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PCA Case No. 2019-28

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

between

UKRAINE

and

THE RUSSIAN FEDERATION

in respect of a

DISPUTE CONCERNING THE DETENTION OF UKRAINIAN NAVAL VESSELS AND SERVICEMEN

Volume I - RESPONSE OF THE RUSSIAN FEDERATION TO THE 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

21 September 2020

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I. INTRODUCTION

1. As established by Article 11(3) of the Rules of Procedure:

> "The Arbitral Tribunal shall rule on any Preliminary Objection in a preliminary phase of the proceedings, unless the Arbitral Tribunal determines, after ascertaining the views of the Parties, that such Preliminary Objection does not possess an exclusively preliminary character and should be ruled upon in conjunction with the merits".

2. Russia has put forward a series of discrete Preliminary Objections that engage express pre-conditions/exceptions to jurisdiction under Part XV, and also the existence (or otherwise) of a dispute within Article 288 of UNCLOS. These are matters that are typically decided at a preliminary phase.

3. Aside from certain misconceived points as to case management (see section III of Ukraine's Observations), Ukraine's key point is that Russia's Preliminary Objections require consideration of matters of fact going to the merits. That is not correct: first, it is not because a jurisdictional objection concerns an issue of fact, or of characterisation, that the objection somehow becomes a matter for the merits (issues of fact/characterisation are frequently considered at a preliminary objections phase); second, the key factual issues are anyway not disputed, despite Ukraine's attempts to portray the position otherwise.

4. Russia's position, in brief, is as follows:

   a. Ukraine seeks to portray its case as a simple one and therefore apt for all the issues – both of jurisdiction and merits – to be decided at the same time.[1] This is an attempt to reduce the Tribunal's rule under Article 11(3) to one of case management. As identified further below, the basic rule in inter-State proceedings, which Article 11(3) reflects, is that jurisdiction is based on consent, and a State should not have to give an account of itself on issues of merits until the requisite consent has been established.

   b. The question is whether the default position established by Article 11(3) – that any Preliminary Objections be dealt with in a preliminary phase – has been displaced on the basis that the given Preliminary Objection "does not possess an exclusively preliminary character *and* should be ruled upon in conjunction with the merits" (emphasis added). In addressing this question, the Tribunal may be assisted by

[1] Observations of Ukraine on the Question of Bifurcation, 7 September 2020 ("Ukraine's Observations"), para. 2.

statements of principle in other cases, but the individual outcome of a given case will be of limited assistance given that this will be fact and issue dependent (as well as depending on the specific procedural rule). For example, Ukraine places very considerable emphasis on the decision of the tribunal in the *South China Sea case* to determine the "military activities" objection alongside the merits.[2] At the same time, Ukraine ignores the fact that the tribunal in the *Coastal States Right case* (between Ukraine and Russia) adopted the opposite approach and determined the "military activities" objection at a preliminary phase. Unsurprisingly, a "cherry-picking" of cases will not assist the Tribunal and is not called for in application of Article 11(3).

c. As to Russia's "military activities" Preliminary Objection, Ukraine's case is that resolution of this objection will require the determination of disputed facts that go to the merits. This is incorrect for two separate reasons: (i) the key facts are not disputed; (ii) Ukraine is anyway (deliberately) confusing the facts that may go to the characterisation of a dispute – which is typically considered at a preliminary phase – and facts that go to the merits, i.e. whether Russia acted in such a way as to violate an applicable rule of the Convention.

d. As to Russia's Preliminary Objection concerning immunity, in accordance with well-established case-law, the Tribunal must determine whether the dispute advanced by Ukraine is one over which it has jurisdiction *ratione materiae* to entertain. That is a discrete legal question suitable for determination at, and very frequently determined at, a preliminary phase.

e. As to Russia's Preliminary Objection concerning jurisdiction as regards the obligation to comply with the Provisional Measures Order and alleged aggravation of the dispute, such jurisdiction depends on the existence of jurisdiction on the main issues. As such jurisdiction does not exist, and the objections in that regard are purely preliminary, this is also the case for jurisdiction with respect to Ukraine's claims that Russia has not complied with the Provisional Measures Order and has aggravated the dispute.

f. As to Russia's Preliminary Objection concerning Article 283 of UNCLOS, this objection is based on the failure to satisfy procedural preconditions to the exercise of

[2] Ukraine's Observations, paras. 3, 12, 29.

this Tribunal's jurisdiction. In accordance with well-established jurisprudence, it is suitable for determination at a preliminary phase.

5. For the Tribunal's convenience, in the submissions below, Russia follows the order in Ukraine's Observations.

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II. UKRAINE HAS FAILED TO ESTABLISH THAT RUSSIA'S OBJECTIONS FALL WITHIN THE EXCEPTION TO THE DEFAULT RULE OF ARTICLE 11(3)

6. The starting point is Article 11(3) of the Rules of Procedure, quoted in full at paragraph 1 above. This expressly establishes the default position that the Tribunal "*shall* rule on any Preliminary Objection in a preliminary phase of the proceedings" (emphasis added). This default position reflects the basic principle that no State may be brought before an international court or a tribunal unless it consents thereto. As stated in the *ICAO Council* case, it is "an essential point of legal principle […] that a party should not have to give an account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter, or whose jurisdiction has not yet been established".[3]

7. Ukraine's contentions run directly counter to that "essential point of legal principle"; it is demanding that Russia argue the merits of the claim despite the fact that the Tribunal's jurisdiction has not yet been established and that Russia has raised a number of clear and discrete jurisdictional objections. In this respect, Ukraine invokes the exception to Article 11(3), i.e. it contends that Russia's Preliminary Objections do "not possess an exclusively preliminary character".

8. In terms of identifying whether a "Preliminary Objection does not possess an exclusively preliminary character and should be ruled upon in conjunction with the merits", the approach was usefully articulated by the International Court of Justice in *Nicaragua v. Colombia*, as follows:

> "In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have

[3] *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 56 (**RUL-2**), cited in *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China), PCA Case No. 2013-19,* Award on Jurisdiction and Admissibility, 29 October 2015 (**UAL-5**), at para. 390. See also *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 101, para. 26 (**RUL-42**) referring to "the fundamental principl[e] [...] that it [the Court] cannot decide a dispute between States without the consent of those States to its jurisdiction" and the Declaration of Judge Keith in *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007,* para. 1 (**RUL-52**) referring to the Court's "power" and "responsibility", when it may properly do so, "to decide at a preliminary stage of a case a matter in dispute between the Parties if deciding that matter will facilitate the resolution of the case". See more generally, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary objections*, Judgment, 8 November 2019, para. 33: "The Court recalls that its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them (*Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 307, para. 42." (**RUL-60**).

before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some element thereof, on the merits."[4]

9. This two-limbed approach was followed by the tribunal in the *South China Sea* case,[5] as relied upon by Ukraine in its Observations.[6]

10. It is important to identify, as indeed is reflected at paragraph 6 of Ukraine's Observations, that the relevant question is thus whether some element of the merits will be pre-judged by determining the given jurisdictional objection at a preliminary phase. It is not sufficient that a claimant State merely point to some overlap in the facts, and it is noted in this respect that Ukraine takes the ICJ's words out of context in its reliance on *Nicaragua v. USA*.[7]

a. In that case, the Court was considering a reservation by the USA that its acceptance of the Court's jurisdiction did not extend to "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court…".[8]

b. In referring to "question[s] concerning matters of substance relating to the merits of the case", the Court was not articulating a general test for whether or not a given objection is exclusively preliminary.[9] Rather, it was making a fact-specific comment that the question of whether or not its final decision in *Nicaragua v. USA* in

[4] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 852, para. 51 (**RUL-51**).

