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PCA Case No. 2017-06

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

before

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

between

UKRAINE

and

THE RUSSIAN FEDERATION

REVISED MEMORIAL OF UKRAINE

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

REGISTRY
The Permanent Court of Arbitration

20 May 2021

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Chapter One: Introduction

1. Positioned on the Black Sea, the Sea of Azov, and the Kerch Strait which connects them, Ukraine relies on access to the world's oceans — access guaranteed by the United Nations Convention on the Law of the Sea (“UNCLOS” or the “Convention”). Since 2014, however, Russia has defied the legal order for the oceans established by the Convention and applicable in these waters. Russia has undermined freedom of navigation and transit passage, jeopardized the environment, and risked priceless cultural heritage. This conduct breaches Russia's obligations to all UNCLOS States Parties, and has particularly injured Ukraine.

2. Russia's disregard for the freedom of navigation is nowhere clearer than in the Kerch Strait — a busy international waterway that has historically carried more than 10,000 vessel transits each year. There, in violation of the Convention's guarantee of transit passage, the Russian Federation has unilaterally built a bridge with a clearance of 33 meters that prevents the passage of large cargo vessels, as well as specialized vessels, that used or foreseeably would have used the Strait. Russia's bridge impedes traffic to Ukraine's Sea of Azov ports at Mariupol and Berdyansk, while leaving unaffected the smaller vessels that call at Russia's ports on the Don River and the Russian internal waterway system. Between January 2011 and July 2017, [REDACTED] [REDACTED] passed through the Kerch Strait and called at Mariupol and Berdyansk. Since August 2017, when the central arch of the bridge was put in place, not a single vessel of this size has been able to reach those ports. Moreover, even for smaller vessels, Russia's hastily constructed bridge poses potential hazards: its structural integrity is far from assured in the challenging conditions of the Kerch Strait and the bridge may hamper navigation by promoting ice buildup and sedimentation in the Strait. In violation of its obligations as a State bordering an international strait, Russia has failed to provide requested information on these threats to safe navigation.

3. Russia has impeded passage through the Kerch Strait and navigation in the Sea of Azov in other ways, as well. Commercial vessels heading through the Strait to Ukrainian ports now face long delays and frequent inspections by armed personnel from the Russian Border Guard. Foreign governmental vessels are, at present, subject to a complete restriction on passage through the Kerch Strait that is expected to last more than six months. In the Sea of Azov, vessels also have faced stoppages and inspections by Russian authorities.

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In addition to interfering with free navigation, Russia has violated Ukraine's rights as a flag State, both by stopping and inspecting Ukrainian vessels, and also by seizing two of them — the jack-up drilling rigs (“JDRs”) *Sivash* and *Tavrida* — in the territorial sea adjacent to Crimea.

4. Russia's construction projects in the Kerch Strait have threatened not only navigation, but also the marine environment. The Black Sea, Sea of Azov, and Kerch Strait comprise a single, interconnected ecosystem, and are enclosed seas subject to heightened obligations of cooperation under UNCLOS. The Black Sea and Sea of Azov are particularly susceptible to pollution, and they are home to an abundance of marine life. Russia has risked the health of this fragile marine ecosystem by disregarding its obligations to protect and preserve the environment, including by failing to conduct adequate environmental impact assessments and environmental monitoring, and failing to cooperate on environmental matters with Ukraine and other littoral States. In plain terms, Russia has placed in the Kerch Strait more than 12 million metric tons of construction materials, a liquid-natural-gas pipeline, and five undersea cables; yet, in violation of multiple provisions of UNCLOS, Russia has failed to conduct any valid assessment of the environmental effect of these activities.

5. Russia's reckless approach to the fragile marine environment of this region has been mirrored by its utter failure to protect the uniquely well-preserved underwater cultural heritage (“UCH”) of the Black Sea, Sea of Azov, and Kerch Strait. Amateur divers have been given free rein to despoil newly discovered sites of world importance, removing amphorae from the seabed with flagrant disregard for established international standards for marine archaeology. Instead of putting a stop to these activities, the Russian authorities have commended and encouraged them, even sending the President of the Russian Federation down to one key site in a submersible for a photo opportunity. In one particularly egregious example of its cavalier attitude towards UCH, after damaging a World War II-era airplane by allowing an amateur group to use a construction crane to lift it out of the Kerch Strait, Russia allowed another group to undertake the same process — risking harm to yet another historic plane. The Black Sea, Sea of Azov, and Kerch Strait have for centuries been an international crossroads, used not only by the ancient Greeks, but also by the Romans, Byzantines, Venetians, and many others. UNCLOS imposes a far higher standard of protection for these irreplaceable archeological and historic objects than Russia has provided.

6. Russia's disregard for its UNCLOS obligations in the Black Sea, Sea of Azov, and Kerch Strait has resulted in great injury to Ukraine. At the same time, Russia's violations reach far beyond Ukraine: in its disrespect for the core tenets of UNCLOS, Russia has set itself in opposition to all UNCLOS States Parties. Multiple States, and the U.N. General Assembly, have expressed grave concerns about the conduct at issue in this arbitration, and about Russia's attempts to exclude UNCLOS from the Sea of Azov and Kerch Strait. Ukraine asks the Tribunal to declare the Russian Federation in violation of UNCLOS and vindicate the rights of Ukraine and other UNCLOS States Parties, including by ordering Russia to: cease hindering navigation in the Kerch Strait and to and from Ukrainian ports; modify the Kerch Strait bridge so that it ceases to be an impediment to transit passage; assess and implement effective environmental protection measures; and cease harming valuable underwater cultural heritage. It is imperative that Russia not be permitted to persist in its unilateral approach that seeks to place itself above the law.

7. The basis for Ukraine's requested relief is explained in this Revised Memorial, which is organized as follows: Chapter Two sets forth the procedural history of this dispute. Chapter Three explains why the Tribunal has jurisdiction over this dispute under section 2 of UNCLOS Part XV, accounting for the Tribunal's Award on Preliminary Objections. Chapter Four provides factual background on the importance of the Black Sea, Sea of Azov, and Kerch Strait to Ukraine. Chapter Five establishes that the Sea of Azov and Kerch Strait are governed by UNCLOS and, in particular, that the Sea of Azov contains areas of exclusive economic zone such that the Kerch Strait is an international strait subject to the regime of transit passage. Chapter Six sets out Ukraine's claims and describes how Russia has violated, and is still violating, its obligations and Ukraine's rights under the Convention. Chapter Seven sets out the ways in which Russia has deepened and compounded its violations of the Convention since the commencement of this arbitration, thereby breaching its obligation not to aggravate the dispute before this Tribunal. Chapter Eight describes the relief to which Ukraine is entitled as a result of Russia's actions, and Chapter Nine contains Ukraine's Submissions.

Chapter Two: Procedural History

8. This proceeding commenced on 16 September 2016, when Ukraine served on the Russian Federation its Notification and Statement of the Claim and Grounds on which it is Based pursuant to Article 287 and Annex VII, Article I of UNCLOS (“Notification”). The Tribunal was constituted on 22 December 2016, comprising H.E. Judge Jin-Hyun Paik as President, and H.E. Judge Boualem Bouguetaia, H.E. Judge Alonso Gómez-Robledo, Professor Vaughan Lowe QC, and H.E. Judge Vladimir Vladimirovich Golitsyn as arbitrators.² Professor Lowe and Judge Golitsyn were appointed by Ukraine and Russia, respectively, and the remaining appointments were made by the then-Vice-President of the International Tribunal for the Law of the Sea (“ITLOS”), H.E. Judge Boualem Bouguetaia, pursuant to Article 3, subparagraph (d) of Annex VII to the Convention.³

9. Following an initial Procedural Conference held in the Hague on 12 May 2017, and pursuant to the Rules of Procedure adopted by the Tribunal on 18 May 2017,⁴ Ukraine submitted its original Memorial on 19 February 2018 (“Original Memorial”). The Russian Federation submitted Preliminary Objections dated 19 May 2018 (“Preliminary Objections”), raising six grounds for opposing jurisdiction and admissibility.⁵ On 20 August 2018, the Tribunal issued Procedural Order No. 3, in which it determined to consider Russia’s Preliminary Objections prior to hearing the merits.⁶

10. The parties then exchanged two rounds of written submissions on the Preliminary Objections, with Ukraine submitting its Written Observations and Submissions on 27 November 2018,⁷ Russia filing a Reply on 28 January 2019,⁸ and Ukraine submitting a Rejoinder on 28 March 2019.⁹ The Tribunal conducted oral hearings on Russia’s Preliminary Objections the week of 10 June 2019, during which each Party presented two rounds of oral argument.¹⁰

² Procedural Order Regarding the Terms of Appointment of the Tribunal (18 May 2017) § 3.

³ *Id.*

⁴ Rules of Procedure, dated 18 May 2017, Art. 13(1).

⁵ Preliminary Objection of the Russian Federation, dated 19 May 2018 [hereinafter “Preliminary Objections”].

⁶ Procedural Order No. 3, Regarding Bifurcation of the Proceedings (20 August 2018), p. 5.

⁷ See Written Observation and Submissions of Ukraine on Jurisdiction, dated 27 November 2018.

⁸ Reply of the Russian Federation to the Written Observations and Submissions of Ukraine on Jurisdiction, dated 28 January 2019.

⁹ Rejoinder of Ukraine on Jurisdiction, dated 28 March 2019.

¹⁰ See *generally* Transcripts of Hearing on Preliminary Objections, dated 10-14 June 2019.

11. On 21 February 2020, the Tribunal issued its Award on Preliminary Objections stating that it:

“Upholds the Russian Federation’s objection that the Arbitral Tribunal has no jurisdiction over Ukraine’s claims, to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine’s claims necessarily requires it to decide, directly or implicitly, on the sovereignty of either Party over Crimea;

“Finds that the Russian Federation’s objection that the Arbitral Tribunal has no jurisdiction over Ukraine’s claims concerning activities in the Sea of Azov and in the Kerch Strait does not possess an exclusively preliminary character, and accordingly decides to reserve this matter for consideration and decision in the proceedings on the merits;

“Rejects the other objections of the Russian Federation to its jurisdiction^[11];

“Requests Ukraine to file a revised version of its Memorial, which shall take full account of the scope of, and limits to, the Arbitral Tribunal’s jurisdiction as determined in the [. . .] Award[.]”¹²

12. In its Procedural Order No. 6 of 21 February 2020, the Tribunal fixed the procedural timetable for the further proceedings on the merits, inviting Ukraine to submit this Revised Memorial no later than 20 November 2020.¹³ In its Procedural Order No. 7 of 17 November 2020, the Tribunal extended the date for submission of Ukraine’s Revised Memorial to no later than 20 May 2021.¹⁴

¹¹ The objections rejected by the Tribunal concerned: (i) alleged military activities under Article 298(1)(b); (ii) alleged law enforcement activities under Article 298(1)(b); (iii) Article 298(1)(a)(i); (iv) Article 297(3)(a); (v) the alleged agreement of the parties under Article 287 on the use of Annex VIII procedures; and (vi) alleged alternative dispute settlement provisions applicable under Article 281. See Procedural Order No. 3, Regarding Bifurcation of the Proceedings (20 August 2018), p. 2.

¹² Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, ¶ 492 [hereinafter “Award on Preliminary Objections”].

¹³ Procedural Order No. 6, Regarding the Procedural Timetable for Further Proceedings (21 February 2020), ¶ 2(a).

¹⁴ Procedural Order No. 7, Regarding the Revised Procedural Timetable for Further Proceedings (17 November 2020), ¶ 1(a).

Chapter Three: The Tribunal's Jurisdiction Over the Dispute Before It

13. This Tribunal has jurisdiction to resolve Ukraine's claims. As set out in the prior Chapter, the Tribunal has rejected all of Russia's objections to jurisdiction and admissibility, save two. Consistent with the Tribunal's Award on Preliminary Objections,¹⁵ the claims set forth in this Revised Memorial do not require a decision on the sovereignty of either Party over Crimea. Rather, they relate to the Russian Federation's disregard for its UNCLOS obligations and the maritime rights of Ukraine, as well as for the interests of the many other UNCLOS States Parties that may use the Black Sea, Sea of Azov, and Kerch Strait for navigation and transit passage, desire to protect the delicate ecosystem of these waters, and have an interest in the rich cultural heritage that lies beneath them.

14. The Tribunal's Award on Preliminary Objections reserved for the merits stage the question of the legal status of the Sea of Azov and Kerch Strait.¹⁶ Chapter Five explains that the Sea of Azov contains areas of territorial sea and exclusive economic zone and that the Kerch Strait is thus an international strait. Ukraine's claims relating to the Sea of Azov and Kerch Strait are thus properly before this Tribunal.

15. Finally, in its Preliminary Objections, Russia argued that this Tribunal was barred from hearing Ukraine's case under Article 281, Article 287 and Annex VIII, and Articles 297 and 298. The Tribunal conclusively rejected Russia's objections under these provisions.¹⁷

16. For the avoidance of doubt, Ukraine also meets all other preconditions to jurisdiction. Ukraine and Russia are both States Parties to UNCLOS,¹⁸ and the conditions set out in Articles 286 and 288(1) for the Tribunal's exercise of compulsory jurisdiction have been met.

17. These two articles provide for compulsory resolution of disputes that are submitted pursuant to the procedures set out in the Convention, and that "concern[] the interpretation or application of [the] Convention." Specifically, UNCLOS Article 286 provides that "any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1 [of UNCLOS Part XV],

¹⁵ Award on Preliminary Objections, ¶ 492.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Ukraine ratified UNCLOS on 26 July 1999, and the Russian Federation ratified UNCLOS on 12 March 1997.

be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under [section 2 of UNCLOS Part XV].”¹⁹ Article 288(1) provides that “[a] court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.”²⁰ Ukraine has complied with the pre-dispute consultation requirements of section 1 of Part XV,²¹ and the Tribunal’s Award on Preliminary Objections confirms that “the dispute was submitted to it in accordance with the Convention and the declarations made by the Parties.”²²

18. Further, this dispute concerns the interpretation or application of the Convention, within the meaning of Articles 286 and 288(1). It concerns Russia’s violations of the provisions of the Convention governing: free navigation and passage through straits; protection (and cooperation with respect to the protection) of the marine environment; and protection of UCH. Specifically, Russia has violated:

- a. Articles 38, 43, and 44, by impeding navigation to and from Ukrainian ports through the Kerch Strait;
- b. Articles 2, 58, 87, and 92, through its harassment of vessels in the Sea of Azov;
- c. Articles 2 and 91, through its seizure of two Ukrainian-flagged JDRs;
- d. Articles 123, 192, 194, 204, 205, and 206, by failing to adequately assess, monitor, and protect against potentially harmful effects to the marine environment caused by the construction activities in the Kerch Strait;

¹⁹ UNCLOS Art. 286.

²⁰ UNCLOS Art. 288(1).

²¹ On numerous occasions, Ukraine has protested the Russian Federation’s violations of the Convention, both through bilateral diplomatic correspondence and in appropriate multilateral fora. *See, e.g., Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-620-518 (10 March 2015) (**UA-9**); *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-620-2476 (9 October 2015) (**UA-10**); Statement by Mr. Oleksiy Shapoval, Legal Adviser of the Permanent Mission of Ukraine to the United Nations, at the Plenary Meeting of the United Nations General Assembly on Oceans and the Law of the Sea (8 December 2015) (**UA-11**); Report on the Twenty-Fifth Meeting of States Parties to the United Nations Convention on the Law of the Sea, U.N. Doc. SPLOS/287 (13 July 2015), ¶ 94 (**UA-12**); *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation*, No. 1599/2dsng (16 February 2016) (**UA-13**). Ukraine also sought to consult and exchange views with the Russian Federation during a meeting in Minsk, Belarus, on 11 July 2016. *See Consultations Between Ukraine and Russia on the Interpretation and Application of UNCLOS at Minsk, Belarus* (11 July 2016), Informal Minutes Prepared by the Government of Ukraine, p. 30 (**UA-14**).

²² Award on Preliminary Objections, ¶ 41.

