26 November 2018) ("FSB Report") **(UA-4)**) **(UAL-2)**.

the stated reason for the arrest on the evening of 25 November 2018, although this would be inconsistent with Russia's claim that it was not engaged in law enforcement activity. Russia's approach of not engaging with facts and evidence presented by Ukraine suggests that, in addition to the overt factual disputes noted above, there are additional such disputes that will crystallize as the proceedings continue. And Russia's focus on discrete pieces of evidence while ignoring their context and the conflicting evidence presented by Ukraine misses the point. The Tribunal's fact-finding role requires it not to accept isolated pieces of evidence pointed to by one party as the "undisputed" critical facts, but to consider *all* pieces of evidence and, in the words of the International Court of Justice, "make its own clear assessment of their weight, reliability and value."[33]

15. In sum, Russia's military activities objection is fact-intensive, relies on a disputed version of the facts, and would require the Tribunal to weigh prematurely the same facts and evidence that are the basis for Ukraine's claim on the merits. The Tribunal should conclude, similar to the conclusion of the *South China Sea* tribunal, that "the specifics of [Russia's] activities in and around [the Black Sea] and whether such activities are military in nature [are] matter[s] best assessed in conjunction with the merits."[34]

B. Russia's Objection Concerning Immunity Under Article 32

16. Russia's second objection, concerning the substance of Article 32, also lacks an exclusively preliminary character, for several reasons. Article 32 addresses the immunity of warships and other non-commercial government vessels.[35] The parties have differing views of its meaning: Ukraine maintains that Article 32 guarantees immunity to warships and other non-commercial government vessels while in the territorial sea,[36] whereas Russia

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[33] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Judgment of 19 December 2005, p. 200, ¶ 59 **(UAL-38)**.

[34] *South China Sea,* Award on Jurisdiction, ¶ 411 **(UAL-5)**; *see also id.*, ¶ 409 **(UAL-5)**.

[35] UNCLOS Art. 32.

[36] Memorial of Ukraine, ¶¶ 67, 86.

maintains it is a "without prejudice" provision that confers no substantive rights.[37] In the *ARA Libertad* case, faced with a similar disagreement, ITLOS concluded that because "a difference of opinions exists between [the parties] as to the applicability of article 32," a "dispute appears to exist between the Parties concerning the interpretation or application of the Convention."[38] A dispute "concerning the interpretation or application of [the] Convention" is precisely what the Tribunal has jurisdiction to resolve.[39] Thus, whether Ukraine's or Russia's interpretation of Article 32 is correct is a question for the merits, not jurisdiction.

17. Even setting aside the merits nature of Russia's position on Article 32, the objection is not exclusively preliminary in character for another reason as well: it is predicated on a fundamental factual dispute between the parties. According to Ukraine's view of the facts, the question of whether Article 32 provides for an immunity is irrelevant because Russia arrested and detained the *Berdyansk*, the *Nikopol*, and the *Yani Kapu beyond the territorial sea*.[40] Ukraine claims, therefore, that these arrests violated Articles 95 and 96 of the Convention.[41] It is undisputed that these provisions provide for an applicable immunity for warships and other non-commercial government vessels, and that these Articles are applicable beyond the territorial sea.[42] Russia's position that Article 32

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[37] Russia's Preliminary Objections, ¶¶ 82, 89; *see generally id.*, ¶¶ 75–89.

[38] *The "ARA Libertad" Case (Argentina v. Ghana),* ITLOS Case No. 20, Provisional Measures, Order of 15 December 2012, ¶ 65 **(UAL-1)**.

[39] *See* UNCLOS Arts. 286, 288 (conferring jurisdiction with respect to "any dispute concerning the interpretation or application of this Convention").

[40] *See* Memorial of Ukraine, ¶¶ 34–37; Nebylytsia Statement, ¶¶ 14–16; Hrytsenko Statement, ¶¶ 20–23; Witness Statement of Petty Officer Oleh Mykhailovych Melnychyk (7 May 2020) ("Melnychyk Statement"), ¶ 15.

[41] *See* Memorial of Ukraine, ¶¶ 74–75, 77–78, 153(a).

[42] *See* UNCLOS Art. 95 ("Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State."); *id.* Art. 96 ("Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State."); *id.* Art. 58(2) ("Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.").

does not provide for an applicable immunity is thus irrelevant to Ukraine's claims arising from violations of immunities provided for by Articles 95 and 96.