[5] *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China), PCA Case No. 2013-19,* Award on Jurisdiction and Admissibility, 29 October 2015, para. 382 (**UAL-5**): "the accumulated jurisprudence of the International Court of Justice indicates that whether or not a preliminary objection will be found, in the circumstances of a particular case, to 'possess an exclusively preliminary character' will depend on two types of enquiry: first, whether the Tribunal has had the opportunity to examine all the necessary facts to dispose of the preliminary objection; and second, whether the preliminary objection would entail prejudging the dispute or some elements of the dispute on the merits." See also the *Coastal State Rights* case referring to "the criteria for ascertaining whether a preliminary objection possesses an exclusively preliminary character" as including the "risk of the arbitral tribunal prejudging in an award on jurisdiction questions of the merits that, by definition, have not been fully pleaded by the parties at that stage" (*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 concerning the Preliminary Objections of the Russian Federation, 21 February 2020 (**UAL-25**), para. 289.

[6] Ukraine's Observations, paras. 6 and 11.

[7] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984* (**UAL-36**), para. 76, referred to in Ukraine's Observations at para. 10 as follows: "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.'"

[8] *Ibid.*, para. 67; see also the Court's finding, para. 76: "At any rate, this is a question concerning matters of substance relating to the merits of the case: obviously the question of what States may be 'affected' by the decision on the merits is not in itself a jurisdictional problem."

[9] As reflected by the fact this phrase has not been referred to subsequently by the Court.

fact "affected" other State Parties to the multilateral treaty relied upon by Nicaragua was (obviously) a "question of substance relating to the merits of the case".[10]

11. There is thus no general bar on the Tribunal considering or even determining issues of fact in deciding Russia's Preliminary Objections, as long as in doing so it does not pre-judge issues of merits (as to which the Tribunal has not yet had detailed submissions on either fact or law).[11] However, it is notable in the current case that the key facts relevant to the Preliminary Objections are anyway largely undisputed.

A. Russia's objection pursuant to UNCLOS Article 298(1)(b) – "military activities"

12. Russia contends that the dispute before the Tribunal concerns military activities and is therefore excluded from the Tribunal's jurisdiction pursuant to Article 298(1)(b) of UNCLOS. This is a discrete jurisdictional objection suitable for consideration at a preliminary phase. Ukraine, however, adopts the position that: "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]

1. The supposedly "disputed" facts

13. As to the latter contention, the Tribunal has the facts before it necessary to decide at this stage whether or not this dispute is one "concerning military activities" for the purposes of Article 298(1)(b) of UNCLOS. Ukraine seeks to muddy the waters by asserting that the critical facts are in dispute.[13] They are not.

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[10] See *ibid.*, para 75: "it is only when the general lines of the judgment to be given become clear that the States "affected" could be identified. By way of example we may take the hypothesis that if the Court were to decide to reject the Application of Nicaragua on the facts, there would be no third State's claim to be affected."

[11] See *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 852, para. 51 (**RUL-51**): "[t]he determination by the Court of its jurisdiction may touch upon certain aspects of the merits of the case (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 15). Moreover, the Court has already found that the question of whether the 1928 Treaty and the 1930 Protocol settled the matters in dispute does not constitute the subject-matter of the dispute on the merits. It is rather a preliminary question to be decided in order to ascertain whether the Court has jurisdiction". See also K. Mačák, "Part Three, Statute of the International Court of Justice, Ch. III, Procedure, Article 43", in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed., OUP, 2019, para. 203, referring to Article 79(8) of the Rules of Court: "Rather than carrying the preliminary objections over into the merits phase, questions of fact and law 'touching upon' the merits are now brought forward into the jurisdictional phase, to dispose of the objections at the earliest possible stage in the proceedings. Thus, under the present Rules, objections should be decided at the preliminary stage wherever reasonably possible: *in dubio preliminarium eligendum*. This also seems to be in line with the approach taken by the court, which has been very cautious in declaring an objection to be 'not exclusively preliminary' in character and, in fact, has done so only on four occasions." (**RUL-61**).

[12] See, e.g., Ukraine's Observations, para. 11.

[13] Ukraine's Observations, para. 13. Ukraine also asserts that the Tribunal must accept the facts as presented by Ukraine (Ukraine's Observations, para. 10). That is not correct; the Separate Opinion of Judge Higgins in *the Oil Platforms case* cited in support of that assertion (at fn. 11; **UAL-37**) is clearly made in a different context

14. In particular, Ukraine does not and cannot contest the following, which is taken from Ukraine's own documents, statements and pleadings:[14]

a. [redacted]

b. The three Ukrainian Vessels were military vessels, namely naval warships and an auxiliary vessel, and were part of a fleet mandated to carry out "important public duties in the interest of Ukraine's national defence".[17]

c. Those Ukrainian Military Vessels were armed with guns and artillery,[18] with "encryption technology used in connection with classified radio communications and system of state recognition".[19]

d. Russian forces used force against the Ukrainian Military Vessels and Military Servicemen, notably the Russian forces rammed the "*Yani Kapu*", and subsequently opened fire (with first warning, then target, shots) on the "*Berdyansk*", resulting in

(addressing whether the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States afforded a basis of jurisdiction in respect of any of the claims advanced by Iran). In any event, the key facts for the purposes of the military activities objection are common ground between the Parties (and so no need arises to accept the facts as presented by only one Party).

[14] In the premises, Ukraine's suggestion of a one-sided presentation of the facts by Russia ("isolated pieces of evidence pointed to it by one party": Ukraine's Observations, para. 14) is misplaced.

[15] [redacted]

[16] [redacted]

[17] UM, paras. 16, 17, 22, 23, 74; Report on the Events of 24-25 November 2018 in the Sea of Azov and Kerch Strait, Ministry of Defense, Naval Forces of Ukraine, 15 April 2019, pp. 1 and 8 (**UA-5**).

[18] See UM, para. 26 referring to guns on board all three Military Vessels.