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- e. Articles 123, 192, 194, 204, 205, and 206 by failing to cooperate and share information with Ukraine and other potentially-affected States concerning the environmental impact of its construction activities in the Kerch Strait;
 - f. Articles 123, 192, 194, 198, 199, 204, and 205, by failing to notify and cooperate with Ukraine and other States in connection with imminent and actual damage to the marine environment caused by an oil spill off the coast of Sevastopol;
 - g. Article 303, in light of Russia's failure to protect undersea archeological and historical objects; and
 - h. Articles 279 and 300, by aggravating the dispute before the Tribunal.
19. The Tribunal has jurisdiction to resolve each of these claims.

Chapter Four: Importance of the Black Sea, Sea of Azov, and Kerch Strait

20. Comprising almost 500,000 square kilometers,²³ and connecting the Mediterranean to the Caucasus and to the great rivers of central and eastern Europe, the Black Sea, Sea of Azov, and Kerch Strait have for centuries served as an integral route for trade and cultural exchange, and as a home for an abundance of marine life. These waters are bordered by six States, and provide the nearest access to the seas for additional, landlocked nations.²⁴ Each of these States, and the broader community of UNCLOS States Parties, depend on their mutual respect for the law of the sea.

21. This Chapter provides background on these waters that is relevant to Russia's violations of the Convention. Ukraine (and other States Parties) have extensively used the Black Sea, the Sea of Azov, and the Kerch Strait as a critical navigational route, both for trade and, in Ukraine's case, for the extraction of valuable living and non-living resources. At the same time, Ukraine has benefited from the preservation of the sensitive and interconnected ecosystem of these waters, as well as the preservation of the undersea archeological and historic objects that serve as tangible reminders of the rich maritime history of this part of the world's seas and oceans. Russia's conduct in these waters has interfered with Ukraine's rights under the Convention and led to numerous violations of the law of the sea.

²³ See State Hydrographic Service of Ukraine, Oceanographic Atlas of the Black Sea and the Sea of Azov, No. 601, p. 31 (UA-1); Kerch Report, *The Commission on the Protection of the Black Sea Against Pollution*, p. 13 (UA-425-AM).

²⁴ See State Hydrographic Service of Ukraine, Oceanographic Atlas of the Black Sea and the Sea of Azov, No. 601, p. 31 (UA-1).



I. The Critical Role of the Black Sea, Sea of Azov, and Kerch Strait as a Navigational Route and a Source of Natural Resources

22. As a littoral State on the Black Sea and Sea of Azov, Ukraine has long relied on its access to these waters to support its economy. Ukraine's network of thirteen ports on both coasts has the capacity to handle over 230 million tons of cargo each year, and is critical to Ukraine's international trade.²⁵ Ukraine's ports are also integral to its ability to transport goods between its different regions. As the sole body of water connecting the Sea of Azov and the Black Sea, the Kerch Strait has long served both Ukrainian and third-State shipping lines — including major operators using large, ocean-going vessels — as an important international waterway.²⁶

23. In addition to linking Ukraine to the world's oceans, the Black Sea, Sea of Azov, and Kerch Strait are rich in natural resources, and free navigation has been essential to permit the exploration and enjoyment of these resources. In particular, the Black Sea and Sea of Azov abound in marine life, which has been harvested by both artisanal and commercial fishing vessels, and is of importance to communities all along Ukraine's coasts.²⁷ These waters also house significant offshore oil and gas reserves, and Ukrainian state-owned entities have invested in hydrocarbon service vessels and JDRs to access, explore, and develop these reserves.²⁸

A. Ukraine's Access From Its Coasts to the World's Oceans Through the Black Sea, Sea of Azov, and Kerch Strait

24. Ukraine accesses the world's oceans through its Sea of Azov and Black Sea coastlines, as shown in **Map 1**. Cargo transported through Ukraine's seaports accounts for nearly 40 percent of Ukraine's foreign trade in goods, and supports more than 57 percent of Ukraine's exports.²⁹ The seaports are equally important to internal trade: each year,

²⁵ Ukrainian Sea Ports Authority, *Facts and Figures*, p. 5 (2018) (UA-572).

²⁶ See Expert Report of [REDACTED] Report"), ¶¶ 3.1, 3.4.

²⁷ See generally Ulman A., et al., *A Reconstruction of the Ukraine's Marine Fisheries Catches, 1950-2010*, J. Black Sea/Mediterranean Environment, Vol. 21 (2015) pp. 104-105 (UA-59).

²⁸ See generally [REDACTED]

[REDACTED] CNG Vessel Patents (Jack-Up Drilling Rigs) (UA-53).

²⁹ Administration of Sea Ports of Ukraine, *Port Industry: A Driver of National Economic Growth* (2018) (UA-573). See generally Ukrainian Sea Ports Authority, *Facts and Figures* (2018) (UA-572).

millions of tons of grain, construction materials, and other dry goods move through Ukraine's seaports to other locations within Ukraine.³⁰

25. On the Sea of Azov, the ports of Mariupol and Berdyansk are integral to the economy of Ukraine's east, a heavily industrialized region, and thus to the Ukrainian economy as a whole.³¹ The Mariupol and Berdyansk ports play a central role in supplying eastern Ukraine with industrial commodities and serve as export hubs for steel and minerals.³² Together, Mariupol and Berdyansk handled a combined total of over 17 million metric tons of cargo in each of 2012 and 2013.³³ The volume of cargo processed through these ports has decreased, including as a consequence of the Russian actions set out in Chapter Six, but the ports remain important hubs for seaborne trade.³⁴

26. On the Black Sea, the ports of Odesa, Pivdennyi (also known as Yuzhnyi or Southern Port), and Mikolaiv collectively handled more than 85 million metric tons of cargo

³⁰ Ukrainian Sea Ports Authority, Total Cargo Turnover in January-December 2016 (2015-2016) (UA-80); Ukrainian Sea Ports Authority, Overall Volume of Cargo Shipped Along Domestic Routes at Sea Ports in January-December 2019 vs. the Comparable Period the Year Before (2018-2019) (UA-574).

³¹ Eastern regions of Ukraine that border or are close to the Sea of Azov — Donetsk, Dnipropetrovsk, Luhansk, and Zaporizhzhia — were among the top five regions in terms of industrial product sold each year from 2010 to 2013. State Statistics Service of Ukraine, Statistical Publication: Regions of Ukraine, Part II, pp. 228-232 (2016) (UA-76). This trend continued for Donetsk, Dnipropetrovsk, and Zaporizhzhia in 2014, 2015, 2016, and 2017. State Statistics Service of Ukraine, Statistical Publication: Regions of Ukraine, Part II, pp. 262-266 (2019) (UA-575).

³² See Ministry of Economic Development and Trade of Ukraine, Ukraine's Top-100 State-Owned Enterprises, p. 86 (2014) ("In the Azov Sea region, Ukraine has two ports, Mariupol and Berdyansk. In previous years, these ports benefited from their proximity to the industrialized Donbas region, shipping coal, iron ore and steel.") (UA-77).

³³ In 2012, Mariupol and Berdyansk handled a combined total of approximately 17.45 million metric tons of cargo. In 2013, the combined total cargo for both ports was 17.66 million metric tons. See Ukrainian Sea Ports Authority, Overall Volumes of Cargo Handling by Sea Terminals for January-December 2013 in Comparison with the Same Period Last Year (2012-2013) (UA-78).

³⁴ See *id.* The Mariupol sea port handled in total approximately 13 million metric tons of cargo in 2014, 8.9 million metric tons in 2015, 7.6 million metric tons in 2016, 6.5 million metric tons in 2017, 5.9 million metric tons in 2018, and 6.5 million metric tons in 2019; the Berdyansk sea port in total handled approximately 3.2 million metric tons of cargo in 2014, 4.4 million metric tons in 2015, 3.8 million metric tons in 2016, 2.4 million metric tons in 2017, 1.8 million metric tons in 2018, and 2 million metric tons in 2019. Ukrainian Sea Ports Authority, Overall Volumes of Cargo Handling by Stevedore Companies at Sea Ports of the Continental Section & the Autonomous Republic of Crimea for January-December 2014 in Comparison with the Same Period Last Year (2013-2014) (UA-79); Ukrainian Sea Ports Authority, Total Cargo Turnover in January-December 2016 (2015-2016) (UA-80); Ukrainian Sea Ports Authority, Overall Volume of Cargo Handled by Sea Port Terminals in January-December 2018 vs. the Comparable Period the Year Before (2017-2018) (UA-576); Ukrainian Sea Ports Authority, Overall Volume of Cargo Handled by Sea Port Terminals in January-December 2019 vs. the Comparable Period the Year Before (2018-2019) (UA-577).

each year from 2012 through the 2019 (the last year for which data is available).³⁵ The ports historically handled 55-60 percent of Ukraine's seaborne cargo.³⁶ More recently, as Russia has interfered with navigation through the Kerch Strait and into the Sea of Azov, these ports have together accounted for a comparatively greater percentage of the country's seaborne exports.³⁷ The ports handle industrial goods such as automotive and agricultural machinery, as well as agricultural goods.³⁸

27. The Kerch Strait, too, has long served as an important international waterway. As shown in **Map 2**, the Strait is the sole body of water connecting Ukraine's ports on the Sea of Azov to its ports on the Black Sea, as well as to the broader international maritime network, allowing both goods and people to flow. The Strait also enables access from the Black Sea to the Russian ports at the mouth of the Don River, and to navigable deep water river and canal networks, including the Volga-Don network leading to the Caspian Sea.

³⁵ Ukrainian Sea Ports Authority, Overall Volumes of Cargo Handling by Sea Terminals for January-December 2013 in Comparison with the Same Period Last Year (2012-2013) (**UA-78**); Ukrainian Sea Ports Authority, Overall Volumes of Cargo Handling by Stevedore Companies at Sea Ports of the Continental Section and the Autonomous Republic of Crimea for January-December 2014 in Comparison with the Same Period Last Year (2013-2014) (**UA-79**); Ukrainian Sea Ports Authority, Total Cargo Turnover in January-December 2016 (2015-2016) (**UA-80**); Ukrainian Sea Ports Authority, Overall Volume of Cargo Handled by Sea Port Terminals in January-December 2018 vs. the Comparable Period the Year Before (2017-2018) (**UA-576**); Ukrainian Sea Ports Authority, Overall Volume of Cargo Handled by Sea Port Terminals in January-December 2019 vs. the Comparable Period the Year Before (2018-2019) (**UA-577**).

³⁶ See, e.g., Ministry of Economic Development and Trade of Ukraine, Ukraine's Top-100 State-Owned Enterprises, p. 86 (2014) ("The largest ports are Odesa, Illichivsk and Yuzhny, all located in the north-western part of the Black Sea. In 2014, they accounted for 63 percent of Ukraine's total seaport cargo turnover.") (**UA-77**).

³⁷ Ukrainian Sea Ports Authority, Overall Volume of Cargo Handled by Sea Port Terminals in January-December 2018 vs. the Comparable Period the Year Before (2017-2018) (Odesa, Pivdennyi, and Mikolaiv ports combining for approximately 112 million metric tons out of a total of 160 million metric tons of total cargo handled in 2019) (**UA- 576**); Ukrainian Sea Ports Authority, Overall Volume of Cargo Handled by Sea Port Terminals in January-December 2019 vs. the Comparable Period the Year Before (2018-2019) (**UA- 577**).

³⁸ Ukrainian Sea Ports Authority, Overall Volume of Cargo Handled by Sea Port Terminals in January-December 2018 vs. the Comparable Period the Year Before (2017-2018) (Odesa, Pivdennyi, and Mikolaiv ports combining for approximately 112 million metric tons out of a total of 160 million metric tons of total cargo handled in 2019) (**UA-576**); Ukrainian Sea Ports Authority, Overall Volume of Cargo Handled by Sea Port Terminals in January-December 2019 vs. the Comparable Period the Year Before (2018-2019) (**UA-577**).



Map 2

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28. According to data collected by the Kerch Commercial Sea Port, vessels transited the Kerch Strait 43,688 times between 2011 and 2013.³⁹ Of these, 41,172 were transits by vessels flagged to States other than Ukraine.⁴⁰ Many of these vessels were of significant size and commercial importance — [REDACTED]

[REDACTED]

29. Both Mariupol and Berdyansk also regularly handled vessels exceeding 30,000t DWT, including vessels in the Panamax class.⁴⁴ [REDACTED]

[REDACTED]

[REDACTED] The Berdyansk sea port also accommodates substantial international cargo traffic. [REDACTED]

[REDACTED]

³⁹ [REDACTED]. Data from the Kerch Sea Port is not accessible to Ukraine after 2013, as Russia took control of the Sea Port as part of its purported annexation of Crimea in 2014.

⁴⁰ *Id.*

⁴¹ [REDACTED]

⁴² See [REDACTED] Report, ¶ 4.22.

⁴³ [REDACTED]

⁴⁴ [REDACTED]

⁴⁵ [REDACTED] Bulk carriers with a DWT between 60,000-79,999t are generally classified as Panamax bulk carriers. See [REDACTED] Report, ¶ 4.22.

[REDACTED]

30. The many large vessels that called at Mariupol and Berdyansk between 2011 and 2016 necessarily transited the Kerch Strait to do so — [REDACTED] — as the Russian waterways that can be accessed from the Sea of Azov cannot accommodate large, seagoing vessels.⁴⁹

31. In addition to merchant vessels, the Kerch Strait is also an important means of access for many specialized classes of vessels — such as pipe layers, cable layers, gantry crate carriers, and heavy lift crane barges — that are needed to support the development and use of operating and prospective hydrocarbon deposits in the Sea of Azov.⁵⁰

32. Until 2014, Ukraine and Russia jointly managed navigation through the Kerch Strait, and Russia repeatedly recognized the importance of cooperation in this regard.⁵¹ As one aspect of this cooperation, the possibility of a bridge connecting the Ukrainian and Russian coasts on the Kerch Strait had been the subject of bilateral consultation for many years, starting in the late 1990s. In those consultations, it was the Parties' common understanding that any bridge across the Kerch Strait would have to be a cooperative endeavor between the two bordering States.⁵²

⁴⁶ [REDACTED]

⁴⁷ *Id.*

⁴⁸ [REDACTED]

⁴⁹ See Witness Statement of [REDACTED] ¶ 14. See also U.N. Economic and Social Council, Economic Commission for Europe, Exchange of Information on Measures Aimed at Promoting Transport by Inland Waterways: Submitted by the Government of the Russian Federation, U.N. Doc. TRANS/SC.3/2003/3, (19 June 2003), ¶ 7 and Table 1 (noting that “[t]he plan dimensions of locks on the lower Don and the Volga-Don canal are 145 m x 17-18 m . . .” and listing the length of the “Volgo-Don” vessel type as 138.3 meters) (UA-92). In contrast to Russia, Ukraine’s major waterways flow into the Black Sea, as opposed to the Sea of Azov.

⁵⁰ See [REDACTED] Report, ¶¶ 4.52-4.57.

⁵¹ See, e.g., Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on Steps to Ensure Navigational Safety in the Sea of Azov and the Kerch Strait (20 March 2012) (UA-94); Joint Declaration of the Presidents of Ukraine and the Russian Federation on the Delimitation of the Maritime Boundaries of the Azov and Black Seas and the Kerch Strait (12 July 2012) (UA-95).