18. Thus, to prevail on this objection, Russia would have to persuade the Tribunal that the arrests of the three vessels took place in the territorial sea. Yet this is clearly disputed: Russia concedes that its position that the *Berdyansk* and the *Yani Kapu* were arrested in the territorial sea is "contrary to what Ukraine alleges in its Memorial."[43] It is not appropriate for Russia to ask the Tribunal to resolve this factual dispute at a preliminary stage. Even if it were, Russia has not supplied the Tribunal with any basis to do so. In footnotes to its pleading, the Russian Federation simply asserts coordinates where it alleges the arrests took place, but points to no evidentiary support.[44] The Tribunal thus lacks "all the necessary facts to dispose of the preliminary objection," a further reason why the objection lacks an exclusively preliminary character.[45]

19. Moreover, Russia "admit[s]" that it arrested the *Nikopol* outside of the territorial sea.[46] Accordingly, there can be no serious question that Article 95 supplies a relevant immunity, and Russia's objection is facially inapplicable at least with respect to the arrest of the *Nikopol*.[47]

20. Finally, Ukraine notes that even if the *Berdyansk* and the *Yani Kapu* were in the territorial sea, Ukraine's claims are not limited to Article 32. Ukraine's Memorial

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[43] Russia's Preliminary Objections, ¶ 85.

[44] *See id.*, ¶ 85 & n.145–n.148.

[45] *South China Sea*, Award on Jurisdiction, ¶ 382 **(UAL-5)**.

[46] Russia's Preliminary Objections, ¶ 85.

[47] Russia nonetheless argues that "the correct focus is still on Article 32, by the operation of Article 111." *Id.* ¶ 85. Article 111 concerns the right of hot pursuit. The Russian Federation does not explain how a right of hot pursuit could be relevant in the case of a warship, in light of the rule of Article 30 that the "sole recourse available to a coastal State" is to require a warship to leave its territorial sea immediately. Myron H. Nordquist, et al. (eds.), *United Nations Convention on the Law of the Sea: A Commentary (2014)*, Part II, ¶ 30.6 **(UAL-8)**; *see* Memorial of Ukraine, ¶ 86. In any event, Russia's curious theory that Article 111 overrides Article 30 to create a right of hot pursuit with respect to warships, *and* displaces the application of Article 95 immunity in the case of an arrest of a warship in the exclusive economic zone, is plainly a merits argument about the interpretation of the Convention, not a question of jurisdiction.

identifies a dispute between the parties concerning the interpretation and application of Article 30. Russia has specifically invoked Article 30 as the legal basis for its demand that the Ukrainian vessels stop.[48] However, and as explained in Ukraine's Memorial, the sole remedy available to a coastal State is to "require [the warship] to leave the territorial sea immediately."[49] Ukraine therefore maintains that Russia acted inconsistently with Article 30 in demanding that the vessels halt their exit from the territorial sea *en route* back to Odesa.[50] Russia does not address Ukraine's Article 30 argument in its Preliminary Objections, so there is no question that the Tribunal would retain jurisdiction over this claim, irrespective of any decision on the applicability of Article 32.

C. Russia's Objection Concerning the Obligation to Comply with Provisional Measures Orders

21. Russia argues that the Tribunal lacks jurisdiction over Ukraine's claim that Russia breached Articles 290 and 296 by violating the provisional measures order issued by ITLOS. Russia admits, however, that this objection is conditional: it maintains that the Tribunal lacks jurisdiction over the provisional measures violation "since the Tribunal lacks jurisdiction on the main dispute."[51] As explained above, however, Russia's other objections do not possess an exclusively preliminary character and cannot be decided at a preliminary stage of the proceedings. Accordingly, an objection that is conditional on prevailing on these other objections also cannot be decided at a preliminary stage.

22. In any event, Russia offers no substantial support for this objection, and the question of whether Russia is responsible for a violation of the provisional measures order is for the merits. Pursuant to Articles 290 and 296, the Convention expressly imposes an

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[48] *See* Memorial of Ukraine, ¶ 85; *see also* FSB Report, p. 4 (**UA-4**).

[49] Memorial of Ukraine, ¶ 86; UNCLOS Art. 30.

[50] Memorial of Ukraine ¶¶ 85–88, 153(d).