[19] Report on the Events of 24-25 November 2018 in the Sea of Azov and Kerch Strait, Ministry of Defense, Naval Forces of Ukraine, 15 April 2019, p. 8 (**UA-5**).

damage to that military vessel and the wounding of three Ukrainian military personnel on board.[20]

e. The activities of 25 November 2018 all occurred in the wider context of the dispute between Ukraine and Russia about the alleged annexation of Crimea, and were preceded by Ukraine establishing a new Azov Naval Base in Berdyansk.[21]

f. The activities at issue have repeatedly been characterised as military in nature, including in multiple statements by both Russia and Ukraine.[22] Notably, the day after the events, Ukraine stated before the Security Council that "[t]hese events are yet another testament to the relevance of the General Assembly draft resolution prepared by Ukraine and a group of like-minded States regarding the issue of the militarization of Crimea, the Black Sea and the Sea of Azov";[23] before the OSCE, Ukraine stated that "on 25 November the Russian Navy deliberately used military force against three Ukrainian vessels in international waters in the Black Sea. 24 Ukrainian sailors have been captured and are now prisoners of war. [...] I remind that attack of armed forces of one state on armed forces of another state constitutes an act of aggression";[24] and on 21 March and 3 April 2019, the President of Ukraine awarded all the Ukrainian Military Servicemen with military medals and orders, *inter alia*, for personal courage and selfless actions in the performance of military duty.[25]

15. Ukraine cites just three "disputed" facts which, whilst presented as "non-exhaustive examples", have no doubt been carefully selected.[26]

16. As to the first two "disputed" facts, that is, Ukraine's denial that on 25 November 2018 the Ukrainian military and Russian military were "arrayed in opposition to each other" and that

[20] UM, paras. 34, 35, 61, 93.
[21] "Two Ukrainian warships enter Sea of Azov to become part of newly created naval base", *ukrinform.net*, 24 September 2018, available at https://www.ukrinform.net/rubric-defense/2544002-two-ukrainian-warships-enter- sea-of-azov-to-become-part-of-newly-created-naval-base html (**RU-12**).
[22] See the list set out in Preliminary Objections of the Russian Federation, 24 August 2020 ("RPO"), paras. 47-49.
[23] United Nations Security Council, 8410th meeting, 26 November 2018, S/PV.8410, pp. 10, 12 (**RU-16**).
[24] "Statement by H.E. Mr. Pavlo Klimkin, Minister for Foreign Affairs of Ukraine, at the 25th Meeting of the Ministerial Council of the OSCE (Milan, 6 December 2018)", Organization for Security and Co-operation in Europe official website, 6 December 2018, available at https://www.osce.org/whoweare/405560?download=true (**RU-26**).
[25] "Poroshenko decorated captured Ukrainian navy men with state orders", *krymr.com*, 7 April 2019, available at https://ru.krymr.com/a/news-poroshenko-prisudil-ukrainskim-moryakam-gosudarstvenniye-nagradi/29866299 html with further references to the Decrees of the President of Ukraine No. 83/2019 of 21 March 2019 and No. 96/2019 of 3 April 2019 (**RU-42**).
[26] Ukraine's Observations, para. 13.

they were engaged in a "prolonged stand off", this is nothing more than semantics, and the central facts as to an engagement between the Ukrainian and Russian military vessels are not disputed. Thus it is undisputed that, as recorded in the report of Ukraine's Ministry of Defense,[27] over a period of some 12 hours the Russian military engaged in repeated attempts to stop the manoeuvres of the Ukrainian Military Vessels, including ramming the *Yani Kapu*, pursuing the Vessels and opening fire at the *Berdyansk*. Further, in the immediate aftermath of the relevant events and outside the confines of the current claim, Ukraine has stated that:

a. "These [Ukrainian Military] vessels were seized and suffered significant damage as a result of unprovoked, repeated use of artillery fire for effect, ramming, collisions, and other aggressive actions by Russian naval vessels";[28]

b. "[The Ukrainian boats were] followed and attacked by Russian ships, declaring ultimatums, opening deadly fire and using units of special forces to capture Ukrainian vessels";[29]

c. [redacted]

17. Ukraine wishes now to characterise these events as not concerning vessels arrayed in opposition but to say that "the Russian vessels were instead following the Ukrainian vessels in

[27] Report on the Events of 24-25 November 2018 in the Sea of Azov and Kerch Strait, Ministry of Defense, Naval Forces of Ukraine, 15 April 2019 (**UA-5**) (paras. 11-14). See also *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 610/22-110-1329, 26 November 2018, referring to the "unprovoked, repeated use of artillery fire for effect, ramming, collisions, and other aggressive actions by Russian naval vessels" (**UA-18**).

[28] *Ibid.* (**UA-18**).

[29] "Statement by the delegation of Ukraine on the latest Russia's act of unprovoked armed aggression against Ukraine" (as delivered by Ambassador Ihor Prokopchuk, Permanent Representative of Ukraine to the International Organizations in Vienna, to the 1204th special meeting of the Permanent Council, 26 November 2018), available at https://www.osce.org/files/f/documents/2/6/404666.pdf (**RU-22**).

[30] [redacted]

a law enforcement activity".[31] The Tribunal has the basic and undisputed facts before it to decide whether that characterisation is correct or whether, as Russia maintains, the dispute concerns military activities.

18. As to the third "disputed" fact, the checklist document, Ukraine does not dispute that this checklist was found on the *Nikopol* or that Russia has correctly quoted from the document.[32] The paragraph of Russia's Preliminary Objections where Russia refers to the checklist is explaining that Russia's conduct responded to an illegal crossing of its State border by another State's warships (which is "an expression of the sovereignty of the State whose flag it flies"[33]) in violation of Article 322(3) of the Criminal Code of the Russian Federation, i.e. that the Russian military was protecting its State national security interests given the (armed) presence of the military of another State. That is the key point being made, which is not contested in Ukraine's Observations; and the question of whether the Ukrainian Military Vessels' movements on 25 November 2018 were or were not in fact "covert" is beside the point.[34]

19. Flowing from the above, Ukraine's complaint that Russia "largely disregards evidence" and that "[i]t is unclear whether Russia disputes that enforcement of domestic law was the stated reason for the arrest on the evening of 25 November 2018" is not understood. In its Preliminary Objections, Russia expressly referred (twice) to the fact that the Ukrainian Military Servicemen were charged on 25 November 2018 with illegally crossing Russia's state border in violation of Article 322(3) of the Criminal Code of the Russian Federation,[35] noting the "Order on opening a criminal case and commencing criminal proceedings" dated 25 November 2018 (as exhibited to Ukraine's Memorial).[36] Ukraine can (and does) say by reference to this that, as a matter of the correct characterisation of the relevant events, the dispute does not concern military activities. Russia does not agree. There is no factual impediment to the Tribunal now deciding who is right as to the issue of characterisation.