⁵² See Agreement Between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on Joint Steps to Organize the Construction of a Transport Crossing Across the Kerch Strait (17 December 2013), Arts. 1, 3 (noting that implementation of an agreement to organize “the

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33. Both Parties further agreed that any bridge would be constructed in an environmentally sound manner, and would not impede navigation through the Strait to Ukraine's Sea of Azov ports. For example, a 2013 agreement between Ukraine and Russia specifically provided that any future bridge "should not alter the direction or volume of water flow within the Kerch Strait or alter its course, nor should it cause detriment to navigational safety."⁵³ The agreement also specified that "the Parties have agreed" to "conduct[] seismological engineering studies (assessing seismic safety) and environmental engineering studies" in connection with any construction activities, and that "creation of the transport crossing . . . should [not] cause detriment to . . . environmental safety . . . in this area."⁵⁴

34. A subsequent "Scope of Work" agreed to by Ukraine and Russia further confirmed that the design of the crossing across the Kerch Strait should take into account the requirements for "facilitating ship navigation."⁵⁵ It also reaffirmed that an environmental engineering survey should be conducted to assess the environmental impact of the bridge.⁵⁶

35. As a partner in these discussions, Ukraine was in a position to ensure that the clearance of any bridge across the Kerch Strait was sufficiently high so as not to impede navigation to its ports. Ukraine's interests in this regard were unique, given that Russia's most significant regional ports (the busiest being Rostov-on-Don) are riverine ports with water depths ranging from 3.6 to 5 meters, and thus not capable of handling the large ships

construction of a transport crossing across the Kerch Strait," would be achieved through the "coordination of activities" by the authorized bodies of both Ukraine and the Russian Federation) (**UA-96-AM**).

⁵³ *Id.* Art. 8. Following Russia's purported annexation of Crimea, Ukraine's Cabinet of Ministers terminated this agreement on 1 October 2014 in accordance with the procedures set forth in Article 12 of the Agreement. Cabinet of Ministers of Ukraine, Resolution No. 493, On Cancelling the Agreement Between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on Joint Steps to Organize the Construction of a Transport Crossing over the Kerch Strait (1 October 2014) (**UA-97**). The Ministry of Foreign Affairs of Ukraine notified Russia of its decision in a diplomatic note dated 8 October 2014. *See Note Verbale from Ukraine to the Russian Federation*, No. 72/23-612/1-2510 (8 October 2014) (**UA-98**); *Note Verbale from the Russian Federation to Ukraine*, No. 1431/N (17 October 2014) (acknowledging receipt of the 8 October 2014 diplomatic note) (**UA-242**). The Agreement terminated on 13 April 2015. *See Note Verbale from the Russian Federation to Ukraine*, No. 1490/N (6 November 2014) (**UA-99**).

⁵⁴ Agreement Between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on Joint Steps to Organize the Construction of a Transport Crossing Across the Kerch Strait (17 December 2013), Arts. 5, 8 (**UA-96-AM**).

⁵⁵ The Scope of Work for Engineering Surveys and the Development of a Feasibility Study for the Construction of a Transport Crossing Across the Kerch Strait (31 January 2014), § 8.12 (**UA-100**).

⁵⁶ *Id.* § 8.4; *see also id.* § 8.16 (noting that a full environmental impact assessment was to be conducted in the future, as well).

capable of calling at the Ukrainian ports of Mariupol and Berdyansk.⁵⁷ Ukrainian planning documents indicated that, to avoid impeding navigation, any bridge through the Kerch Strait should at the very minimum have a clearance of 50 meters from the waterline, and that a clearance of 65 meters would be more appropriate.⁵⁸ The Ukrainian position accorded with international practice. As explained by Ukraine’s navigation expert, [REDACTED], a comparative study of bridges over passages used by sea-going cargo vessels “strongly suggests that the clearance under a bridge spanning a waterway accommodating ocean-going vessels could be expected to be in a range of approximately 60 to 70 metres.”⁵⁹

B. Navigation of Ukrainian Vessels to Explore and Utilize Natural Resources in the Black Sea and Sea of Azov

36. In addition to using the Black Sea, Sea of Azov, and Kerch Strait as a corridor for trade and transport, Ukraine has also benefitted from the rich fisheries and hydrocarbons resources of these waters.⁶⁰ Free navigation throughout the Black Sea and Sea of Azov, and through the Kerch Strait, has been critical to Ukraine’s exploration and exploitation of these resources.

37. The Black Sea and Sea of Azov are rich in marine life. The Black Sea is home to nearly 180 species and sub-species of fish.⁶¹ Of this rich variety, coastal pelagic fish — a category of fish that inhabit the sunlit portion of the water column — are the most abundant. In particular, anchovy, sprat, and horse mackerel reside in large shoals within the Black

⁵⁷ See [REDACTED] Report, ¶ 3.2.

⁵⁸ [REDACTED] (“[W]e recommend that the bridge be designed with the same [height clearance above the waterline] as in the Bosphorus, or, at least 50 meters.”) [REDACTED]; [REDACTED] (noting that it reviewed bridge design proposals and recommending that “[t]he height on recommended route (RR) No. 12, i.e., Kerch-Enikale Canal with the adjacent exclusion zone, is 65 meters above the highest water level . . .”) [REDACTED]; [REDACTED] (“In order to ensure navigational safety in the Kerch Strait and the unimpeded passage of ships and vessels of the Naval Forces from the Black Sea to the Sea of Azov and vice versa, the height of the bridge crossing in the main navigational section, specifically over the Kerch-Enikale Canal, should be 50 m above the sea-level datum.”) [REDACTED].

⁵⁹ [REDACTED] Report, ¶ 4.7.

⁶⁰ This includes resources located in areas over which Ukraine would enjoy maritime entitlements regardless of its sovereignty over Crimea.

⁶¹ See World Wildlife Fund, Knowledge Hub: Black Sea Basin (accessed 5 November 2020) (UA-581).

Sea.⁶² Other prominent Black Sea species include turbot, whiting, picked dogfish, pontic shad, and various types of mullet. The Sea of Azov also contains a wide variety of marine life, including over 120 species and sub-species of fish,⁶³ such as anchovy, pike-perch, stellate sturgeon, great sturgeon, so-iuy (red-finned) mullet, gobies, turbot, kilka, shad, bream, and Black Sea roach.⁶⁴ Some of these species also migrate through the Kerch Strait into the Black Sea for part of the year, underlining the interconnectedness of these bodies of water.⁶⁵ The Kerch Strait is also itself an important spawning ground for substantial stocks of fish.⁶⁶

38. Both before and after independence, Ukraine has maintained a robust fishing industry, which has relied on free navigation through all three bodies of water. Ukraine has historically operated fishing ports on both the Black Sea (including, for example, Chornomorsk⁶⁷) and the Sea of Azov (including, for example, Mariupol).⁶⁸ These ports serve both a commercial fishing industry and an artisanal one.⁶⁹

39. The Black Sea and Sea of Azov are also home to significant offshore natural gas and hydrocarbon reserves. Oil and gas industry estimates suggest that the value of hydrocarbon reserves in the Black Sea and Sea of Azov total well into the billions of US dollars.⁷⁰ In 2013 alone, Ukraine's state-owned Black Sea gas production company, PJSC State Joint Stock Company Chornomornaftogaz ("CNG-UA"), produced approximately 1,700 million cubic meters ("MMcm") of gas from the Black Sea and Sea of Azov.⁷¹

⁶² See Cihangir, et al., *A Review of the General Food Web in the Black Sea* in Erol Izdar and James W. Murray (eds.), *Black Sea Oceanography* (1991), p. 290 (UA-55).

⁶³ Diripasko, et al., *Sea of Azov: A Brief Review of the Environment and Fishery*, *Aquatic Ecosystem Health & Mgmt.* (2015), p. 185 (UA-56).

⁶⁴ *Id.* pp. 185-193; Expert Report of [REDACTED] Report"), ¶ 26.

⁶⁵ Chaschin A., *Black Sea Populations of Anchovy*, *Scientia Marina* (1996), p. 220 (UA-421). The Sea of Azov anchovy, for example, migrate into the Black Sea in September or October and spend the winter there, before returning to the Sea of Azov in the spring. *Id.*

⁶⁶ [REDACTED] Report, ¶¶ 26, 42-50.

⁶⁷ Chornomorsk formerly was called Ill'ichevsk.

⁶⁸ Ulman et al., *A Reconstruction of the Ukraine's Marine Fisheries Catches, 1950-2010*, *J. Black Sea/Mediterranean Environment* (2015), pp. 104-106 (UA-59).

⁶⁹ *Id.*

⁷⁰ See International Energy Agency, *Energy Policies Beyond IEA Countries: Ukraine 2012*, p. 93 (UA-33); Georg Zachmann and Dmytro Naumenko, *Evaluating the Options to Diversify Gas Supply in Ukraine*, German Advisory Group Institute for Economic Research and Policy Consulting Policy Paper Series (February 2014), p. 14 (UA-34).

⁷¹ Naftogaz, *Gas Production by Naftogaz of Ukraine, 2005-2016* (10 January 2017) (UA-25).

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40. Prior to 2014, CNG-UA made significant investments in and developed a considerable maritime infrastructure in the Black Sea and Sea of Azov to access, explore, and develop offshore hydrocarbon reserves. Ukrainian-flagged offshore oil and gas vessels included a fleet of 24 hydrocarbon service vessels,⁷² including two mobile JDRs.⁷³ CNG-UA also owned and operated two Panamanian-flagged JDRs.⁷⁴

41. CNG-UA used these four JDRs extensively in both the Black Sea and the Sea of Azov prior to 2014, and had ambitious plans for their further use in offshore drilling in 2014.⁷⁵ For example, prior to 2012, CNG-UA used its Ukrainian-flagged rigs to drill in the North Kerchenske and North Bulhanatske fields in the Sea of Azov.⁷⁶ In 2012, the *Tavrida*⁷⁷ navigated to the Black Sea and, together with the Ukrainian-flagged *Sivash*,⁷⁸ conducted drilling operations in the Shtormove field in the northwestern area of the Black Sea in both 2012 and 2013.⁷⁹ In 2014, the *Tavrida* and *Sivash* were scheduled to embark on drilling operations in the Hubkina area, the Bezimenne field, the South Holitsynske field, and the South Kerchenske prospect of the Black Sea, after traveling to the CNG-UA industrial port in Yarylgach Bay in Crimea for repairs.⁸⁰ CNG-UA also discussed, with a Canadian co-investor, deploying the *Sivash* to the Sea of Azov for drilling operations in the West Biruche field, and it began work on upgrading the drilling equipment on the *Sivash* for this purpose.⁸¹

⁷² See CNG Vessel Patents (Jack-Up Drilling Rigs) (UA-53); CNG Vessel Patents (Service Vessels) (UA-54).

⁷³ The *Tavrida* is identified by IMO No. 8763373 and the *Sivash* is identified by IMO No. 8763385. See CNG Vessel Patents (Jack-Up Drilling Rigs), pp. 2, 5 (UA-53); Reissued Certificate of Ownership No. 003527 for the “Tavrida” (1 September 2014) (UA-582); Reissued Certificate of Ownership No. 003547 for the “Sivash” (2 September 2014) (UA-583).

⁷⁴ The *Petro Hodovanets* is identified by IMO No. 9522350 and the *Ukraine* is identified by IMO No. 8771241. CNG-UA reflagged the *Petro Hodovanets* and *Ukraine* to the Ukrainian flag on 17 October 2014. See CNG Vessel Patents (Jack-Up Drilling Rigs), pp. 8, 11 (UA-53).

⁷⁵ Witness Statement of [REDACTED] Statement”), ¶¶ 11-12.

⁷⁶ See *Id.* ¶ 12. See also Marine Treasure Trove of Energy: Oil and Gas of the Sea of Azov and the Black Sea to Help Crimea, *GEOnews.com.ua* (25 August 2004) (UA-584); Chernomornaftogaz Is Modernizing Floating Drilling Rigs, *OilCapital* (17 March 2005) (UA-585).

⁷⁷ See CNG Vessel Patents (Jack-Up Drilling Rigs), p. 1 (UA-53).

⁷⁸ See *id.*

⁷⁹ The *Tavrida* and *Sivash* each drilled one well in the Shtormove field. See CNG Annual Report 2013 (UA-586).

⁸⁰ [REDACTED] Statement, ¶ 12; see also CNG Annual Report 2013, Table 19 (UA-586).

⁸¹ [REDACTED] Statement, ¶ 12.

42. In addition to its JDRs, CNG-UA's hydrocarbon service vessels included a range of tug boats, work boats, supply boats, crane vessels, barges, crew boats, pipe-laying barges, and other seagoing ships essential to the functioning and development of Ukraine's gas fields.⁸² These vessels operated in Ukraine's gas and oil fields in both the Black Sea and the Sea of Azov.⁸³

43. In order to access, service, and help develop the significant hydrocarbon reserves claimed and controlled by Ukraine in the Black Sea and Sea of Azov, Ukrainian vessels must be able to navigate in those seas, and through the Kerch Strait.⁸⁴ Navigation through the Strait, in particular, is important to ensure that rigs and service vessels can be freely deployed where they are most needed, such that Ukrainian companies do not need to maintain duplicative hydrocarbon service fleets in each sea.

II. The Rich and Sensitive Marine Ecosystem of the Black Sea, Sea of Azov, and Kerch Strait

44. The Black Sea, Sea of Azov, and Kerch Strait (collectively, the "Black Sea Basin" or "Basin") are enclosed seas⁸⁵ that, together, comprise a single, interconnected, and highly sensitive marine ecosystem. Ukraine has a particular interest in the health of this ecosystem, given that it is one of six littoral States.

45. The singular ecosystem of the Black Sea Basin is a product of the Basin's geography. It is an elongated and nearly enclosed Basin separated from the wider oceanic system by the Turkish Straits, Sea of Marmara, Mediterranean Sea, and Strait of Gibraltar.⁸⁶ The Black Sea Basin receives salt water via an undercurrent through the Bosphorus. At the same time, it collects fresh water from twenty-three European countries through five major rivers: the Danube, Dnieper, and Dniester rivers, which drain into the Black Sea, and the Don and Kuban rivers, which drain into the Sea of Azov.⁸⁷ For this reason, the Black Sea

⁸² See CNG Vessel Patents (Service Vessels) (UA-54).

⁸³ See *id.*; ██████████ Statement, ¶¶ 7-8.

⁸⁴ See ██████████ Report, ¶ 4.59.

⁸⁵ See UNCLOS, Art. 122 ("'Enclosed or semi-enclosed sea' means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States." See also *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, ICJ Judgment of 3 February 2009, ¶ 15 ("The Black Sea is an enclosed sea . . .") (UAL-2).

⁸⁶ ██████████ Report, ¶ 13.

⁸⁷ *Id.* ¶ 14.

Basin receives a significantly higher proportion of its volume from fresh water than its neighbors, the Marmara and Mediterranean Seas.⁸⁸

46. As described by [REDACTED], Ukraine's expert on the marine ecosystem of the Black Sea Basin and [REDACTED], these geographical factors combine to form a particularly fragile marine ecosystem which is more vulnerable to environmental effects from isolated, localized events than most other marine ecosystems.⁸⁹ As a consequence of its geography, the water column in the Black Sea is vertically stratified. The higher-salinity water coming from the Mediterranean Sea is denser than the fresh water draining into the Basin, causing an unusually swift change in water density with depth — a phenomenon known as pycnocline.⁹⁰ This strong pycnocline prevents vertical mixing of the waters in the Black Sea, meaning that oxygen from the surface atmosphere never reaches the deeper waters, resulting in a complete absence of oxygen in the waters below 70-200 meters in depth. This phenomenon is called anoxia.

47. Because the water layers do not mix, they have distinct currents.⁹¹ The less-saline, less-dense upper water layer moves in a “rim current,” which transports the less-saline water around the perimeter of the Black Sea, into the territorial seas of the respective coastal States.⁹² The rim current is swift: it can reach speeds of one meter-per-second, or 86.4 kilometers-per-day.⁹³ As a result, anything on the sea surface or in the upper-water layer — pollutants, suspended solids, zooplankton, phytoplankton — can be transported

⁸⁸ *Id.* ¶ 17.

⁸⁹ *Id.* ¶ 27.

⁹⁰ *Id.* ¶ 21; L. Svetlichny, A. E. Kideys, E. Hubareva, S. Besiktepe & M. Isinibilir, *Development and Lipid Storage in Calanus euxinus from the Black and Marmara Seas: Variabilities Due to Habitat Conditions*, *Journal of Marine Systems*, Vol. 59 (2006), p. 53 (UA-411).

⁹¹ [REDACTED] Report, ¶¶ 16-18, 22; see also T. Oguz, S. Tugrul, A. E. Kideys, V. Ediger, N. Kubilay, *Physical and Biogeochemical Characteristics of the Black Sea*, *The Sea*, Vol. 14, Ch. 33 (2004), p. 1336 (UA-405).