[51] Russia's Preliminary Objections, ¶ 96.

obligation to "comply promptly with any provisional measures" prescribed by ITLOS.[52] Ukraine claims that Russia did not comply with this obligation,[53] while Russia maintains that it did.[54] This is straightforwardly a "dispute concerning the interpretation or application of [Articles 290 and 296 of the] Convention," which the Tribunal has jurisdiction to decide on the merits.[55] In its brief argument, Russia points to the judgment of the International Court of Justice in *LaGrand*, but that case did not involve a treaty (like UNCLOS) that expressly imposes an obligation to comply with provisional measures orders, such that a dispute concerning that treaty obligation falls within the treaty's compromissory clause.[56]

D. Russia's Objection Concerning Aggravation of the Dispute

23. Russia very briefly argues that the Tribunal lacks jurisdiction over Ukraine's claim that Russia breached Article 279 of the Convention by aggravating the dispute. The parties simply disagree on the interpretation of Article 279. Ukraine contends that Article 279 imposes an obligation not to aggravate a dispute subject to the Convention's system of dispute settlement, an interpretation which (as Russia admits) is supported by the decision of the *South China Sea* tribunal.[57] Russia contends that it does not, and that the interpretation of the *South China Sea* tribunal was wrong.[58] Again, this is a straightforward "dispute concerning the interpretation or application of [Article 279 of the] Convention," which the Tribunal has jurisdiction to decide on the merits.[59] Notably, the *South China Sea*

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[52] UNCLOS Art. 290(6); *see also id.* Art. 296(1) ("Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.").

[53] Memorial of Ukraine, ¶¶ 76, 89–91.

[54] Russia's Preliminary Objections, ¶ 9.

[55] UNCLOS Arts. 286, 288(1).

[56] *LaGrand Case (Germany v. United States of America)*, ICJ Judgment of 27 June 2001 (considering a dispute arising under the Vienna Convention on Consular Relations) **(UAL-22)**.

[57] Memorial of Ukraine, ¶ 73; Russia's Preliminary Objections, ¶ 99.

[58] Russia's Preliminary Objections, ¶¶ 99–100.

[59] UNCLOS Arts. 286, 288(1).

tribunal resolved this question of interpretation in its Award on the merits – not at the preliminary phase of that case.[60]

24. Russia also makes a cursory argument that "Ukraine's claim that Russia aggravated the dispute is moreover unfounded."[61] This is of course an argument about the factual merits of Ukraine's claim, and not properly a jurisdictional objection.

E. Russia's Objection Concerning the Article 283 Requirement of an Expeditious Exchange of Views on Settlement of the Dispute

25. Finally, Russia briefly claims that Ukraine failed to comply with the requirement of Article 283 for the parties to a dispute to proceed expeditiously to an exchange of views regarding its settlement. Tribunals have been deferential to the States concerned in applying this provision, and in fact while Article 283 objections to jurisdiction are frequently made, such an objection has never been accepted.[62] Russia concedes that "a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted."[63] ITLOS concluded that Ukraine was reasonable in reaching such a conclusion here, in light of Russia's non-committal response to the *note verbale* of 15 March 2019.[64] Notably, Russia in its Preliminary Objections mischaracterizes that response: according to Russia's Objections, it "respond[ed]

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[60] *South China Sea,* Award on the Merits, ¶¶ 1169–1172 **(UAL-7)**.

[61] Russia's Preliminary Objections, ¶ 101.

[62] *See Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom),* PCA Case No. 2011-03, Award of 18 March 2015, ¶¶ 385–386 **(RUL-25)**; *In the Matter of the Duzgit Integrity Arbitration (Malta v. The Democratic Republic of São Tomé and Príncipe)*, PCA Case No. 2014-07, Award of 5 September 2016 ("*Duzgit Integrity*, Award"), ¶ 201 **(UAL-17)**; *Guyana v. Suriname*, PCA Case No. 2004-04, Award of the Arbitral Tribunal of 17 September 2007 ("*Guyana v. Suriname*, Award"), ¶¶ 410, 457 **(UAL-39)**; *South China Sea,* Award on Jurisdiction, ¶ 352 **(UAL-5)**; *Barbados v. Republic of Trinidad and Tobago,* PCA Case No. 2004-02, Award of the Arbitral Tribunal of 11 April 2006, ¶¶ 202–205, 214 **(UAL-40)**; *see also The "Enrica Lexie" Incident (Italian Republic v. Republic of India),* PCA Case No. 2015-28, Award of 21 May 2020, ¶ 247 **(UAL-41)**; *In the Matter of the Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, PCA Case No. 2014-02, Award on the Merits of 14 August 2015, ¶ 156 **(UAL-6)**.

[63] Russia's Preliminary Objections, ¶ 103 (quoting *MOX Plant (Ireland v. United Kingdom)*, ITLOS Case No. 10, Provisional Measures, Order of 3 December 2001, ¶ 60 **(RUL-11)**).