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[31] Ukraine's Observations, para. 13.
[32] RPO, para. 45.
[33] UM, para. 1 citing the *"Ara Libertad" (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012,* para. 94 (**UAL-1**). See also UM, para. 7.
[34] See Ukraine's Observations at para. 13 noting that the Ukrainian vessels "openly 'communicated their intentions to transit the Strait to the Russians'" and that it was not "a non-permitted secret incursion".
[35] At fns. 46 and 75. See also the Federal Security Service of the Russian Federation, Press Service on Acts of Provocations by Ukrainian Naval Ships, 26 November 2018 (26 November 2018) referring to the Russian laws on protecting its State border cited by Russia when issuing the orders to stop (**UA-4**, pp. 4-5).
[36] Order on Opening a Criminal Case and Commencing Criminal Proceedings, 25 November 2018 (**UA-13**).

20. As to Ukraine's position that "there are additional such disputes which will crystallize as the proceedings continue",[37] it is for Ukraine to explain now why the default rule in Article 11(3) is displaced. This could only be done by concrete instances of why a given Preliminary Objection is not exclusively preliminary in nature, not by a speculative and unfounded assertion as to future factual disputes (an assertion that is, moreover, inconsistent with Ukraine's position that this is a simple and straightforward case).

2. Answering the military activities objection would not determine the dispute, or some element thereof, on the merits

21. Answering the military activities objection would not determine or prejudge the dispute, or some element thereof on the merits.[38] Nor would it present a "risk [of the arbitral tribunal] considering, and forming a potentially incomplete view of, evidence that is common to jurisdictional and merits questions".[39]

22. It is simply not the case that "the facts and arguments in support of [the military activities objection are] in significant measure the same as the facts and arguments on which the merits of the case depend".[40]

23. In considering whether or not this dispute is correctly characterised as "concerning military activities" for the purposes of Article 298(1)(b) of UNCLOS, the Tribunal must refer to the key and undisputed facts of 25 November 2018. But it is not being asked to go into any further assessment of the facts that would prejudge issues on the merits; by reference to those key and undisputed facts, there is sufficient material to decide the issue. Thus the Tribunal is not being asked to consider whether or not the arrest/detention/prosecution of the Ukrainian Military Vessels/Servicemen violated the immunity-related provisions of UNCLOS, which is the merits claim.[41] That is an entirely separate issue turning on (1) the discrete factual question of the location of the relevant activity (2) the legal question of whether *ratione materiae*

[37] Ukraine's Observations, para. 14.
[38] *Cf.* Ukraine's Observations, para. 11.
[39] *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 concerning the Preliminary Objections of the Russian Federation, 21 February 2020 (**UAL-25**), cited in Ukraine's Observations, para. 6.
[40] *Cf. Guyana v. Suriname, PCA Case No. 2004-04,* Order No. 2, 18 July 2005 (**UAL-35**), cited in Ukraine's Observations at fn. 4. *Cf.* also Ukraine's Observations, para. 7.
[41] Ukraine's Observations, para. 10: "The merits of this case concern Ukraine's claims that its vessels and their crews were arrested and detained, and the service members prosecuted, as a matter of law enforcement, in contravention of UNCLOS provisions providing for immunity."

UNCLOS provides for an applicable immunity and, if it does,[42] (3) whether the subsequent arrest/detention/prosecution violated the relevant UNCLOS provision(s).

a. Of course it is not the case that at the preliminary stage of proceedings a tribunal is prohibited from considering *any* factual issues relevant to the merits claim.[43] But in any event, both (1) and (2) above are discrete issues not referred to in (or relevant to) the military activities objection (and for the reasons set out in Section II.B below are in any event suitable for preliminary determination).

b. As to (3), the fact of the arrest/detention/prosecution of the Ukrainian Military Servicemen and Vessels, including Russia's "application of its civilian criminal regime" in that regard,[44] is not disputed, and consideration of Ukraine's submission that such application is inconsistent with the characterisation of the activities as "military" for the purposes of Article 298 of UNCLOS is a matter of legal judgment for the Tribunal which does not require further, in depth investigation of the facts.

24. More generally, the question of the correct characterisation of a dispute is one that is typically taken prior to the merits, i.e. it is not generally seen as determining the merits or any element thereof, as the ICJ jurisprudence demonstrates.[45]

25. As already noted, Ukraine relies heavily on the tribunal in the *South China Sea* case joining the military activities objection to the merits.[46] However:

a. It is notable that Ukraine ignores the approach of the tribunal in the more immediate analogue of the *Coastal State Rights* case. Contrary to Ukraine's submission

[42] Russia's position that UNCLOS does not provide for an applicable immunity is set out in its RPO at Chapter 3.
[43] See the terms of the relevant test as set out at paragraph 8 above.
[44] Ukraine's Observations, para. 11.
[45] E.g. *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation*), *Preliminary Objections*, Judgment, 8 November 2019, para. 24 (**RUL-60**); *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 308, para. 48 (**RUL-58**); *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, p. 602, para. 26 (**RUL-55**); *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007,* p. 848, para. 38 (**RUL-51**); *Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 26 (**RUL-50**); *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 449, para. 31 (**RUL-9**); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, pp. 262-263, paras. 29-30 (**RUL-38**); *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, pp. 466-467, paras. 30-31 (**RUL-39**).
[46] Ukraine's Observations, paras. 12, 15 and 29.

before that tribunal,[47] it was held that the military activities objection could be determined at a preliminary jurisdictional stage.[48]

b. The tribunal in *South China Sea* did not provide detailed reasoning as to why the military activities objection was joined to the merits,[49] but it is notable that the situation before that tribunal was materially different in that the respondent State was not appearing. Further, the merits issues in the *South China Sea* case were quite different, and an assessment of whether determining a jurisdictional objection would prejudge a merits issue requires attention to be given to both aspects, i.e. what is required to determine the jurisdictional objection and what issues arise on the merits.

c. There is no reason in principle why the issue of characterisation raised by the question of whether there is a dispute concerning military activities should be approached any differently to any other issue of characterisation of a dispute. There are of course multiple examples of where international courts and tribunals have determined issues of the characterisation of a dispute at a preliminary phase.

26. Ultimately, the question before this Tribunal is whether in this case Russia's Preliminary Objection is indeed of an exclusively preliminary character (which it is, for the reasons set out above).

B. Russia's objection based on Article 32 of UNCLOS requires a decision at a preliminary stage

27. In accordance with a well-established case-law, in order for the Tribunal to determine whether the dispute is one over which it has jurisdiction *ratione materiae* to entertain, "it cannot limit itself to noting that"[50] the Parties have differing views as to the meaning of Article 32 like

[47] *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 concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 326 (**UAL-25**).