⁹² [REDACTED] Report, ¶¶ 16-18, 22; see also T. Oguz, S. Tugrul, A. E. Kideys, V. Ediger, N. Kubilay, *Physical and Biogeochemical Characteristics of the Black Sea*, *The Sea*, Vol. 14, Ch. 33 (2004), p. 1336 (UA-405).

⁹³ [REDACTED] Report, ¶ 23; see also T. Oguz, S. Tugrul, A. E. Kideys, V. Ediger, N. Kubilay, *Physical and Biogeochemical Characteristics of the Black Sea*, *The Sea*, Vol. 14, Ch. 33 (2004), p. 1336 (UA-405).

from one place to another within the Basin in a matter of a few days or weeks. Some fish stocks have adapted to follow the current during certain parts of the year.⁹⁴

48. The Basin is especially vulnerable to pollution in part because the rim currents can transport pollutants from one isolated location to the rest of the Black Sea quickly, in a matter of days, thereby contaminating the entire region.⁹⁵ Moreover, the Basin does not enjoy the flushing or diluting effects from which a sea more expansively connected to the wider oceanic system would benefit. Accordingly, any contaminants found in the upper-water layer do not easily dissipate through mixing within a larger body of water.⁹⁶

49. Finally, because of the anoxic character of the lower-water layer, only the upper-water layer is suitable for marine life.⁹⁷ As a consequence, any pollution or contamination of the upper-water layer disproportionately concentrates its effects on the entire population of marine life.⁹⁸ This disproportionate risk is compounded by the fact that the Basin's separation has led to a less biodiverse ecosystem than some other large bodies of water.⁹⁹ Therefore, to the extent that a single species or group of species are affected by an external contaminant or pollutant, the interconnected ecosystem is disproportionately impacted as compared to other more diverse ecosystems around the world. In other words, the delicate balance within the ecosystem is more easily disturbed, potentially leading to severe consequences.

50. The Black Sea, Sea of Azov, and Kerch Strait are nevertheless home to an abundance of marine life. Indeed, while the Black Sea Basin lacks biodiversity relative to similar nearby waters, it still supports a thriving population of marine life that feeds off the nutrients deposited by the major rivers in the region.¹⁰⁰ As described above, it is home to

⁹⁴ [REDACTED] Report, ¶ 23; *see also* T. Oguz, S. Tugrul, A. E. Kideys, V. Ediger, N. Kubilay, *Physical and Biogeochemical Characteristics of the Black Sea*, The Sea, Vol. 14, Ch. 33 (2004), p. 1336 (UA-405).

⁹⁵ [REDACTED] Report, ¶ 27.

⁹⁶ *Id.* ¶ 29.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *See id.* ¶ 24.

¹⁰⁰ *Id.* ¶ 25; Ahmet E. Kideys, *Fall and Rise of the Black Sea Ecosystem*, *Science*, Vol. 297 (30 August 2002), p. 1483 (UA-415).

approximately 180 species and sub-species of fish,¹⁰¹ including many harvestable varieties.¹⁰² As for the Sea of Azov, it contains over 120 species and sub-species of fish,¹⁰³ as also described above.¹⁰⁴

51. Many of the species in the Black Sea and Sea of Azov are highly migratory by nature, but tend to return to the same waters to spawn and to hibernate. The Kerch Strait and the waters adjacent to Crimea are particularly important spawning and hibernation grounds for several species of fish.¹⁰⁵ In particular, the Kerch Strait serves as an important spawning ground and migratory corridor between the Black Sea and the Sea of Azov for species including the picked dogfish, shad, anchovy, striped mullet, and turbot.¹⁰⁶ As a specific example, a sub-species of anchovy native to the Sea of Azov, commonly referred to as “Azov anchovy,” reproduces, feeds, and hibernates along the coast of Crimea.¹⁰⁷ Each winter, Azov anchovy migrate through the Kerch Strait and gather in massive shoals along the coasts of Crimea in the Black Sea, and this is generally when the Azov anchovy are harvested.¹⁰⁸ **Map 3** illustrates the primary harvesting areas for commercially valuable fish species in the Black Sea, the Sea of Azov, and the Kerch Strait.

¹⁰¹ See World Wildlife Fund, Knowledge Hub: Black Sea Basin (accessed 5 November 2020) (**UA-581**).

¹⁰² See *supra* Chapter Four, Section I.B.

¹⁰³ O.A. Diripasko, et al., Sea of Azov: A Brief Review of the Environment and Fishery, *Aquatic Ecosystem Health & Mgmt.* (2015), pp. 184-194 (**UA-56**).

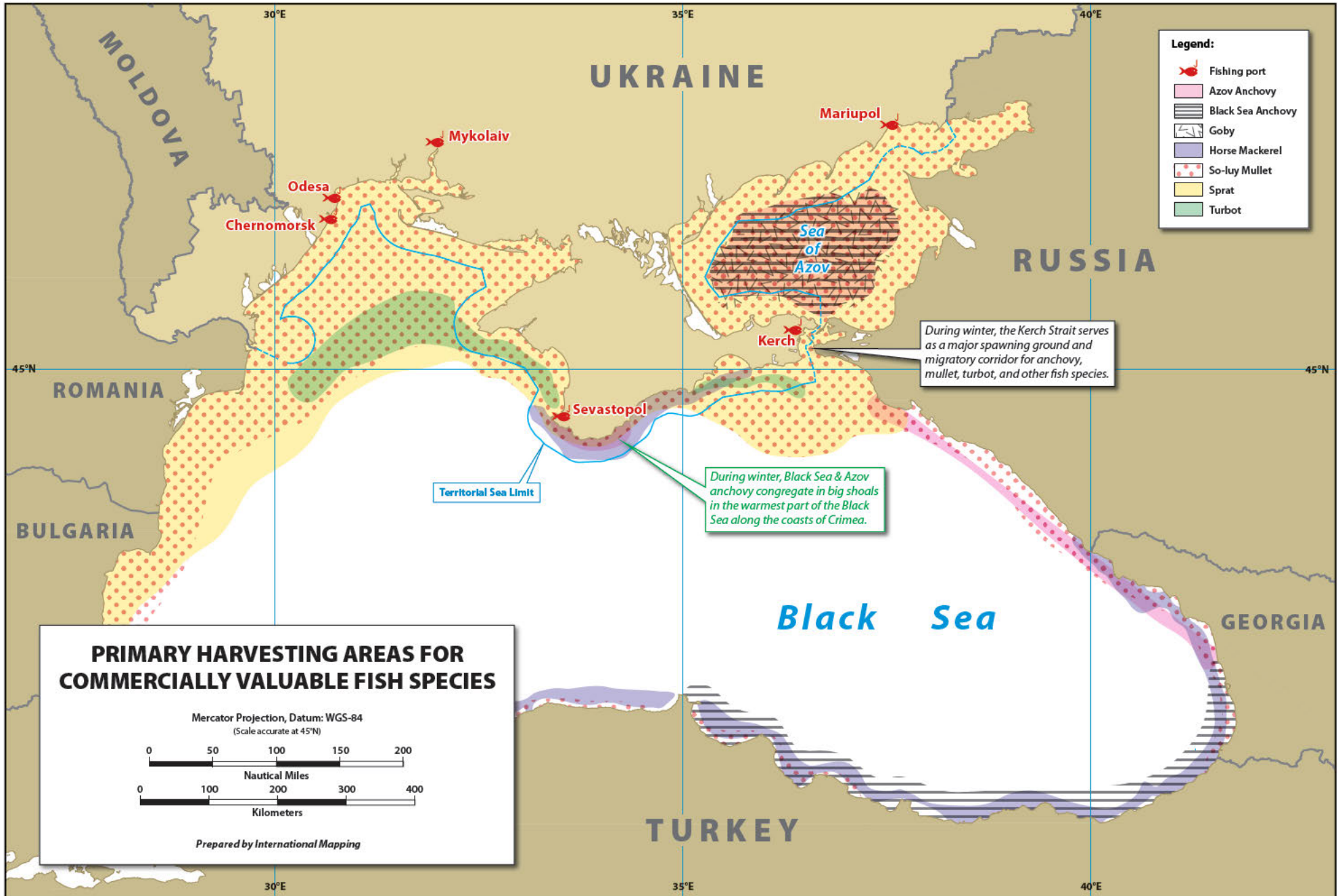
¹⁰⁴ See *supra* Chapter Four, Section I.B.

¹⁰⁵ [REDACTED] Report, ¶¶ 42-45.

¹⁰⁶ *Id.*; European Parliament, Directorate-General for Internal Policies, *Fisheries in the Black Sea* (2010) (**UA-57**); see also V.A. Shlyakhov & G.M. Daskalov, *The State of Marine Living Resources, in State of the Environment of the Black Sea (2001–2006/7)* (Oguz T. ed. 2008), pp. 291-326 (**UA-58**).

¹⁰⁷ [REDACTED] Report, ¶¶ 42-45.

¹⁰⁸ *Id.* ¶ 45.



III. The Unique Underwater Cultural Heritage of the Black Sea, Sea of Azov, and Kerch Strait

52. The Black Sea, Sea of Azov, and Kerch Strait have long served as a commercial and cultural crossroads between Europe, Asia, and Africa.¹⁰⁹ The Black Sea Basin also presents uniquely favorable conditions for the preservation of UCH. As a consequence, these waters hold extensive UCH of significance to all humankind.

53. The Black Sea has a long history of maritime activity, with numerous cultures over many centuries navigating the region for trade and communication.¹¹⁰ As early as the sixth and seventh centuries B.C., trade between the ancient Greeks and indigenous peoples of the Black Sea region took place through Greek colonies established on the eastern shores of the Crimean Peninsula.¹¹¹ The fruits of that trade were transported back to Greece in ships, some of which were wrecked in the waters of the Black Sea.¹¹² Over the following twenty-seven centuries, those early shipwrecks were joined by others, as Greek civilization was succeeded by Roman, Byzantine, Venetian, Genoese, Turkic, Russian, and Ukrainian settlements on the coasts of the Black Sea.¹¹³

54. The waters of the Black Sea Basin are also the final resting place of numerous military vessels, their crews, and other equipment deployed in the great wars that have punctuated the history of the region, including the Crimean War of 1853-56 and the Second World War of 1939-45.¹¹⁴ Given the central role the Crimean peninsula has played in many of those conflicts, and in trade across the Black Sea Basin since ancient times, its coastal

¹⁰⁹ See generally Domna Lyratzopouou and Grigoris Zarotiadis, Black Sea: Old Trade Routes and Current Perspectives of Socioeconomic Co-Operation, 9 *Procedia Economics and Finance* 74 (2014), pp. 74-75 (UA-105); Dadiani Dynasty: The Black Sea Region, *Smithsonian* (2013), p. 2 (UA-106).

¹¹⁰ See generally Underwater Archaeology of the Black Sea: Crimean Coastal Survey (1997) (UA-107).

¹¹¹ *Id.* pp. 2-3.

¹¹² *Id.* pp. 8-9.

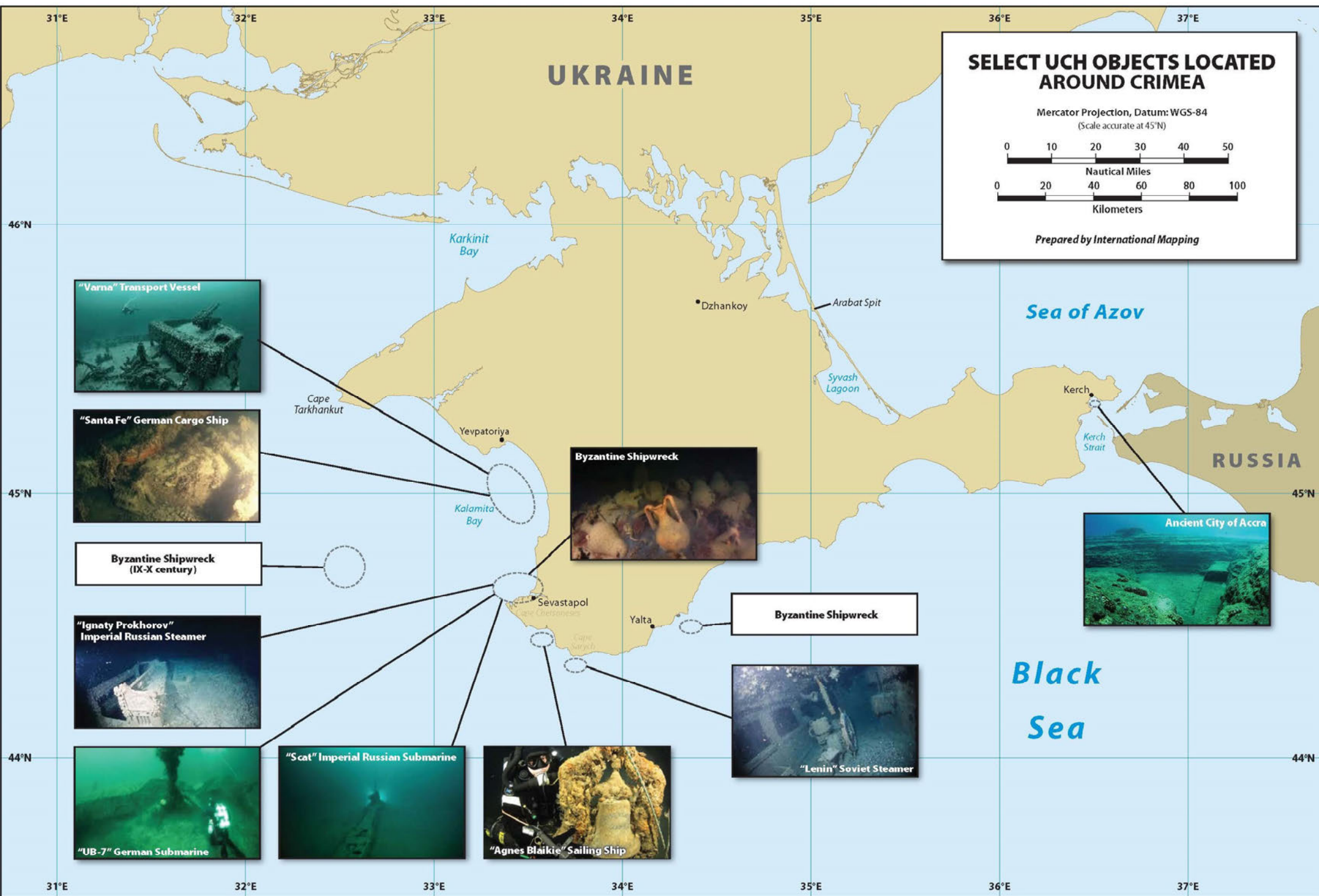
¹¹³ By way of comparison, a 2016 survey of the Black Sea off the Bulgarian coast revealed more than 40 preserved shipwrecks, ranging from the ninth to the 19th century. Nick Romeo, *Centuries of Preserved Shipwrecks Found in the Black Sea*, *National Geographic*, 26 October 2016 (UA-108). The earliest of the wrecks appears to be from the late 800s, when the Byzantine Empire controlled much of the region. Archaeologists leading the project report that there were also many sunken Ottoman ships from the 16th through 18th centuries, several 19th-century ships, and a medieval Italian vessel that likely dates to the 14th century. *Id.*

¹¹⁴ Russia acknowledges the wealth of the Black Sea in UCH. In a 2014 report to UNESCO on the situation of the purported Republic of Crimea, Russia noted that “[i]n the waters of the Black and Azov Seas there is a significant number of underwater heritages.” See Information on the Situation in the Republic of Crimea (Russian Federation) in the Fields of UNESCO Competence, Received from Russian Competent Authorities (2014), p. 13 (UA-109).

Confidential Information Redacted

waters contain a particularly rich and diverse array of UCH. **Map 4** depicts some of the more notable UCH sites around the peninsula, indicating the approximate locations of a selection of objects of archaeological and historic interest.¹¹⁵

¹¹⁵ Sergiy A. Voronov, *The Encyclopedia of Maritime Wrecks of Ukraine* (2008), pp. 25-26, 43-44, 123-124, 185-186, 195-196, 199, 256-258, 571-572, 687-688 (**UA-461**); Putin Made a Dive in a Bathyscaphe Near Sevastopol, *Interfax*, 18 August 2015 (**UA-230**).