[64] ITLOS Provisional Measures Order, ¶ 86 **(UAL-2)**.

advising that comments *will* be provided,"[65] but its *note verbale* said only that comments were "*possible*."[66] ITLOS agreed with Ukraine that Russia's response was insufficient and determined that "Ukraine could reasonably conclude under the circumstances that the possibility of reaching agreement was exhausted."[67]

26. Russia's basis for disagreeing with ITLOS is to allege that Ukraine acted in bad faith by requesting too prompt a response. This argument should be rejected in light of the Convention's requirement of an "expeditious[]" exchange of views, as ITLOS observed.[68] But if the Tribunal were to entertain Russia's argument, it would require an assessment of facts overlapping with the merits. In its *note verbale* of 15 March 2019, Ukraine referred to the urgency of the situation.[69] The facts giving rise to that urgency, including the continued detention of the servicemen and vessels, and the imminent continuation of criminal proceedings and mandated court appearances, also relate to Russia's immunity violation and aspects of Ukraine's claims on the merits.[70] Thus, Russia's preferred analysis of the Article 283 issue risks the Tribunal prejudging facts "interwoven with the merits," making this objection not of an exclusively preliminary character.[71]

27. Finally, Ukraine notes that even in circumstances where an Article 283 objection does not appear to have overlapped with merits questions in the same manner, tribunals have not viewed the presence of this commonly made, and just as commonly rejected, objection as an independent basis for bifurcation.[72]

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[65] Russia's Preliminary Objections, ¶ 104 (emphasis added).

[66] *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation*, No. 3528/2dsng (25 March 2019) (emphasis added) **(UA-21)**.

[67] ITLOS Provisional Measures Order, ¶ 86 **(UAL-2)**; *see also id.*, ¶¶ 86–89 **(UAL-2)**.

[68] *Id.* ¶ 88 **(UAL-2)**.

[69] *Note Verbale of the Ministry of Foreign Affairs in Ukraine*, No. 72/22-188/3-682 (15 March 2019) **(UA-17)**.

[70] Memorial of Ukraine, ¶¶ 2, 8, 39–44.

[71] *South China Sea*, Award on Jurisdiction, ¶ 379 **(UAL-5)**.

[72] *See, e.g.*, *Guyana v. Suriname*, Order No. 2, ¶¶ 2–3 (joining Suriname's preliminary objections to the merits) **(UAL-35)**; *Guyana v. Suriname*, Award, ¶ 408 (noting, at the merits phase, Suriname's

III. Rejecting Bifurcation Would Serve the Interests of Efficiency and Justice in This Case

28. In the circumstances presented in this case, bifurcation will not promote efficiency, and will instead lead to duplicative briefing for the reasons explained above. Nor would bifurcation serve the interests of justice, but, to the contrary, would frustrate it. This case is focused on the arrest and detention of Ukrainian vessels in violation of their immunity under the Convention, as well as Russia's continued violation of that immunity through detention and ongoing criminal prosecutions. Among the reparations to which Ukraine is entitled is compensation to the 24 servicemen for the harm suffered in nine and a half months of unlawful detention, an ordeal described in detail in Ukraine's Memorial and accompanying witness statements,[73] and the cessation of the continuing criminal proceedings against them.[74] They should not be made to wait an inordinate amount of time for accountability, compensation, and cessation of the ongoing harm of being the subject of unlawful criminal prosecutions.

29. Moreover, in the specific context of UNCLOS Annex VII arbitrations, bifurcation has not generally contributed to the efficient resolution of disputes. In nearly all

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jurisdictional argument that because Guyana failed to fulfill its "obligation as specified in Article 283 of the Convention to inform Suriname of any alleged breach of the Convention" and that "[b]y failing to fulfill that obligation, Guyana did not undertake recourse to the Section 1 procedures, and because of that failure to take recourse to Section 1 procedures, Guyana cannot avail itself of the Section 2 compulsory dispute jurisdiction") **(UAL-39)**; *Duzgit Integrity*, Award, ¶¶ 19, 139, 197–201 (rejecting São Tomé's request for bifurcation and addressing its Article 283 objection at the merits phase) **(UAL-17)**; *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom),* PCA Case No. 2011-03, Procedural Order No. 2 dated 15 January 2013 ("*Chagos,* Procedural Order No. 2"), ¶¶ 1–2 (rejecting the United Kingdom's request for bifurcation) **(UAL-42)**; *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom),* PCA Case No. 2011-03, Preliminary Objections of the United Kingdom dated 31 October 2013, Chapter IV (arguing that "the Tribunal has no jurisdiction over Mauritius' other claims because the requirements of Article 283 have not been met") **(UAL-43)**.