[48] *Ibid.*, paras. 327-341. In the *Arctic Sunrise*, Award on Jurisdiction (26 November 2014), the jurisdictional objection concerning Article 298(1)(b) was also dealt with at a preliminary phase, although it is acknowledged that in that case the Netherlands did not dispute that the relevant dispute concerned "law-enforcement activities in activities in regard to the exercise of sovereign rights or jurisdiction" (para. 68) (**UAL-44**).

[49] Ukraine cites paras. 411 and 309 of the *South China Sea* Award (at fn. 20 of its Observations). Para. 411 of the Award simply reads "[t]he Tribunal considers the specifics of China's activities in and around Second Thomas Shoal and whether such activities are military in nature to be a matter best assessed in conjunction with the merits" and para. 409 just asserts "[t]he Tribunal considers 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". Similarly, para. 396 states (without further explanation) that "[t]he nature of such activities, however, is a merits determination that the Tribunal cannot make at this point in the proceedings" (**UAL-5**).

[50] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, pp. 809-810, para. 16 (**RUL-43**); *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 308, para. 46 (**RUL-58**).

Ukraine expects it to do;[51] it "must ascertain whether the [alleged] violations [...] do or do not fall within the provisions of the Treaty"[52] and, as recently noted by the ICJ, "[t]his may require the interpretation of the provisions that define the scope of the treaty."[53] The Tribunal simply cannot proceed to adjudicate the merits of the dispute until such a preliminary decision is taken.

28. Since, according to Ukraine, Article 32 of UNCLOS has been violated by Russia and might bring within the jurisdiction of the Tribunal the question of Russia's respect for the immunity to which certain Ukrainian vessels are said to be entitled, it is at the present stage that the Tribunal must conduct an analysis of the said provision. This is squarely in line with the approach adopted by international courts and tribunals at the preliminary stage. As summarised by ITLOS,

> "To enable the Tribunal to determine whether it has jurisdiction, it must establish a link between the facts advanced by [the Applicant] and the provisions of the Convention referred to by it and show that such provisions can sustain the claim or claims submitted by [the Applicant]."[54]

Examples before the ICJ include the *Oil Platforms* case in which, in determining whether there was a dispute concerning the interpretation or application of the 1955 Treaty of Amity, the Court ruled on the scope of each provision that the claimant relied on and as to which interpretation was disputed.[55] In the recent case concerning *Certain Iranian Assets*, it "examine[d …] each of the provisions on which Iran relie[d], in order to ascertain whether it permit[ted] the question of sovereign immunities to be considered as falling within the scope *ratione materiae* of the Treaty of Amity."[56] In particular, the Court considered whether one of these provisions obliged the Respondent to respect the sovereign immunity to which the entities concerned in the case would have allegedly been entitled under customary international law and concluded that the provision could not be interpreted as incorporating, by reference, the

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[51] Ukraine's Observations, para. 16.

[52] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, pp. 809-810, para. 16 (**RUL-43**). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996*, p. 615, para. 30 (**RUL-44**); *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 308, para. 46 (**RUL-58**); *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 23, para. 36 (**RUL-59**); *M/V Louisa (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013*, para. 99 (**RUL-23**).

[53] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary objections*, Judgment, 8 November 2019, para. 57 (**RUL-60**).

[54] *M/V Louisa (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013*, para. 99 (**RUL-23**).

[55] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, paras. 27-49 (**RUL-43**).

[56] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 26, para. 52 (**RUL-59**).

customary rules on sovereign immunities.[57] Similarly, in the case concerning *Immunities and Criminal Proceedings*, the Court ruled at an early stage that the provision at issue did not create new rules or incorporate rules of customary international law relating to immunities of States and State officials. It concluded that it lacked jurisdiction in relation to this aspect of the dispute while noting that its determination regarding the absence of incorporation of the customary international rules on immunities was without prejudice to the continued application of those rules.[58] The same result is warranted here.

29. Applying well-established treaty interpretation rules, Russia's Preliminary Objections made clear that Article 32 of UNCLOS does not afford immunity protection; in other words – those of the ICJ again – it "do[es] not cover the actions carried out in this case" and "does not lay down any norms applicable to this particular case."[59] Ukraine's claims concerning immunity must accordingly be dismissed as a preliminary matter outside the scope of UNCLOS and the Tribunal's jurisdiction.

30. This conclusion remains even if it were the case that "[t]he determination […] of the […] jurisdiction may touch upon certain aspects of the merits of the case".[60] A mere alleged link between an objection and facts related to the merits does not suffice to disregard the preliminary character of the objection. The real test is whether "answering the preliminary objection would determine the dispute, or some elements thereof, on the merits."[61] As the ICJ underlined on several occasions, "the establishment of the Court's jurisdiction […] is a 'question of law *to be resolved in the light of the relevant facts*'";[62] its "task […] is to consider the questions of law *and fact* that are relevant to the objection to its jurisdiction".[63] If the

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[57] *Ibid*., p. 28, paras. 56-58.
[58] *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 323, para. 102 (**RUL-58**). See also *ibid*., *Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016*, p. 1160, para. 49 (**RUL-56**).
[59] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 816, para. 36 (**RUL-43**).
[60] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 852, para. 51 (**RUL-51**), referring to *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 15.
[61] *Ibid.* See also, e.g.: *Rand Investments Ltd., William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand, Robert Harry Leander Rand and Sembi Investment Limited v. Republic of Serbia, ISCID Case No. ARB/18/8*, Procedural Order No. 3, 24 June 2019, Dissenting Opinion of Professor Marcelo G. Kohen, para. 6 (**RUL-62**).
[62] *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 450, para. 37 (**RUL-9**) quoting *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 76, para. 16 (emphasis added).
[63] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary objections*, Judgment, 8 November 2019, p. 28, para. 58 (**RUL-60**) (emphasis added).

Tribunal had to assess all the facts pertaining to the merits in order to decide whether or not it has jurisdiction *ratione materiae*, it should of course declare that the objection in question does not possess an exclusively preliminary character. But this is not the case here: what is at issue is only the straightforward fact relating to the precise location of the incidents.

31. It is not because Ukraine failed to give the crucial and accurate details of this relevant fact in its Memorial – a duty which is inherent on it[64] – that Russia should be barred from its entitlement to have its preliminary objection answered at the preliminary stage of the proceedings.[65] Russia provided the Tribunal with the limited and necessary facts to decide the question raised, i.e. the coordinates detailed at paragraph 85 of its Preliminary Objections and depicted on Map 1 as officially received from the FSB Border Guard service. Those of the warning shots and use of weapons are confirmed by a Report annexed by Ukraine to its request for the prescription of provisional measures.[66] If Ukraine's view were to be accepted, it would mean that it is enough for the Claimant State to retain information necessary for the Court or tribunal to deny exercising its jurisdiction for dismissing a preliminary objection. This cannot be the law.