SELECT UCH OBJECTS LOCATED AROUND CRIMEA

Mercator Projection, Datum: WGS-84
(Scale accurate at 45°N)

0 10 20 30 40 50
Nautical Miles

0 20 40 60 80 100
Kilometers

Prepared by International Mapping

55. There is also reason to believe that traces of civilizations long predating the ancient Greeks may exist in the waters of the Black Sea Basin. Geologists hypothesize a rapid rise in water levels in the Black Sea following the last ice age, when a channel first opened up connecting what had been an inland freshwater lake with the Mediterranean Sea.¹¹⁶ As water levels rose, prehistoric settlements on the shores of that lake would have disappeared, as the lakeshore became part of the continental shelf of what is now the Black Sea. Remnants of such settlements have been discovered off the coast of Bulgaria¹¹⁷ and may well exist elsewhere in the Black Sea Basin.¹¹⁸

56. The UCH of the Black Sea is further distinguished by uniquely favorable conditions for the preservation of objects of archaeological and historical interest. As a result of the density differences between lighter freshwater flowing into the Black Sea from the many rivers that terminate along its coastline and a bottom current from the heavier, highly saline Mediterranean, the Black Sea has a stratified water column. As described above,¹¹⁹ the deeper waters of the Black Sea consist of cold, dense, saline, anoxic water.¹²⁰ The virtual absence of oxygen in the bottom waters of the Black Sea contributes to a highly favorable preservative environment for archaeological material.¹²¹ Sedimentation,

¹¹⁶ Several authors argue that the Black Sea experienced significant sea level fluctuations during the early Holocene, with smaller amplitude changes through the mid-to-late Holocene, whereas others suggest a rather gradual rise in the level of the Black Sea, part of the rise of the global sea level. *See generally* Elena V. Ivanova et al., *The Holocene Black Sea Reconnection to the Mediterranean Sea: New Insights from the Northeastern Caucasian Shelf*, 497 *Paleography, Paleoclimatology, Paleoecology* 41-61 (2015) (UA-110); Nick Romeo, *Centuries of Preserved Shipwrecks Found in the Black Sea*, *National Geographic*, 26 October 2016 (UA-108).

¹¹⁷ *See* Ivan Dykov, *Maritime Archaeologists Find Bronze Age Settlement under Black Sea's Seabed off Bulgaria's Coast*, *Archaeology in Bulgaria*, 17 October 2017 (UA-111).

¹¹⁸ *See generally* Vladimir D. Blawatsky, *Submerged Sectors of Towns on the Black Sea in Underwater Archaeology, a Nascent Discipline* (1972) (UA-112).

¹¹⁹ *See supra* Chapter Four, Section II.

¹²⁰ *Id.*

¹²¹ *Id.* *See generally* Arthur C. Trembanis, et al., *Bedforms, Hydrodynamics, and Scour Process Observations from the Continental Shelf of the Northern Black Sea*, *Geological Society of America Special Paper 473*, also published in Buynevich et al. (eds.), *Geology and Geoarchaeology of the Black Sea Region: Beyond the Flood Hypothesis* (2011) (UA-114); Michael L. Brennan, *Quantification of Trawl Damage to Pre-Modern Shipwreck Sites: Case Studies from the Aegean and Black Seas*, in *Scientific Colloquium on Factors Impacting Underwater Cultural Heritage* (2011), p. 28 (“The preservation state of the wooden elements of the shipwrecks [and other archeological material] is due to the low-oxygen contents of the waters here. While the onset of the suboxic and anoxic zones of the Black Sea are deeper than these wrecks, density currents along the oxic/anoxic interface wash anoxic waters higher up onto the shelf, making it hard for wood-boring organisms to live there, and thereby preserving the structures of the ships.”) (UA-115).

particularly in the areas of the Black Sea around the mouths of the Danube and Dnieper rivers,¹²² further assists the preservation of archaeological materials, even those located close to shore.¹²³ This combination of environmental factors has resulted in the discovery of remarkably well-preserved ships and other artifacts on the seabed of the Black Sea, dating back thousands of years.¹²⁴

57. Ukraine and most of the other littoral States of the Black Sea have made significant efforts to protect UCH within their maritime areas, and to cooperate for such purposes, taking active steps to protect the UCH within their maritime areas, both acting under their respective domestic legal regimes, and in accordance with the highest international standards. Ukraine's domestic legislative framework specifically provides for the protection of UCH. The Law of Ukraine on Protection of Cultural Heritage of 8 June 2000 (the "Cultural Heritage Law") defines "cultural heritage" broadly, as "the totality of cultural heritage objects, inherited by mankind from previous generations."¹²⁵ The term "cultural heritage object" includes "land or water areas (underwater cultural objects and archeological heritage)."¹²⁶ The law further provides that "[a]ll archaeological monuments, including those located underwater as well as the movable items associated with them shall be state property,"¹²⁷ and requires anyone who wishes to engage in any underwater archaeological explorations or excavations to first obtain a permit from the national executive authority responsible for implementing state policy on the protection of cultural heritage.¹²⁸ Individuals or entities engaging in archaeological explorations are also required

¹²² William J. Broad, 'We Couldn't Believe Our Eyes': A Lost World of Shipwrecks is Found, *New York Times* (11 November 2016) (UA-587).

¹²³ See Donny L. Hamilton, *Methods of Conserving Archaeological Material from Underwater Sites* (Conservation Research Laboratory, Center for Maritime Archaeology and Conservation, Texas A&M University) (1999), p. 4 ("In general, artifacts recovered from anaerobic marine environments (i.e., buried in sediment) are recovered in better condition than artifacts recovered from aerobic marine environments (i.e., the water column and surface sediment).") (UA-116).

¹²⁴ See, e.g., BBC News, *Shipwreck Found in Black Sea is 'World's Oldest Intact'* (23 October 2018) (reporting the discovery in good condition of an ancient Greek ship more than 2,400 years old on the Black Sea seabed off Bulgaria) (UA-613).

¹²⁵ Law of Ukraine, "On the Protection of Cultural Heritage" (8 June 2000), Art. 1 (UA-117).

¹²⁶ *Id.*

¹²⁷ *Id.* Art. 17.

¹²⁸ *Id.* Art. 35(1).

to ensure the preservation of objects of cultural heritage discovered during archaeological research, and to timely report their findings to the authority that issued the permit.¹²⁹

58. On 18 March 2004, Ukraine adopted a law “On the Protection of Archaeological Heritage.” Under Article 10 of that law, permits to conduct scientific research on archeological heritage, including UCH, may be granted only to qualified archeologists, whose expertise is certified by the Institute of Archeology of the National Academy of Sciences of Ukraine.¹³⁰ The law further empowers the competent cultural heritage authority to designate protection zones where archaeological monuments are located.¹³¹

59. Ukraine’s Department of Underwater Heritage, a specialized state-owned enterprise created by the Institute of Archaeology to develop underwater archaeology in Ukraine, developed the first register of UCH of Ukraine.¹³² As of 2010, approximately 2,514 objects had been registered, including objects in Ukraine’s internal waters, territorial sea, and exclusive economic zone.¹³³

* * *

60. The Black Sea, Sea of Azov, and Kerch Strait are of significant importance to both Ukraine and the wider international community with regard to free navigation, the marine environment, and underwater cultural heritage. By ratifying UNCLOS, Russia agreed to abide by the rules prescribed by the Convention in each of these areas. As will be explained in Chapter Six, far from keeping that solemn commitment, Russia has since 2014 persistently and brazenly flouted its obligations under the Convention.

¹²⁹ *Id.* Art. 35(2).

¹³⁰ Law of Ukraine, “On the Protection of Archaeological Heritage” (18 March 2004), Art. 10 (UA-118).

¹³¹ *Id.* Art. 6. For example, the Ministry of Culture of Ukraine adopted the Order of 27 March 2012 No. 267 “On Approving the Research and Design Documentation Pertaining to the Boundaries and Conditions of Use of the Protected (Buffer) Zones of the Tauric Chersonesos National Preserve” (UA-119).

¹³² See Ukraine National Report on Underwater Cultural Heritage, Report made in the UNESCO Regional Meeting in Istanbul 25-27 October, 2010, (10 November 2010), p. 2 (UA-128). The Department of Underwater Heritage ceased to exist in 2012, when its functions were transferred to the Black Sea Centre for Underwater Research, a State Budgetary Institution of the Autonomous Republic of Crimea located in Feodosia, Crimea.

¹³³ See *id.*

Chapter Five: The Sea of Azov and Kerch Strait Are Governed by UNCLOS

61. Prior to 1991, the Soviet Union claimed the Sea of Azov and Kerch Strait as a single juridical bay on the basis that they were entirely surrounded by a single State. The dissolution of the Soviet Union in 1991, however, marked a seismic change in the region. Where once there was a single sovereign in control of these waters, now there were two sovereigns along the waters' shores. As a result, the Sea of Azov and Kerch Strait ceased to qualify as a single-State juridical bay, and the areas seaward of the Ukrainian and Russian baselines became subject to the general regime of the law of the sea.

62. Faced with this new situation, Ukraine moved to place itself on an equal footing with its larger neighbor, by embracing the international law of the sea and, in particular, UNCLOS — the “constitution for the oceans,”¹³⁴ which was then about to enter into force. In 1992, and in anticipation of UNCLOS coming into force, Ukraine deposited baselines for the Sea of Azov with the Secretariat of the United Nations. Both Russia and Ukraine invoked UNCLOS in an early post-Soviet fisheries agreement governing the Sea of Azov. Ultimately, both Ukraine and Russia ratified UNCLOS, and in so doing, agreed that their legal rights in the seas and oceans would be governed by the Convention.¹³⁵

63. Nonetheless, in these proceedings, Russia has sought to exclude UNCLOS from the Sea of Azov and Kerch Strait. It claims that those waters are the internal waters of Ukraine and Russia, over which both States exercise sovereignty. Yet this claim of shared sovereignty, itself inconsistent with international law, masks the reality of what Russia does in practice: unilaterally asserting its dominance over these critical bodies of water, undermining Ukraine's rights as well as the freedom of navigation for all States, in order to serve its own ends.

64. Russia's efforts must be rejected. UNCLOS does not permit a 40,000 square kilometer sea to be claimed in its entirety as internal waters. Nor does it permit Russia to deny freedom of navigation to the more than [REDACTED] foreign vessels that call annually at Ukraine's Sea of Azov ports.¹³⁶ There is simply no precedent for the assertion of sovereignty

¹³⁴ See Tommy T. B. Koh, *A Constitution for the Oceans* (1982), p. 1 (UAL-108).

¹³⁵ Ukraine ratified UNCLOS on 26 July 1999. In turn, the Russian Federation ratified UNCLOS on 12 March 1997. See U.N. Treaty Collection, *Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, Chapter XXI: Law of the Sea, No. 6: United Nations Convention on the Law of the Sea (10 December 1982)* (status as of 11 March 2020), pp. 3-4 (UA-8). The law of the sea applicable at the time of the Soviet Union's dissolution in 1991 is discussed in Chapter Five, Section IV.A below.

¹³⁶ [REDACTED]

over a large, heavily trafficked, pluri-State sea that connects multiple ports handling international shipping to the rest of the world's oceans.

65. Pursuant to UNCLOS, the Sea of Azov and Kerch Strait contain, beyond Ukraine and Russia's baselines, territorial seas defined under Articles 3 and 4, and in the case of the Sea of Azov, exclusive economic zones defined under Articles 55 and 57. The Kerch Strait is consequently an international strait within the meaning of Article 37. Articles 58, 86, and 89, in turn, preclude any State from claiming sovereignty over the areas within the Sea of Azov that extend beyond 12 nautical miles from its baselines. Notably, the few, rare examples of pluri-State internal waters relate to much smaller areas in which no exclusive economic zone can exist, making Articles 58, 86, and 89 inapplicable.

66. Even if UNCLOS did allow the Parties to jointly claim the Sea of Azov and Kerch Strait as sovereign internal waters, Ukraine has asserted no such claim and the Parties have not agreed to any such claim. In the 1990s and 2000s, Ukraine and Russia engaged in negotiations over whether to "grant" an internal waters status to the Sea of Azov and Kerch Strait, but such negotiations ended without success. Moreover, Ukraine's openness to an internal waters status has consistently been subject to the critical condition of delimitation of the waters, so that Russia could not exercise *de facto* control of the entire Sea.

67. Nor are the Sea of Azov and Kerch Strait subject to a claim of pluri-State historic title. When surrounded by the Soviet Union, the Sea of Azov always qualified as a juridical bay, and therefore no prescriptive claim to historic title could have arisen. Thus, once the Soviet Union dissolved, the waters ceased to be subject to any special legal regime. Instead, they became subject to the general law of the sea which, as now embodied by UNCLOS, continues to govern the Sea of Azov and Kerch Strait today.

I. Under UNCLOS, the Sea of Azov and Kerch Strait Are Comprised of Territorial Seas and Exclusive Economic Zones, and the Kerch Strait Qualifies as an International Strait

68. Applying the rules of UNCLOS, the Sea of Azov contains territorial seas and exclusive economic zones, and the Kerch Strait is an international strait connecting the Sea of Azov and the Black Sea.¹³⁷

_____ reflects an average annualized figure from 2011 to mid-2020.

¹³⁷ See, e.g., UNCLOS Arts. 3-4, 5, 7-8, 55, 57.

69. As the Tribunal noted in its Award on Preliminary Objections, “what constitutes internal waters is governed by the Convention.”¹³⁸ Specifically, Article 8 of the Convention provides that “waters on the landward side of the baseline of the territorial sea form part of the internal waters of *the State*”¹³⁹ — that is, of a single State. The drawing of baselines is governed by Articles 5 to 7 and 9 to 14 (and Article 47 for archipelagic states).¹⁴⁰ These articles provide that baselines must generally follow the coast, although they do allow for baselines to be drawn along, among other geographical features not relevant here, the entrances to bays.¹⁴¹ The provision on bays (Article 10), however, expressly applies only “to bays the coasts of which belong to a *single State*,”¹⁴² and thus does not apply to the Sea of Azov. Accordingly, under UNCLOS, the Sea of Azov and Kerch Strait cannot, as a whole, qualify as internal waters. Instead, only those limited areas landward of Ukraine and Russia’s coastal baselines qualify for such status.

70. UNCLOS also defines the scope and breadth of the territorial sea and the exclusive economic zone. Articles 3 and 4 of the Convention provide that the territorial sea may extend up to 12 miles “from baselines determined in accordance with this Convention.”¹⁴³ In turn, Articles 55 and 57 of the Convention provide that the exclusive economic zone extends beyond the territorial sea, for a breadth of no more than “200 nautical miles from [such] baselines.”¹⁴⁴ Pursuant to these articles, all areas seaward of Ukraine and Russia’s respective baselines constitute the territorial seas and exclusive economic zones of the two States.¹⁴⁵

¹³⁸ Award on Preliminary Objections, ¶ 294.

¹³⁹ UNCLOS Art. 8 (emphasis added).

¹⁴⁰ See UNCLOS Arts. 5-7, 9-14, 47.

¹⁴¹ These features include reefs (Article 6); a fringe of islands situated outside the mainland (Art. 7); roadsteads (Article 12); and low-tide elevations (Article 13).

¹⁴² UNCLOS Art. 10 (emphasis added).

¹⁴³ As the Virginia Commentary explains, the expression in Article 3 of the Convention that “[e]very State has the right to establish the breadth of its territorial sea” for up to 12 miles “has been interpreted . . . as indicating that this rule, which it points out was adopted by ‘a genuine consensus,’ is considered to be part of general international law and is of a declaratory nature.” Virginia Commentary, Art. 3, p. 81 (**UAL-120**).

¹⁴⁴ UNCLOS Art. 57.