[73] Memorial of Ukraine, ¶¶ 40–45, 125–136; *see generally* Hrytsenko Statement, ¶¶ 24–34; Nebylytsia Statement, ¶¶ 17–27; Melnychyk Statement, ¶¶ 17–25; Witness Statement of Senior Lieutenant Roman Mykolayovych Mokryak (14 May 2020), ¶¶ 17–23; Witness Statement of Master Chief Petty Officer Yuriy Oleksandrovych Budzylo (7 May 2020), ¶¶ 7–12; Witness Statement of Senior Seaman Vyacheslav Anatoliyovych Zinchenko (6 May 2020), ¶¶ 4–18; Witness Statement of Senior Seaman Andriy Anatoliyovych Artemenko (8 May 2020), ¶¶ 8–29.

[74] Memorial of Ukraine, ¶ 154(a).

prior Annex VII cases to consider bifurcation, Tribunals have either rejected bifurcation,[75] or, after bifurcating, declined to dismiss the case in its entirety and joined at least some jurisdictional issues to the merits.[76] This includes, as noted above, the *South China Sea* tribunal, which concluded that the assessment of whether activities were military in nature for purposes of an objection under Article 298(1)(b) should be performed at the merits stage.[77]

30. Finally, while the issues in this case are important, they are also limited in nature. Ukraine complains of a single incident – the arrest and initial detention of three naval vessels on the evening of 25 November 2018 – and continuing violations of the Convention's immunity provisions and the provisional measures order that flowed from that incident. This case is unlike other cases where bifurcation could at least have some value in winnowing the issues in a multi-faceted dispute.

31. In light of past experience of Annex VII tribunals and particularly given the circumstances of this case, in which the events subject to the merits of the dispute are discrete and the jurisdictional objections are focused on assessing the very same events, bifurcating issues of jurisdiction would serve little value but would risk delay, increased cost, fragmented consideration of the evidence, and duplicative briefing.[78] These considerations,

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[75] *See Guyana v. Suriname*, Order No. 2, ¶¶ 2–3 **(UAL-35)**; *Duzgit Integrity*, Award, ¶ 19 **(UAL-17)**; *Chagos,* Procedural Order No. 2, ¶¶ 1–2 **(UAL-42)**.

[76] *See South China Sea,* Award on Jurisdiction, ¶ 413(H) (joining seven separate submissions to the merits because they "would involve consideration of issues that do not possess an exclusively preliminary character") **(UAL-5)**; *In the Matter of the Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation),* PCA Case No. 2014-02, Award on Jurisdiction of 26 November 2014, ¶ 79(2) (reserving all jurisdictional issues not raised by Russia in its Declaration for the merits) **(UAL-44)**; *Coastal State Rights,* Award on Preliminary Objections, ¶ 297 (joining Russia's objection over the status of the Sea of Azov and the Kerch Strait to the merits because it did "not possess an exclusively preliminary character") **(UAL-25)**. The *Southern Bluefin Tuna* tribunal is the only Annex VII tribunal to have bifurcated proceedings and then fully disposed of the case at the preliminary objections phase. *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility of 4 August 2000 **(UAL-45)**.

[77] *South China Sea,* Award on Jurisdiction, ¶¶ 409, 411 **(UAL-5)**.

[78] *Cf., e.g.*, Lucy Greenwood, *Does Bifurcation Really Promote Efficiency?* 28 J. of Int'l Arbitration 105–111 (2011) (concluding, on the basis of a survey of almost two hundred International Centre for

along with the fundamental value of the efficient administration of justice, add to the reasons why the Tribunal should reject bifurcation.

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32. The Preliminary Objections of the Russian Federation are not exclusively preliminary in character. The overlapping facts and evidence relevant to both Russia's jurisdictional objections and the merits, and the need for the Tribunal – contrary to Russia's assertion – to resolve significant factual disputes in order to decide those objections, risk the Tribunal prejudging the merits if it were to hear those objections in a preliminary phase. Ukraine therefore requests that the Tribunal determine that Russia's objections are not exclusively preliminary in character, decline Russia's request for bifurcation of these proceedings into separate jurisdictional and merits phases, and join Russia's objections to the merits, at which time Ukraine's UNCLOS claims and Russia's objections can be examined in light of a fully developed evidentiary record.

Kyiv, Ukraine, 7 September 2020

H.E. Yevhenii Yenin
Deputy Minister for Foreign Affairs of Ukraine
Agent for Ukraine

Settlement of Investment Disputes ("ICSID") and ICSID Additional Facility cases, that bifurcated cases took longer, on average, to reach a final award when compared to consolidated cases) **(UAL-46)**.