32. Ukraine criticizes Russia for not responding to its argument concerning the alleged violation of Article 30 of UNCLOS, insisting that the sole remedy available to Russia was to "require [the warship] to leave the territorial sea immediately" – not to halt.[67] Such an alleged violation however falls under the same premise as Russia's objection according to which UNCLOS does not provide for an applicable immunity. Indeed, similarly to Article 32, Article 30 is "without prejudice" with respect to other rules of international law. All it does is to endorse the classic remedy available to a coastal State in case of non-compliance by warships with its laws and regulations, i.e. to request them to leave immediately, and it turns such a remedy into a conventional one. Ukraine's interpretation of Article 30 of UNCLOS is only valid to the extent that a request to leave is the only method available to coastal States *under the Convention*, the provision "does not specify what further steps the coastal State may take to secure compliance with its request [… O]ther forcible measures may be taken under general

[64] See, in this sense, Article 62 of the ITLOS Rules (**RUL-45**) or Article 49 of the ICJ Rules (**RUL-3**).
[65] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007,* p. 852, para. 51 (**RUL-51**), referring to *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 15.
[66] Federal Security Service of the Russian Federation, Press Service on Acts of Provocations by Ukrainian Naval Ships, 26 November 2018 (**UA-4**).
[67] Ukraine's Observations, para. 20.

international law".[68] Actually, as explained by Professors Churchill and Lowe, "the coastal State may use any force necessary to compel" warships to leave the territorial sea.[69] The question of the legality of other remedies are beyond the scope of UNCLOS, therefore Russia's request to halt and other measures lie outside the Tribunal's jurisdiction.

33. This also disposes of Ukraine's argument regarding the alleged incompatibility of Russia's invocation of Article 111 of UNCLOS with Article 30.[70] Besides, hot pursuit is an exception to the long-established principle of international law that "vessels on the high seas are subject to no authority except that of the State whose flag they fly"[71] and this is so whether the vessels in question are military or not. It must be noted in this respect that Article 111 does not differentiate between different categories of "foreign ship[s]": this silence is all the more noticeable that paragraph 5 of this provision is dedicated to the condition that the right of hot pursuit "be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and specifically authorized to that effect". This concerns the pursuing ship; the contrast with the lack of qualification of the pursued ship is striking.

34. In sum, the Tribunal must interpret the above referred provisions at the present stage in order to determine whether or not they lay down any norms applicable to this particular case.

C. The Russian objection that the Tribunal lacks jurisdiction on the Ukrainian claim that Russia has failed to comply with the ITLOS Provisional Measures Order has an exclusively preliminary character

35. In its Observations, Ukraine takes a stand on the question of whether this Tribunal has jurisdiction on its claim that Russia has not complied with the ITLOS Provisional Measures Order,[72] a point on which it submitted a pure assertion without any argument in its Memorial.[73] It now follows Russia's argument that jurisdiction on compliance with the Provisional Measures Order depends on jurisdiction on the main objections submitted by Russia.[74] This

[68] R. Barnes, "Article 30: Non-compliance by warships with the laws and regulations of the coastal state", in A. Proelß (ed.), *United Nations Convention on the Law of the Sea: A Commentary*, Nomos, 2017, p. 247 (**RUL-57**).
[69] R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 3rd ed., Manchester University Press, 1999, p. 99 (**RUL-48)**. See also D.P. O'Connell, "Ch. 7: Innocent Passage in the Territorial Sea", in I.A. Shearer (ed.), *The International Law of the Sea*, Oxford University Press, Vol. I, 1982, p. 297 (**RUL-40**); or I. Delupis, "Foreign Warships and Immunity for Espionage", *AJIL*, 1984, Vol. 78, pp. 72-73 (**RUL-41**).
[70] Ukraine's Observations, fn. 47.
[71] *The Case of the S.S. "Lotus", Judgment, Series A. – No. 10, 7th September 1927*, p. 25 (**RUL-37**).
[72] Ukraine's Observations, paras. 21-22.
[73] UM, para. 47.
[74] Ukraine's Observations, para. 21.

was held in the *LaGrand* and *Ghana/Côte d'Ivoire* judgments. As stated in the Preliminary Objections, the fact that this Tribunal lacks such jurisdiction has as a consequence that it also lacks jurisdiction on the alleged non-compliance with the provisional measures prescribed by ITLOS.[75]

36. Following the Russian Federation's position, Ukraine now holds that the objection to the Tribunal's jurisdiction over the question of non-compliance with the Provisional Measures Order depends on the existence of jurisdiction on the other objections that constitute the main dispute.[76]

37. However, in Ukraine's view the other objections submitted by Russia "do not possess an exclusively preliminary character" and so "an objection that is conditional on prevailing on these other objections also cannot be decided at a preliminary stage".[77]

38. As it has been shown in Russia's Preliminary Objections[78] and further developed in the present Response,[79] the other preliminary objections submitted by Russia are, nonetheless, exclusively preliminary. They can be dealt with without getting into the merits and, as far as they require an examination of facts, these facts are common ground between the Parties.

39. Consequently, and following the logic of Ukraine's Observations, Russia's objection concerning the lack of jurisdiction to decide on the alleged non-compliance with the Provisional Measures Order can be decided at a preliminary stage because of the preliminary character of the other objections submitted by Russia.

40. In its brief argument on this point, Ukraine adds that "Russia offers no substantial support for this objection."[80] This is simply not true. The objection of the Russian Federation is supported by a principle contained in ICJ and ITLOS case-law. Ukraine attempts to discredit Russia's "substantial support" by simply stating that the *LaGrand* case did not involve a treaty, such as UNCLOS, that "expressly imposes an obligation to comply with provisional measures orders", and that includes said obligation within the scope of its compromissory clause.[81] What Ukraine fails to see is that the fact that such a principle was held in a case in which the relevant convention did not include obligations such as those of Articles 290 and 296 of UNCLOS

[75] RPO, paras. 94-96.
[76] Ukraine's Observations, para. 21.
[77] *Ibid.*
[78] RPO, para. 16.
[79] See above Sections II.A and B.
[80] Ukraine's Observations, para. 22.
[81] *Ibid.*

proves that this principle does not need to be codified in a treaty to apply. In any event, Ukraine's argument must also fail in light of the fact that the rule expressed in *LaGrand* was also applied in *Ghana/Côte d'Ivoire*, a case decided by the Special Chamber of ITLOS and that involves and applies UNCLOS.[82] This was deliberately ignored by Ukraine, as there is no mention of this case in its Observations.

41. Ukraine also notes that "the question of whether Russia is responsible for a violation of the provisional measures order is for the merits".[83] This is obviously so, provided that, contrary to Russia's view, this Tribunal has jurisdiction to adjudicate the matter. In fact, Russia's alleged responsibility in this regard has not been addressed in the Preliminary Objections as it is not relevant at this stage.