¹⁴⁵ As explained in Chapter Five, Section VI.A, *infra*, Ukraine and Russia have passed laws defining their exclusive economic zones as extending from their territorial seas to a line up to 200 miles from their baselines. See Law of Ukraine “On the Exclusive (Maritime) Economic Zone of Ukraine,” No. 162/95-VR (16 May 1995), Art. 2 (**UA-6**); Federal Law on the Exclusive Economic Zone of the Russian Federation (2 December 1998), Art. 1 (**UA-590**). Moreover, Ukraine has specifically deposited

71. The Kerch Strait, moreover, is an international strait in which all vessels enjoy the rights of transit passage. Article 37 defines as a “strait used for international navigation,” subject to the regime of transit passage, any strait that connects “one part of . . . an exclusive economic zone” to another.¹⁴⁶ The Kerch Strait connects the exclusive economic zones in the Sea of Azov to the exclusive economic zones in the Black Sea, and is intensively used for international navigation. Thus, the Kerch Strait qualifies as a “strait used for international navigation” to which transit passage applies under UNCLOS Article 37. Indeed, as explained in Chapter Four, as a matter of practice the Strait has been and continues to be used by a large number of foreign-flagged vessels.

II. UNCLOS Prevents Russia and Ukraine From Claiming Sovereignty Over the Sea of Azov, Jointly or Otherwise

72. UNCLOS bars Russia and Ukraine from claiming sovereignty over areas of exclusive economic zone in the Sea of Azov. This result follows from Articles 58, 86, and 89, which collectively establish that no State may purport to assert sovereignty over any part of the seas beyond its “internal waters” and “territorial sea,” as those areas are defined and limited by the Convention.

73. Article 89 of UNCLOS provides that “[n]o State may validly purport to subject any part of the high seas to its sovereignty.”¹⁴⁷ By virtue of Articles 86 and Article 58(2), Article 89 applies not just to the high seas, but to all areas of the sea beyond the territorial sea established under UNCLOS. As the Virginia Commentary explains, “Article 89 is applicable in the exclusive economic zone in accordance with article 58, paragraph 2. Therefore, no State may validly purport to subject any part of the exclusive economic zone to its sovereignty.”¹⁴⁸

baselines for the measurement of its territorial sea and exclusive economic zone in the Sea of Azov. *See Note Verbale of the Permanent Mission of Ukraine to the United Nations to the Secretary-General of the United Nations*, No. 633 (11 November 1992) (**UA-3**). Russia has not specifically deposited baselines, and thus its baselines are the normal baselines indicated by the low-water line along its coast. *See UNCLOS Art. 5*. While Russia’s position in these proceedings could be read as disclaiming an exclusive economic zone in the Sea of Azov, the effect of such a position would simply be to render as Ukraine’s exclusive economic zone, or as high seas, waters that would otherwise be covered by Russia’s entitlement. Also, regardless of whether Russia claims an exclusive economic zone, it (like Ukraine) would continue to enjoy rights to an area of continental shelf in the Sea of Azov.

¹⁴⁶ UNCLOS Art. 37.

¹⁴⁷ UNCLOS Art. 89.

¹⁴⁸ Virginia Commentary, Art. 89 (**UAL-121**).

74. Since the Sea of Azov contains areas of water beyond — indeed, well beyond — the 12-mile territorial seas of Ukraine and Russia as defined under UNCLOS, Ukraine and Russia may not subject the Sea of Azov as a whole to their sovereignty as internal waters. Specifically, neither State may proclaim sovereignty over the areas beyond their respective territorial seas in the Sea of Azov, as Russia seeks to do here.

75. Russia cannot escape the UNCLOS rules recalled above by arguing before this Tribunal that Ukraine and Russia jointly claimed sovereignty over the Sea of Azov.¹⁴⁹ Such an argument runs afoul of Articles 293(1) and 311(3). Article 293(1) specifies that the Tribunal is bound to “apply this Convention,” and may not consider agreements or rules that are “incompatible with [the] Convention.”¹⁵⁰ That, of course, excludes the application of agreements and rules that conflict with Articles 58, 86, and 89. Further, under Article 311(3), agreements “modifying or suspending the operation of provisions of this Convention” are impermissible where they: (i) “affect the application of the basic principles embodied [in UNCLOS],” (ii) “affect the enjoyment by other States Parties of their rights and obligations under this Convention,” or (iii) “relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention.”¹⁵¹ A formal or informal *inter partes* agreement to enclose the Sea of Azov would: (i) impermissibly undermine the basic principle of freedom of navigation; (ii) affect rights of *all* States in the exclusive economic zone — most importantly, “the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms”;¹⁵² and (iii) as described below, conflict with and undermine the object and purpose of the Convention. Article 311(3) of UNCLOS, therefore, prohibits Russia from asserting here any alleged agreement to jointly claim the Sea of Azov as their sovereign internal waters.

¹⁴⁹ Such joint sovereignty is what Russia intends by its claim of “common internal waters,” at least as regards the Sea of Azov. *See* Award on Preliminary Objections, ¶ 199 (“The Sea of Azov and the Kerch Strait, according to the Russian Federation, were historically internal waters of the Russian Empire, and later the USSR, and, since 1991, the common internal waters of Ukraine and the Russian Federation As regards the present situation, the Russian Federation explains that, while it exercises sovereignty jointly with Ukraine in the Sea of Azov, it exercises exclusive sovereignty over the waters of the Kerch Strait.”).

¹⁵⁰ UNCLOS Art. 293(1).

¹⁵¹ UNCLOS Art. 311(3).

¹⁵² UNCLOS Art. 58.

76. This result accords with the reasoning of the *South China Sea* tribunal, which observed that “the text of the Convention [...] comprehensively addresses the rights of other States within the areas of the exclusive economic zone and continental shelf and leaves no space for an assertion of historic rights.”¹⁵³ Indeed, a central purpose of the Convention is to systematize the zones over which coastal States can claim jurisdiction, and to balance those claims against the competing rights of third States and the interests of the international community.¹⁵⁴ As the *South China Sea* tribunal explained:

The Convention was a package that did not, and could not, fully reflect any State’s prior understanding of its maritime rights. Accession to the Convention reflects a commitment to bring incompatible claims into alignment with its provisions, and its continued operation necessarily calls for compromise by those States with prior claims in excess of the Convention’s limits.¹⁵⁵

77. Pluri-State internal waters claims, for which no rules exist in the Convention, upset this careful balance, and undermine the predictability and regularity that UNCLOS, as the “constitution for the oceans,” was intended to provide.¹⁵⁶ To allow idiosyncratic claims to pluri-State internal waters would result in a constant churn of conflicts and side deals between individual littoral and user States of many different bodies of water.

78. This risk is particularly pronounced in waters otherwise large enough to contain exclusive economic zones, and over which claims of sovereignty are prohibited under Articles 58, 86, and 89. A claim to internal waters over such an area entirely changes the character of the waters from a shared resource for all States (subject to special coastal State rights set forth in UNCLOS Parts V and VI) to waters owned and used for the exclusive benefit of a small group of States. The recognition of such claims would not only deprive other UNCLOS States Parties of navigational rights that they would otherwise enjoy, but

¹⁵³ *South China Sea Arbitration*, Award of 12 July 2016, ¶ 261 (internal citations omitted) (UAL-11).

¹⁵⁴ *Id.* (explaining that in the negotiating the Convention, “the importance of adopting a comprehensive instrument was manifest”); *The Oxford Handbook of the Law of the Sea* (Donald R. Rothwell, et al. eds., Oxford Univ. Press 2015), pp. 27-28 (UAL-107); *see also id.* pp. 10-11, 294 (discussing increasingly expansive coastal State claims after World War II).

¹⁵⁵ *South China Sea Arbitration*, Award of 12 July 2016, ¶ 261 (internal citations omitted) (UAL-11); *see also id.* ¶¶ 253-254 (noting the prohibition on un-enumerated exceptions and reservations in Article 309, and concluding that “[i]t is simply inconceivable that the drafters of the Convention could have gone to such lengths to forge a consensus text and to prohibit any but a few express reservations while, at the same time, anticipating that the resulting Convention would be subordinate to broad claims of historic rights”).

¹⁵⁶ Tommy T. B. Koh, *A Constitution for the Oceans* (1982), p. 1 (UAL-108).

also, among other things, rights to harvest any surplus of the coastal State's allowable catch under UNCLOS Article 62, and to conduct marine scientific research projects for peaceful purposes under UNCLOS Article 246. The prejudice to other UNCLOS States Parties is well illustrated by the present case, where Russia has used its conception of an alleged internal waters status of the Sea of Azov and Kerch Strait to build a bridge that blocks large ships from entering those waters, and to impede and suspend the navigation of Ukrainian and third-State vessels, as described in detail in Chapter Six.

79. In short, an internal waters status for the Sea of Azov is inconsistent with UNCLOS — it is not legally permissible for two States to derogate from the rights of “all States” in the exclusive economic zone.

III. The Limited Examples of Pluri-State Internal Waters Satisfy Three Necessary Criteria Not Met in the Sea of Azov

80. Even before UNCLOS, it was long recognized that a sea surrounded by more than one State generally cannot be claimed as internal waters. As explained in the 1960s by Professor Yehuda Blum, a delegate to the Third U.N. Conference on the Law of the Sea, “[w]ater areas surrounded by the territory of a single coastal State, and thus having the status of ‘closed seas,’ which subsequently, because of political changes resulting in the establishment of more than one state on their shores, become multinational in character, generally have come to be regarded as essentially parts of the high seas.”¹⁵⁷ Sir Gerald Fitzmaurice similarly opined in 1959 that “[i]t is not, in general, open to the coastal States of the bay (even by agreement *inter se*) to draw a closing line and, by claiming the waters of the bay as internal waters, to divide these up amongst themselves.”¹⁵⁸

¹⁵⁷ See Yehuda Z. Blum, *Historic Titles in International Law* (1965), p. 279 (quoting Charles B. Selak, Jr., *A Consideration of the Legal Status of the Gulf of Aqaba*, 52 *AJIL* 660 (1958), p. 693) (UAL-56); see also Reply of the United States in Support of Motion for Partial Summary Judgment on Count I of the Amended Complaint at 19, n.11, *State of Alaska v. United States of America*, No. 128, Original (March 2004) (exemplifying the U.S. position that inland waters cannot be pluri-state, and in particular explaining “the waters at issue here would not have qualified as inland at [the time of Alaska’s statehood], even under Alaska’s theory, because a portion of the claimed waters that Alaska designates as inland waters extended into Canada at the time of Alaska’s statehood and for the preceding 40 year period”; “Alaska has previously acknowledged that historic inland waters ‘must be entirely bounded by the same state or nation’”) (internal citations omitted) (UAL-122).

¹⁵⁸ Sir Gerald Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea: Part I— The Territorial Sea and Contiguous Zone and Related Topics*, 8 *Int’l & Comparative L.Q.* 73 (Jan. 1959), pp. 82- 83 (UAL-57).

81. The limited exceptions to this general rule — including exceptions recognized in the *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (“*Gulf of Fonseca*”) and *In the Matter of an Arbitration Under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, Signed on 4 November 2009* (“*Croatia/Slovenia*”) — have been permitted only in bays that have three necessary characteristics in common: first, they are too small to contain areas of high seas or exclusive economic zones, and so the exercise of sovereignty over them is not inconsistent with Articles 58, 86, and 89 (and with prior treaties and principles to similar effect, such as Article 2 of the 1958 Convention on the High Seas¹⁵⁹); second, the exercise of sovereignty over them does not cause prejudice to third States; and third, all littoral States have affirmatively agreed to an internal waters status.¹⁶⁰

82. Here, in contrast, none of the three conditions is met. The large size of the Sea of Azov is not in dispute. The prejudice to third States is made apparent by the extensive third State navigation through the Kerch Strait and in the Sea of Azov. And there is no agreement between the littoral States on the Sea of Azov’s internal waters status.

¹⁵⁹ See U.N. Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, Chapter XXI: Law of the Sea, No. 2: Convention on the High Seas (29 April 1958), art. 2 (“The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty.”) (UA-600).

¹⁶⁰ Russia has also referred to the Rio de la Plata estuary, the Ruvuma Bay, and the Oyapock Bay. See Reply of the Russian Federation to the Written Observations and Submissions of Ukraine on Jurisdiction, dated 28 January 2019, ¶ 72. These bodies of water are river mouths, and thus governed by different rules of UNCLOS and of the pre-UNCLOS law of the sea regime. Specifically, unlike UNCLOS Articles 8 and 10, Article 9 on the drawing of baselines across river mouths is not limited to bodies of water bordered by a single State, and thus may admit the possibility of pluri-State claims. See UNCLOS Art. 9 (“If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-water line of its banks.”). In all events, both the Ruvuma Bay and the Oyapock Bay meet the three-part test required for pluri-State bays, while the joint Argentinian/Uruguayan claim to the Rio de la Plata is contested by other interested States. See United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, Limits in the Seas, No. 123, Uruguay’s Maritime Claims (27 November 2000), p. 5 (reflecting that the Rio de la Plata estuary is claimed as a river mouth, and also taking the position that the internal waters claim is based on “an invalid baseline . . . because it exceeds 24 miles and because more than one state borders this body of water”) (UA-560).

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

83. Consistent with UNCLOS Articles 58, 86, and 89, pluri-State internal waters have been recognized only in bodies of water covering what would otherwise constitute territorial sea.¹⁶¹ This is true of both the Gulf of Fonseca, which is 1,800 square kilometers or approximately 20 times smaller than the Sea of Azov,¹⁶² and the Bay of Piran, which is approximately 19 square kilometers or approximately 2,000 times smaller.¹⁶³ As illustrated in **Figure 1**, no geographical area even remotely comparable to the Sea of Azov has been recognized as pluri-State internal waters.

¹⁶¹ Even scholars who support the concept of pluri-State internal waters recognize this limit. See Tullio Scovazzi, *Problems Relating to the Drawing of Baselines to Close Shared Maritime Waters* in Clive R. Symmons (ed.), *Selected Contemporary Issues in the Law of the Sea* (2011), p. 29 (pluri-State internal waters may be claimed only where “they do not include waters that have the status of an exclusive economic zone or high seas”) (**UAL-60**).

¹⁶² Britannica Online Encyclopedia, Gulf of Fonseca (11 April 2017) (describing the size of the Gulf of Fonseca as 1,800 square kilometers) (**UA-507**).

¹⁶³ See *In the Matter of an Arbitration Under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, Signed on 4 November 2009 (Croatia v. Slovenia)*, PCA Case No. 2012-04, Final Award of 29 June 2017, ¶ 872 (describing the Bay of Piran’s area as approximately 18.2 square kilometers) (**UAL-61**).



Sources for areas:

¹Encyclopedia Britannica (Online ed. 2018)

²Croatia v. Slovenia, Final Award of 29 June 2017

³Area calculated in ESRI ArcMap

Figure 1

84. The Sea of Azov is too large to be claimed as an internal, pluri-State bay. It comprises 40,000 square kilometers of sea,¹⁶⁴ and, as noted above, contains large areas of exclusive economic zone.

B. Third States Would be Prejudiced by a Pluri-State Internal Waters Status in the Sea of Azov

85. A further requirement for a pluri-State bay to be recognized as internal waters is that such status cannot interfere with the rights of third States. Since internal water status for pluri-State bays has only been recognized in areas that would otherwise constitute territorial seas, the sole right to be protected is the right of innocent passage, including passage to and from ports on the coast.

86. In the *Gulf of Fonseca* judgment (which post-dates the negotiation of UNCLOS, but pre-dates its entering into force), the International Court of Justice (“ICJ”) emphasized that the gulf constituted internal waters only “in a qualified sense,” as the gulf’s waters were subject to the right to innocent passage for *all* nations.¹⁶⁵ As the Court observed:

Since the practice of the three coastal States still accepts that there are the littoral maritime belts subject to the single sovereignty of each of the coastal States, but with mutual rights of innocent passage, there must also be rights of passage through the remaining waters of the Gulf, not only for historical reasons but because of the practical necessities of a situation where those narrow Gulf waters comprise the channels used by vessels seeking access to any one of the three coastal States.¹⁶⁶

The Court concluded that “rights of passage must be available to vessels of third States seeking access to a port in any one of the three coastal States; *such rights of passage being essential in a three-State bay with entrance channels that must be common to all three*

¹⁶⁴ Britannica Online Encyclopedia, Sea of Azov (8 July 2009) (describing the size of the Sea of Azov as nearly 38,000 square kilometers) (UA-508).