42. In light of the above, this objection should also be addressed in a preliminary phase.

D. The Russian objection that the Tribunal lacks jurisdiction on Ukraine's claim that Russia has aggravated the dispute is exclusively preliminary in character

43. In its Preliminary Objections Russia clarified that Ukraine's claim that Russia aggravated the dispute is in fact a claim that Russia has not complied with the ITLOS Provisional Measures Order.[84] The Order's operative part contains a point prescribing that the Parties "shall refrain from taking any action which might aggravate or extend the dispute".[85] Ukraine's objection concerning this part of the Provisional Measures Order calls for the same answer as in Section II.C.

44. Ukraine nevertheless insists on its claim that Russia's alleged aggravation of the dispute falls under Article 279 of UNCLOS.[86] Russia denies that this is the case because Article 279 does not refer to aggravation,[87] and because, as stated above, Article 279 does not offer an autonomous ground for a contentious claim.

45. Ukraine states that 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".[88]

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[82] RPO, para. 95.
[83] Ukraine's Observations, para. 22.
[84] RPO, para. 92.
[85] *Case Concerning The Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Provisional Measures, Order of 25 May 2019* ("ITLOS PM Order"), para. 124(1)(c) (**UAL-2**).
[86] Ukraine's Observations, para. 23.
[87] See RPO, paras. 97-101.
[88] Ukraine's Observations, para. 23.

46. There is no reason, however, for dealing with this question together with the merits.

47. Whether Article 279 of UNCLOS refers to the aggravation of disputes is a pure question of law having no reference to facts. It can be decided by the Tribunal in a preliminary phase.

E. Article 283 of UNCLOS objection is a preliminary objection to be decided at the preliminary stage

48. Article 11(3) of the Rules of Procedure of this arbitration is clear: a preliminary objection shall be addressed at the preliminary stage "unless it does not possess an exclusively preliminary character".

49. Ukraine's argument that Article 283 of UNCLOS objection should be joined with the merits ignores the Rules of Procedure adopted in this arbitration, as well as established practice of international courts and tribunals on what constitutes a preliminary objection.

50. International courts and tribunals have consistently treated objections based on failure to satisfy procedural preconditions to the exercise of jurisdiction, such as existence of a dispute[89] or exhaustion of other means of settlement of the dispute,[90] as preliminary objections. Both the ITLOS[91] and Annex VII tribunal[92] treated Article 283 of UNCLOS objection, specifically, as a proper preliminary one.

51. Ukraine's reference to the decisions of the *Chagos Marine Protected Area* and *Suriname/Guyana* tribunals not to bifurcate Article 283 objections[93] is of no assistance to this Tribunal. Unlike the present case, the rules of procedure in these arbitrations did not envisage bifurcation of preliminary objections.[94] For example, Article 11(3) of the rules of procedure in

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[89] E.g., *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, pp. 846-856, paras. 26-57 (**RUL-29**).

[90] E.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 132, para. 157 **(RUL-53)**; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary objections*, Judgment, 8 November 2019, pp. 30-31, paras. 69-70 **(RUL-60)**; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 16, para. 20 (**RUL-46**).

[91] *The M/V "Norstar" Case (Panama v. Italy*), Preliminary Objections, Judgment, 4 November 2016, para. 207 (**RUL-30**).

[92] *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China), PCA Case No. 2013-19*, Award on Jurisdiction and Admissibility, 29 October 2015, para. 332 (**UAL-5**).

[93] Ukraine's Observations, para. 27.

[94] Ukraine relies on an unpublished order in the *Duzgit Integrity* refusing to bifurcate certain jurisdictional and admissibility objections. That decision provides no guidance to this Tribunal: there is no publicly available information concerning whether the rules of procedure in that arbitration provided for bifurcation of preliminary

the *Chagos Marine Protected Area* provided that

> "The Arbitral Tribunal may, after ascertaining the views of the Parties, determine whether objections to jurisdiction or admissibility shall be addressed as a preliminary matter or deferred to the Tribunal's final award. If either Party so requests, the Arbitral Tribunal shall hold hearings prior to ruling on any objection to jurisdiction or admissibility."[95]

Similarly, the rules of procedure in Guyana/Suriname arbitration provided that

> "The Arbitral Tribunal, after ascertaining the views of the Parties, may rule on objections to jurisdiction or admissibility as a preliminary issue or in its final Award."[96]

52. Ukraine is incorrect in asserting that the objection is "interwoven with the merits" since the Tribunal will need to consider the facts relating to the "urgency" of Ukraine's situation.[97] First, Ukraine's observations do not identify any claim on the merits made by Ukraine depending on whether the situation was urgent, hence in assessing compliance with Article 283 of UNCLOS the Tribunal could not be addressing an issue relevant to the merits. Second, the facts Ukraine identifies as the ones that the Tribunal may need to consider: the detention of Ukraine's Vessels and Servicemen at the time of Ukraine's *Note Verbale* of 15 March 2019 and the existence of the ongoing criminal proceedings against the servicemen at that time[98] are matters of the record and are not contested by the Russian Federation.

53. Finally, contrary to Ukraine's submission,[99] ITLOS *prima facie* finding that Article 283 of UNCLOS was satisfied in this case does not justify the joinder of Article 283 objection to the merits. As pointed out by ITLOS itself, the Order "*in no way prejudges the question of the jurisdiction of the Annex VII arbitral tribunal… and leaves unaffected the rights of Ukraine and the Russian Federation to submit arguments in respect of these questions*".[100] In fact, Ukraine invites the Tribunal to prejudge the merits of the Russian Federation's objection in deciding on whether to bifurcate the arbitration. This is not only inappropriate but also irrelevant under the test established by Article 11(3) of the Rules of Procedure. Whether the preliminary objection should be upheld or denied is an issue properly decided after the parties have had full opportunity to present their arguments in writing and at the hearing. Under

objections, the applicable criteria for bifurcation, whether Article 283 of UNCLOS objection was raised as a preliminary objection and the reasons the tribunal refused to bifurcate proceedings in that case.

[95] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Rules of Procedure, 29 March 2012, Article 11(3) (**RUL-54**).

[96] *Guyana v. Suriname*, Rules of Procedure, 2004, Article 10(3) (**RUL-49**).

[97] Ukraine's Observations, para. 26.

[98] *Ibid*.

[99] *Ibid.*, para. 25.

[100] ITLOS PM Order, para. 122.

Article 11(3) of the Rules of Procedure the assessment of the merits of the objection does not affect the decision on whether the objection is preliminary or not.

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III. UKRAINE'S CASE ON THE INTERESTS OF EFFICIENCY AND JUSTICE

54. Ukraine's Observations include a short section on supposed interests of efficiency and justice that are said to be served by bifurcation. This calls for two short points.