¹⁶⁵ Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), ICJ Judgment of 11 September 1992, ¶ 412 [hereinafter “Gulf of Fonseca”] (UAL-58).

¹⁶⁶ *Id.* ¶ 412.

*States.*¹⁶⁷ By recognizing third-State navigational rights in the Gulf of Fonseca, the Court eliminated the risk of prejudice to the navigational interests of third States, whose access to and from a port in any of the littoral States was preserved.¹⁶⁸ Similarly, a risk of third State prejudice does not arise in the Bay of Piran, a tiny body of water lacking any commercial port or harbor.¹⁶⁹

87. By contrast, under Russia’s vision of the Sea of Azov and Kerch Strait as internal waters, third States are already facing substantial prejudice. Third States have consistently exercised their right to transit passage through the Kerch Strait. As explained in Chapter Four, large numbers of foreign-flagged vessels have historically transited the Strait, and continue to do so. Now, however, Russia has built a bridge over the Kerch Strait that hinders the navigation of large commercial vessels, has delayed the passage of vessels through the Strait, and has impeded free navigation by stopping and inspecting vessels *en route* to and from Ukraine’s Sea of Azov ports.¹⁷⁰

88. Other littoral States on the Black Sea — Turkey, Romania, and Bulgaria (the latter two through the European Union) — have taken note of Russia’s conduct, and protested Russia’s discriminatory stoppages of ships as an unwarranted interference with third-State navigational rights.¹⁷¹ So too have the United States¹⁷² and the European

¹⁶⁷ *Id.* (emphasis added). *See also id.* (“The Gulf waters are therefore, if indeed internal waters, internal waters subject to a special and particular regime, not only of joint sovereignty but of right of passage.”).

¹⁶⁸ *See* Juridical Regime of Historic Waters Including Historic Bays - Study Prepared by the Secretariat, [1962] 2 Y.B. Int’l L. Comm’n 1, U.N. Doc. A/CN.4/143, p. 23, ¶ 160 (noting that the importance of the distinction between internal waters and the territorial sea “lies in the fact that . . . the coastal State must allow the innocent passage of foreign ships through its territorial sea, but has no such obligation with respect to its internal waters”) (UA-591). Similarly, a risk of third-State prejudice does not arise in other examples of pluri-State internal waters Russia relies on. For example, the Bay of Piran, the Rovuma Bay, and the Bay of Oypock would be entirely covered by the territorial seas of the coastal States and none of them have commercial harbors.

¹⁶⁹ *See* Maps of Ports and Harbors Located in Croatia and Slovenia, World Port Source (last accessed 18 May 2021) (UA-592).

¹⁷⁰ *See infra* Chapter Six, Sections I.A.3, I.B.

¹⁷¹ *See* Statement by the Spokesperson on the Escalating Tensions in the Azov Sea, *European External Action Service* (25 November 2018) (UA-486); Press Release Regarding the Tension in the Azov Sea and Kerch Strait, No. 321, *Republic of Turkey, Ministry of Foreign Affairs* (26 November 2018) (UA-477).

¹⁷² *See* Heather Nauert, Press Statement: Russia’s Harassment of International Shipping Transiting the Kerch Strait and Sea of Azov, *United States Department of State* (30 August 2018) (UA-543).

Union.¹⁷³ For example, the Ministry of Foreign Affairs of Turkey has noted that, “[a]s a littoral state of the Black Sea, we emphasize that freedom of passage at the Kerch Strait should not be hindered.”¹⁷⁴ The representative of the European Union in the U.N. General Assembly stated in December 2018 that “the European Union calls ‘strongly’ on the Russian Federation . . . to ensure free and unhindered access through the Kerch Strait in accordance with international law.”¹⁷⁵ This statement reflected substantial concerns within the European Union that Russia was seeking to “transfor[m] it [*i.e.*, the Sea of Azov] into an internal lake within the Russian Federation,” and abrogate “Ukraine’s absolute right to have full access to the Sea of Azov, as enshrined in the UN Convention on the Law of the Sea” — continuing a “pattern” of “blocking maritime transport [that] has already been exercised by Russia in the Baltic Sea.”¹⁷⁶

89. Many other U.N. member states have also expressed an interest in the issue, joining resolutions that condemn Russia’s actions and call on Russia to refrain from impeding the lawful exercise of navigational rights in the Sea of Azov and Kerch Strait. A December 2018 resolution of the U.N. General Assembly, for example, “call[ed] upon the Russian Federation to refrain from impeding the lawful exercise of navigational rights and freedoms in the Black Sea, the Sea of Azov and the Kerch Strait, in accordance with applicable international law, in particular provisions of the 1982 United Nations Convention on the Law of the Sea.”¹⁷⁷ A year later in December 2019, a resolution of the U.N. General

¹⁷³ See Statement by the Spokesperson on the Escalating Tensions in the Azov Sea, *European External Action Service* (25 November 2018) (**UA-486**); European Parliament, Resolution No. P8_TA-PROV(2018)0435 “Situation in the Sea of Azov: European Parliament Resolution of 25 October 2018 on the Situation in the Sea of Azov (2018/2870(RSP))” (25 October 2018) (**UA-544**).

¹⁷⁴ Press Release Regarding the Tension in the Azov Sea and Kerch Strait, No. 321, *Republic of Turkey, Ministry of Foreign Affairs* (26 November 2018) (**UA-477**).

¹⁷⁵ United Nations, General Assembly Adopts Resolution Urging Russian Federation to Withdraw Its Armed Forces from Crimea, Expressing Grave Concern about Rising Military Presence (17 December 2018) (**UA-553**).

¹⁷⁶ European Parliament, Resolution of 25 October 2018 on the Situation in the Sea of Azov (2018/2870(RSP), ¶ G(4)-(5) (**UA-544**); see also European Parliament, Resolution of 29 April 2021 on Russia, the Case of Alexei Navalny, the Military Build-up on Ukraine’s border and Russian Attacks in the Czech Republic (2021/2642(RSP), ¶ T(6) (urging “Russia to uphold its obligation under the UN Convention on the Law of the Sea and to guarantee the freedom of navigation and transit passage through the international strait to the ports of the Sea of Azov”) (**UA-593**).

¹⁷⁷ U.N. General Assembly Resolution 73/194, U.N. Doc. No. A/RES/73/194, Problem of the Militarization of the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, as well as Parts of the Black Sea and the Sea of Azov (17 December 2018), p. 2 (**UA-549**). Resolution 73/194 was adopted by 66 votes to 19 votes, with 72 abstentions. U.N. General Assembly Official Records, 73rd Sess., 56 plen. mtg., U.N. Doc. A/73/PV.56 (17 December 2018), p. 20 (**UA-594**).

Assembly again “[c]all[ed] upon the Russian Federation to refrain from impeding the lawful exercise of navigational rights and freedom” and “condemn[ed] . . . the harassment of commercial vessels by the Russian Federation and its restriction of international shipping there”¹⁷⁸ And, in December 2020, a U.N. General Assembly resolution yet again “[c]all[ed] upon the Russian Federation to refrain from impeding the lawful exercise of navigational rights and freedoms” and “condemn[ed] . . . the harassment by the Russian Federation of commercial vessels and its restriction of international shipping there”¹⁷⁹

90. Most recently, in April 2021, NATO, the European Union, and the United States each condemned Russia’s planned closures of areas of the Black Sea, including the southern entrance to the Kerch Strait, to navigation by foreign military and governmental vessels for over six months, through October 2021.¹⁸⁰ The NATO statement called the closures “unjustified” and “call[ed] on Russia to ensure free access to Ukrainian ports in the Sea of Azov, and allow freedom of navigation.”¹⁸¹ The European Union stressed that it “expects Russia to ensure unhindered and free passage to and from the Sea of Azov in accordance with international law.”¹⁸² And, the United States complained of Russia’s “history of . . . impeding access to Ukraine’s ports in the Sea of Azov [and] impacting Ukraine’s international commerce.”¹⁸³

91. These objections illustrate that third States have not acquiesced in any internal waters status for the Sea of Azov and Kerch Strait, nor in any claimed right by Russia to interfere with navigation in those waters. Third States — particularly those that

¹⁷⁸ U.N. General Assembly Resolution 74/17, U.N. Doc. No. A/RES/74/17, Problem of the Militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov (9 December 2019), p. 3 (**UA-595**). Resolution 74/17 was adopted by 63 votes to 19 votes, with 66 abstentions. U.N. General Assembly Official Records, 74th Sess., 41 plen. mtg., U.N. Doc. A/74/PV.41 (9 December 2019), p. 20 (**UA-569**).

¹⁷⁹ U.N. General Assembly Resolution 74/17, U.N. Doc. No. A/RES/75/29, Problem of the Militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov (7 December 2020), p. 4 (**UA-596**).

¹⁸⁰ See *infra* Chapter Six, Section I.A.iii.

¹⁸¹ NATO, EU Condemn Russia's Plans To Close Parts Of Black Sea For Six Months, *RFE/RL* (16 April 2021) (**UA-597**).

¹⁸² *Id.*

¹⁸³ U.S. Department of State, Press Statement: Russia’s Intention To Restrict Navigation in Parts of the Black Sea (19 April 2021) (**UA-598**); see also Cynthia J. Parmley and Raul Pedrozo, “Russia’s Illegal Restriction of Navigation in the Black Sea,” *Lawfare* (27 April 2021) (articulating the views of two faculty members at the U.S. Naval War College that “Russia’s closure of the strait violates Article 38 of UNCLOS because the Kerch Strait is considered a strait used for international navigation under Article 37”) (**UA-755**).

border on and frequently use the broader Black Sea Basin — would face substantial harm if Russia’s view of the regime governing these waters were accepted. Such States, and the international community more broadly, continue to claim and exercise their navigational rights in the Sea of Azov and Kerch Strait. Beyond prejudicing third State navigational rights, moreover, treating the Sea of Azov as internal waters would, as noted, deny third States their additional rights under UNCLOS relating to surplus catch and marine scientific research.

C. Ukraine and Russia Never Agreed to a Pluri-State Internal Waters Status

92. Finally, affirmative agreement of the States concerned is also a necessary (but not sufficient) pre-condition to the recognition of a common internal waters status.

93. In *Gulf of Fonseca*, the Court based its decision that the waters in question were internal waters in part on the fact that all bordering States had agreed to assert a historic claim to the Gulf of Fonseca’s waters. As the Court explained: “If all the bordering States *act jointly* to claim historic title to a bay, it would seem that in principle what has been said above regarding a claim to historic title by a single State would apply to this group of States.”¹⁸⁴ Under the Court’s reasoning, it was necessary for the bordering States to “act” and to do so “jointly.” The *Gulf of Fonseca* decision thus requires affirmative agreement by the bordering States to create a pluri-State internal waters regime.¹⁸⁵

94. The practice of Latvia and Estonia in the Gulf of Riga further supports the conclusion that States must affirmatively agree to a pluri-State internal waters status following the dissolution of a State surrounding a single-State bay. After the dissolution of

¹⁸⁴ *Gulf of Fonseca*, ICJ Judgment of 11 September 1992, ¶ 394 (emphasis added) (internal quotation marks and citations omitted) (UAL-58).

¹⁸⁵ Similarly, with respect to the Rovuma Bay — bordered by Tanzania and Mozambique — a line closing the bay was adopted by agreement of the parties in 1998. See Agreement between the Government of the United Republic of Tanzania and the Government of the People’s Republic of Mozambique regarding the Tanzania/Mozambique Boundary (28 December 1988), p. 1, Art. 2 (“All waters on the landward side of this line constitute the internal waters of the two countries.”) (RU-13). With respect to the Bay of Oyapock — bordered by Brazil and French Guiana — “a closing line of the bay was established as a baseline with the agreement of both parties.” E. Jiménez de Aréchaga, “Brazil-France (French Guiana), Report Number 3-3”, in J. I. Charney and L. M. Alexander (eds.), *International Maritime Boundaries*, Vol. I (Martinus Nijhoff, 1993), p. 779 (RUL-57); see also Maritime Delimitation Treaty between the Federative Republic of Brazil and the French Republic (30 January 1981), Art. 1.3 (declaring the line closing the Bay of Oyapock was established by agreement at the sixth conference of the Joint Commission) (RU-54).

the Soviet Union, Latvia sent Estonia a “proposal to declare the Gulf of Riga a historic bay” with the status of joint internal waters, reflecting a recognition that any such status required the affirmative agreement of both States.¹⁸⁶ Estonia, however, “vetoed Latvia’s endeavours,” which, as Alexander Lott observes, was possible because “each of the new coastal States needs to recognise the continuous historical status of the bay.”¹⁸⁷ Neither State took the position that the prior internal waters status had simply carried over notwithstanding the dissolution of the Soviet Union. Without the agreement of both States, the Gulf of Riga is treated as international waters.¹⁸⁸

95. Russia has relied on the treatment of the Bay of Piran in the 2009 *Croatia/Slovenia* arbitration as a counter-example. But there, the parties’ arbitration agreement specifically disallowed the tribunal from considering any unilateral actions by either State post-dating the dissolution of Yugoslavia.¹⁸⁹ The parties’ arbitration agreement, in effect, constituted an agreement between the two States to continue their pre-dissolution regime. Here, in contrast, there has been no agreement between the Parties to a pluri-State internal waters status. The Parties’ history of unsuccessful negotiation on this issue is set out in the next section.

96. In sum, none of the three necessary conditions for recognition of pluri-State internal waters is met here. Russia’s assertion of such status is exceptional. It not only contradicts UNCLOS and harms the interests of other UNCLOS States Parties, but it also risks the creation of a categorically new type of internal waters that is without any parallel or precedent.

¹⁸⁶ See Alexander Lott, *The Estonian Straits: Exceptions to the Strait Regime of Innocent or Transit Passage* (Brill Nijhoff, 2018), p. 128 (**UAL-110**).

¹⁸⁷ See *id.* p. 129.

¹⁸⁸ See *id.* p. 130.

¹⁸⁹ See *In the Matter of an Arbitration Under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, Signed on 4 November 2009, Final Award of 29 June 2017, Annex to the Award, Arbitration Agreement Between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, Art. 5* (“No document or action undertaken unilaterally by either side after 25 June 1991 shall be accorded legal significance for the tasks of the Arbitral Tribunal or commit either side of the dispute and cannot, in any way, prejudice the award.”) (**UAL-61**). The Arbitration Agreement also permitted the Tribunal to rely on “equity and the principle of good neighborly relations,” rather than being strictly confined to applicable principles of international law. *Id.* Art. 4.

IV. Even Assuming Ukraine and Russia Could Have Jointly Claimed the Sea of Azov and Kerch Strait as Internal Waters, They Never Agreed to Do So

97. Even if the Parties could have jointly claimed the Sea of Azov and Kerch Strait as internal waters, they never agreed to do so. This absence of agreement, and the conduct of Ukraine, confirms that Ukraine and Russia are not bound by an internal waters status.

A. Ukraine Made Clear Shortly After Independence That It Considered the Sea of Azov to Contain Territorial Sea and Exclusive Economic Zone

98. Shortly after its independence, Ukraine made clear that it considered the Sea of Azov as containing its territorial sea and exclusive economic zone, reflecting the Sea's changed status as a result of the dissolution of the Soviet Union, as well as Ukraine's embrace of the UNCLOS regime. The Soviet Union and the Ukrainian Soviet Socialist Republic both signed UNCLOS when the Convention was opened for signature at Montego Bay in 1982, but neither ratified it by 1991, and the Convention had not yet entered into force.¹⁹⁰ Accordingly, at independence, Ukraine's and Russia's territorial sea and continental shelf were established in accordance with the 1958 Geneva Conventions on the Law of the Sea, to which both States were party by virtue of their succession to the Ukrainian Soviet Socialist Republic and the Soviet Union.¹⁹¹ Their entitlement to an exclusive economic zone was established pursuant to customary international law.¹⁹²

99. Ukraine acted quickly to assert and secure these maritime rights. On 11 November 1992, Ukraine deposited baselines with the United Nations Secretariat for measuring the breadth of its territorial sea, exclusive economic zone, and continental shelf,

¹⁹⁰ See U.N. Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, Chapter XXI: Law of the Sea, No. 6: United Nations Convention on the Law of the Sea (10 December 1982) (UA-8).