55. First, the express requirement established by Article 11(3) for the joinder of a Preliminary Objection to the merits – that the Preliminary Objection does not possess an exclusively preliminary character – could not be bypassed by a claim to supposed interests of efficiency and justice. It is for Ukraine to persuade the Tribunal that (i) a given Preliminary Objection does not possess an exclusively preliminary character and (ii) should be ruled upon in conjunction with the merits. The alleged interests of efficiency and justice that Ukraine has raised could go only to the latter.

56. Second, the three points that Ukraine has raised that are said to go to the interests of efficiency and justice are notably weak.

a. The point on which Ukraine places the greatest emphasis is that its claim is limited in nature and involves only a single incident as to which Russia's Preliminary Objections are duplicative.[101] Hence, it is said, that bifurcation would risk delay, increased costs, fragmentation of the evidence and duplicative briefing.[102] Yet, as already noted, Russia's objections are serious, discrete and suitable for consideration at a preliminary phase, regarding which, moreover, there are reasonable time limits set for written pleadings[103] with a hearing that the Rules of Procedure expressly provide "shall be held as expeditiously as is practicable".[104] If the objections are determined in Russia's favour, this will lead to dismissal of Ukraine's claim, ensuring a swifter determination of this dispute, and avoiding unnecessary time and expense. Thus, the "interests of efficiency and justice" are in fact served by the determination of

[101] Ukraine's Observations, para. 30: "while the issues in this case are important, they are also limited in nature". This position sits uneasily with its speculative (and erroneous) claim that a myriad of factual disputes loom on the horizon (Ukraine's Observations, para. 14: " […] in addition to the overt factual disputes noted above, there are additional such disputes that will crystallize as the proceedings continue.").
[102] Ukraine's Observations, paras. 2, 30-31.
[103] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. Russian Federation), PCA Case No. 2019-28*, Procedural Order No. 1, 22 November 2019, para. 5(h): "In the event that the Arbitral Tribunal rules that one or more Preliminary Objections shall be addressed in a preliminary phase, Ukraine shall submit its written response to the Preliminary Objection(s) no later than three months from the date of the ruling of the Arbitral Tribunal. A Hearing on Preliminary Objections shall then be held on dates to be fixed, after ascertaining the views of the Parties, by the Arbitral Tribunal".
[104] Rules of Procedure, Article 11(5).

Preliminary Objections at a preliminary phase.[105] As to the alleged duplication, this has already been addressed in Section II above.

b. As to the position of Ukraine's Military Servicemen,[106] the key point is that these were all released over a year ago.[107]

c. As to the prior practice of Annex VII tribunals, Ukraine cites just three cases where there was no bifurcation,[108] compared to four cases where there was,[109] including *Southern Blue Fin Tuna* where the tribunal disposed of the case at the preliminary objections phase[110] and *Coastal State Rights* where the tribunal accepted the key "sovereignty" objection,[111] a conclusion which the tribunal noted affected "many" of Ukraine's claims.[112] As to the *South China Sea* example,[113] the jurisdictional phase substantially narrowed the issues to be addressed at the merits phase,[114] i.e. promoting the interests of efficiency and justice that Ukraine now relies upon to suggest that there should be no preliminary phase. In any event, the key point (as noted at paragraph 4(b) above) is that the specific outcome of previous cases will

[105] See, e.g., Declaration of Judge Keith in *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, para. 1 (**RUL-52**): "The Court has the power and the responsibility, when it may properly do so, to decide at a preliminary stage of a case a matter in dispute between the Parties if deciding that matter will facilitate the resolution of the case. That power and responsibility arise from the principle of the good administration of justice … The Court should not leave unresolved for later and further argument a matter which in the particular circumstances of the case may be properly decided at that earlier stage". See further *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, Joint declaration of Judges Guillaume and Fleischhauer*, pp. 49-50 noting: "When the Court, in 1972, adopted the text which later became Article 79, it did so for reasons of procedural economy and of sound administration of justice. Court and parties were called upon to clear away preliminary questions of jurisdiction and admissibility as well as other preliminary objections before entering into lengthy and costly proceedings on the merits of a case" (**RUL-47**).

[106] Ukraine's Observations, para. 28.

[107] The Ukrainian Military Servicemen were released on 7 September 2019 and the Ukrainian Military Vessels were released on 18 November 2019.

[108] Ukraine's Observations, fn. 75 (*Guyana v. Suriname*; *Duzgit Integrity*; *Chagos*).

[109] Ukraine's Observations, fn. 76 (*South China Sea*; *Arctic Sunrise*; *Coastal State Rights*; *Southern Bluefin Tuna*).

[110] *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000 (**UAL-45**).

[111] I.e., that it lacked jurisdiction over the dispute as submitted by Ukraine to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea.

[112] *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 concerning the Preliminary Objections of the Russian Federation, 21 February 2020, paras. 197-198 (**UAL-25**). As to the specific example of the approach of the *South China Sea* case, see para. 25 above.

[113] Cited again at para. 29 of Ukraine's Observations.

[114] *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015* (**UAL-5**), decision at para. 413.

be of limited assistance,[115] given that this will be fact and issue dependent (as well as depending on the specific procedural rule[116]); the question before this Tribunal is whether in this case Russia's Preliminary Objections are indeed of an exclusively preliminary character (which they are).

57. In short, the interests of efficiency and justice do not favour Ukraine's position and, moreover, Ukraine is once again ignoring the underlying point of legal principle that a State should not have to give an account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter, or whose jurisdiction has not yet been established.[117]

* * *

58. In conclusion, for the reasons set out above, the Russian Federation requests that the Tribunal determine that the Russian Federation's Preliminary Objections are exclusively preliminary in character and accordingly shall be ruled on in a preliminary phase of the proceedings in accordance with Article 11(3) of the Rules of Procedure.

Moscow, 21 September 2020

Dmitry A. Lobach
Agent of the Russian Federation

[115] For example, in *Guyana v. Suriname*, where there was no bifurcation, the jurisdictional objection was of such a nature that the tribunal was ultimately able to dispose of it in a single sentence (See Award of 17 September 2007, para. 280, **UAL-39**).

[116] It is to be noted that the relevant procedural rule in each of *Guyana v. Suriname* and *Chagos* was materially different to Article 11(3), i.e., there was no default rule in favour of Preliminary Objections being heard at a preliminary phase. *Cf.* Article 10(3) of the Rules of Procedure in *Guyana v. Suriname* and Article 11(3) of the Rules of Procedure in the *Chagos Arbitration* (**RUL-49** and **RUL-54**) The Rules of Procedure in *Duzgit Integrity* do not appear to be in the public domain.

[117] See para. 6 above citing the relevant case law.

Appendix I

ANNEXES: LEGAL AUTHORITIES

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