¹⁹¹ U.N. Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, Chapter XXI: Law of the Sea, No. 1: Convention on the Territorial Sea and the Contiguous Zone (29 April 1958), p. 2 (UA-599); U.N. Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, Chapter XXI: Law of the Sea, No. 2: Convention on the High Seas (29 April 1958), p. 2 (UA-600); U.N. Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, Chapter XXI: Law of the Sea, No. 4: Convention on the Continental Shelf (29 April 1958), pp. 1-2 (UA-601).

¹⁹² *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ Judgment of 3 June 1985, ¶ 34 (“It is in the Court’s view incontestable that . . . the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law.”) (UAL-7).

in both “the Black Sea *and the Sea of Azov*.”¹⁹³ Ukraine’s deposit was in response to an invitation from the U.N. Secretary-General in anticipation of the imminent entry into force of UNCLOS.¹⁹⁴ The Russian Federation made no objection to the baselines Ukraine deposited with the U.N., even though it had repeated notice of Ukraine’s claim, including in 1998, when the U.N. published Ukraine’s baselines in the Law of the Sea Bulletin,¹⁹⁵ and in 2002, when Ukraine reiterated its baselines to Russia in the course of negotiations over the Sea of Azov and Kerch Strait.¹⁹⁶

100. Earlier in 1992, moreover, Ukraine and Russia acknowledged the relevance of UNCLOS to their fishing activities in the Sea of Azov. In the preamble to the 1992 Agreement between the Government of Ukraine and the Government of the Russian Federation on Cooperation in the Fisheries Sector, the two States agreed to “[t]ake into account the UN Convention on the Law of the Sea, 1982”¹⁹⁷ in connection with their efforts “on developing and coordinating their commercial fishing policies and practical activity for the purposes of research, optimum utilization, and preservation of living resources of the [w]orld’s [o]cean[s], including the Black Sea *and the Sea of Azov*.”¹⁹⁸ Moreover, the Parties “confirm[ed] that under the relevant articles of the UN Convention on the Law of the Sea,

¹⁹³ *Note Verbale of the Permanent Mission of Ukraine to the United Nations to the Secretary-General of the United Nations*, No. 633 (11 November 1992) (emphasis added) (UA-3); U.N. Division for Oceans and the Law of the Sea, Office of Legal Affairs, Law of the Sea, Bulletin No. 36 (1998), pp. 49-52 (UA-4).

¹⁹⁴ *Note Verbale from the Under-Secretary General for Legal Affairs of the United Nations*, Ref. No. LOS/CGC/1992/1 (24 June 1992) (UA-2). UNCLOS entered into force as from 16 November 1994, 12 months after the sixtieth state, Guyana, ratified the Convention. See UNCLOS Art. 308(1); U.N. Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, Chapter XXI: Law of the Sea, No. 6: United Nations Convention on the Law of the Sea (10 December 1982), p. 1 (UA-8).

¹⁹⁵ See U.N. Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, Law of the Sea, Bulletin No. 36 (1998), pp. 49-52 (UA-4).

¹⁹⁶ See *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-446-1375 (25 June 2002), p. 1 (“The Ukrainian Side is proceeding from the premise that agreement on the coordinates of baselines would facilitate the soonest possible delimitation and *determination of the legal status of the Sea of Azov*.”) (emphasis added) (UA-513); Minutes of the Fifteenth Meeting of the Delegations of Ukraine and the Russian Federation on the Issues of *Delimitation* (the position of the Ukrainian Side) and *Determination of Legal Status* (the Position of the Russian Side) of the Sea of Azov and the Kerch Strait (16-17 December 2002) (“The Ukrainian side announced the approval of geographical coordinates of the baselines for calculation of the breadth of the territorial sea of Ukraine in the Azov Sea and justified the necessity of its delimitation in accordance with the norms of international law.”) (UA-514).

¹⁹⁷ See Agreement between the Government of Ukraine and the Government of the Russian Federation in the Fisheries Sector (24 September 1992), Preamble (UA-70).

¹⁹⁸ See *id.* Art. 1 (emphasis added).

1982, states that engage in commercial fishing of stocks encountered in the zones of two or more states shall strive to cooperate in the matter of preserving and managing those stocks.”¹⁹⁹

101. Ukraine’s actions on the international stage were mirrored in its domestic legislation. In 1991, Ukraine passed the Law of Ukraine On the State Border of Ukraine, which established Ukraine’s 12-mile territorial sea — and included a definition of internal waters that mirrored the UNCLOS regime for internal waters, and thus did not provide for the possibility of pluri-State internal waters in the Sea of Azov or elsewhere.²⁰⁰ Subsequently, on 16 May 1995, Ukraine passed the Law of Ukraine on the Exclusive (Marine) Economic Zone. In Article 2 of the Law, Ukraine defined its exclusive economic zone in accordance with the relevant rules of UNCLOS as no greater than “200 nautical miles measured from the same baselines as the territorial sea of Ukraine.”²⁰¹ As noted, Ukraine had previously deposited baselines with the United Nations Secretariat for the express purpose “of measuring the width of the territorial waters, economic zone, and continental shelf of the Sea of Azov,”²⁰² and thus Ukraine’s 1995 legislation established an exclusive economic zone in the Sea of Azov, as well as in the Black Sea.

102. When Ukraine ultimately ratified UNCLOS on 26 July 1999,²⁰³ Ukraine again renewed its position that the normal rules of UNCLOS applied to the Sea of Azov and Kerch Strait. In particular, Ukraine ratified UNCLOS without making a reservation as to the

¹⁹⁹ *See id.* Preamble.

²⁰⁰ Law of Ukraine On the State Border of 4 November 1991, Arts. 5-6 (*inter alia*, defining internal waters to include, in relevant part “sea waters on the landward side of the straight baselines,” “waters of gulfs, bays, estuaries and lagoons, harbors and roadsteads, whose shores entirely belong to Ukraine . . . on the condition that the breadth of each sea lane does not exceed 24 nautical miles,” and “waters of gulfs, bays, estuaries and lagoons, seas and straits that historically belong to Ukraine”) (UA-602).

²⁰¹ Law of Ukraine “On the Exclusive (Maritime) Economic Zone of Ukraine,” No. 162/95-VR (16 May 1995), Art. 2 (UA-6).

²⁰² *Note Verbale of the Permanent Mission of Ukraine to the United Nations to the Secretary-General of the United Nations*, No. 633 (11 November 1992), p. 5 (“List of geographic coordinates of points defining the position of baselines for measuring the width of the territorial waters, economic zone, and continental shelf of the Sea of Azov”) (UA-3).

²⁰³ U.N. Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, Chapter XXI: Law of the Sea, No. 6: United Nations Convention on the Law of the Sea (10 December 1982), p. 4 (UA-8).

application of UNCLOS in the Sea of Azov and Kerch Strait (indeed, Russia also made no such reservation).²⁰⁴

103. Notably, Russia also has passed legislation in the post-independence period consistent with the application of UNCLOS's rules on the territorial sea and exclusive economic zone to the Sea of Azov. In July 1998, for example, Russia passed the Federal Law on Internal Maritime Waters, Territorial Sea, and Contiguous Zone of the Russian Federation.²⁰⁵ Similar to the Ukrainian legislation on internal waters, the definition of internal waters in Article 1 does not contemplate pluri-State internal waters.²⁰⁶ In December 1998, the Russian Federation also passed the Federal Act on the Exclusive Economic Zone of the Russian Federation, which defined the exclusive economic zone of Russia consistent with UNCLOS as "200 nautical miles from the baselines from which the breadth of the territorial sea is measured."²⁰⁷ Again, the law contains no carve-out for the waters of the Sea of Azov.²⁰⁸

B. Ukraine and Russia Engaged in Protracted Negotiations Over Russia's Preference for a Possible Internal Waters Status, But Never Reached Agreement

104. Notwithstanding its initial acknowledgement in the 1992 fisheries agreement that UNCLOS would apply to both the Black Sea and the Sea of Azov, in subsequent negotiations with Ukraine, Russia apparently changed its view, and adopted the position that the Sea of Azov and Kerch Strait should constitute internal waters. This was one of many complex issues that needed to be resolved between the two States following the dissolution of

²⁰⁴ *Id.* pp. 33, 40-41.

²⁰⁵ Federal Law on Internal Maritime Waters, Territorial Sea, and Contiguous Zone of the Russian Federation of 17 July 1998 (**UA-603**).

²⁰⁶ *Id.* Art. 1 (defining internal waters to include, in relevant part, "waters on the landward side of the baselines from which the breadth of the territorial sea of the Russian Federation is measured"; "the bays, inlets, firths and estuaries whose coasts belong entirely to the Russian Federation, up to a straight line drawn from shore to shore at the low-water spot where one or several sea lanes are first formed from the direction of the sea, if the breadth of each of them does not exceed 24 nautical miles"; and "bays, inlets, firths, estuaries, seas and straits whose mouths are broader than 24 nautical miles, and which have historically belonged to the Russian Federation, a list of which is drawn up by the Government of the Russian Federation and published in Notices to Mariners").

²⁰⁷ Federal Law on the Exclusive Economic Zone of the Russian Federation (2 December 1998), Art. 1 (**UA-590**); *see also* Presidium of the Supreme Council Of The USSR Decree, No. 10864-X On the Economic Zone of the USSR, Bulletin of the Supreme Council of the USSR No. 9 (2239, Art. 1) (29 February 1984) (**UA-604**).

²⁰⁸ Federal Law on the Exclusive Economic Zone of the Russian Federation (2 December 1998) (**UA-590**).

the Soviet Union and the radically changed political environment in the region, and Ukraine was willing to negotiate on a potential internal waters status as part of its broader attempt to define and stabilize its post-independence relations with its large and assertive neighbor. Ukraine, however, consistently conditioned its willingness to consider an internal waters status for the Sea of Azov and Kerch Strait to the delimitation of those waters — concerned that Russia would use its preference for a “common” status to, in reality, establish unilateral control over the entirety of these bodies of water. The two States thus engaged in protracted and complex negotiations over the legal status and division of the Sea of Azov and Kerch Strait. Those negotiations, which also involved a range of other topics and compromises — including, for example, the determination of certain parts of the land border between the two States — never reached resolution on the status and division of the waters.

105. Ukraine and Russia began their negotiations over the Sea of Azov and Kerch Strait by considering whether to “grant” them an internal waters status, thus reflecting an understanding that the waters did not already possess such status, and that agreement of both States would be required to establish an internal waters regime. Specifically, in the first negotiating session in October 1996, the Russian Delegation insisted that “it would be in the interest of both states to *grant* the waters of the Sea of Azov and the Kerch Strait status as internal waters.”²⁰⁹ Ukraine’s position was that it “believes it appropriate to delimit the state border between Ukraine and the Russian Federation in the Sea of Azov and the Kerch Strait in accordance with international law.”²¹⁰ Ukraine was willing for an agreement on delimitation to involve “*granting* the waters of the Sea of Azov and the Kerch Strait status of the internal waters of Ukraine and the Russian Federation.”²¹¹ At the second negotiating session in July 1997, “the parties reaffirmed their positions expressed during the first meeting.”²¹²

²⁰⁹ Minutes of the Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Continental Shelf and the Exclusive (Maritime) Economic Zone in the Black Sea (17 October 1996), p. 2 (emphasis added) (UA-517).

²¹⁰ *Id.* p. 1.

²¹¹ *Id.* (emphasis added).

²¹² Protocol of the Second Meeting of the Delegations of Ukraine and the Russian Federation to Discuss Draft Agreements Between Ukraine and the Russian Federation on the Legal Status of the Sea of Azov and on Navigation in its Waters, on the Legal Status of the Kerch Strait, and on the Delimitation of the Continental Shelf and the Exclusive (Maritime) Economic Zone in the Black Sea (21 July 1997), p. 1 (UA-605).

106. Subsequently, in the third meeting on 27 April 1998, Ukraine reaffirmed the importance of delimitation, which it proposed should be undertaken “from the principle of legal succession of the states with respect to the territory and the 1982 United Nations Convention on the Law of the Sea.”²¹³ But the Russian Federation again opposed this position. As the Russian delegation explained during the same meeting: “delimitation of the border in the Azov-Kerch waters according to the 1982 United Nations Convention on the Law of the Sea would make it impossible to *grant* these waters status as internal waters.”²¹⁴

107. In subsequent sessions, Ukraine continued to express its openness to an internal waters status for the Sea of Azov and the Kerch Strait, subject to an agreement delimiting those waters.²¹⁵ Russia, for its part, continued to oppose delimitation. The protocol of the Fifteenth Meeting of the delegations of Ukraine and Russia on 16-17 December 2002, for example, notes that “[t]he sides discussed the status of issues regarding *delimitation* (the position of the Ukrainian side) and *determination of legal status* (the position of the Russian side) of the Sea of Azov and the Kerch Strait and the possibility of finding compromise solutions,” and notes that “[t]he Russian side confirmed its disagreement with the attempts of unilateral delimitation of the Azov-Kerch water area.”²¹⁶

108. The State Border Treaty, signed in January 2003 to define the land border between Ukraine and Russia,²¹⁷ reinforces that the Parties had not agreed on the status of the Sea of Azov and Kerch Strait. It states: “Nothing in this Treaty shall prejudice the *positions* of the Russian Federation and Ukraine with respect to the status of the Sea of Azov and the Kerch Strait as internal waters of the two States.”²¹⁸ This savings language evinces no agreed

²¹³ Minutes of the 3rd Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Spaces in the Black Sea (27 April 1998), p. 2 (UA-520).

²¹⁴ *Id.* p. 1 (emphasis added).

²¹⁵ *See, e.g.*, Speech of Ukrainian Delegation Chairman Yu. V. Kostenko at the 11th Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and Delimit the Maritime Spaces in the Black Sea (8 February 2001), p. 2 (emphasis added) (UA-562).

²¹⁶ Minutes of the Fifteenth Meeting of the Delegations of Ukraine and the Russian Federation on the Issues of *Delimitation* (the position of the Ukrainian Side) and *Determination of Legal Status* (the Position of the Russian Side) of the Sea of Azov and the Kerch Strait (16-17 December 2002), pp. 1-2 (UA-514).

²¹⁷ Treaty Between the Russian Federation and Ukraine on the Russian-Ukrainian State Border (28 January 2003), Preamble (“Acting out of the need to settle questions of the course of the Russian–Ukrainian State border”) (UA-529).

²¹⁸ *Id.* Art. 5 (emphasis added).

position that the Sea of Azov and Kerch Strait were treated by the Parties as internal waters. Rather, it reflects that the two States had conflicting *positions* — in plural — as to how a *future* internal waters status for those bodies of water could work in practice, given Ukraine’s position on delimitation and Russia’s concern that delimitation would be inconsistent with an internal waters regime. In short, ten years after Ukraine’s independence, and after Ukraine’s deposit of baselines for the Sea of Azov under UNCLOS, the Parties were at a stalemate as to the possible future legal status and delimitation of the Sea of Azov.

109. Shortly after the execution of the State Border Treaty, in October 2003, Russia precipitated a crisis in the Kerch Strait by building a dam between the Russian coast and Ukraine’s Tuzla Island.²¹⁹ Russia’s actions prompted warnings of a possible “armed conflict,” as well as serious fears in Ukraine that Russia would seek to annex the island.²²⁰ The crisis was resolved, in December, through the execution of the 2003 Sea of Azov Treaty. Concluded hurriedly in the face of this Russian aggression, the Treaty was meant to preserve each Party’s position, serving as a basis for de-escalation of the Tuzla Island crisis, and for further negotiations.

110. The limited purpose of the Sea of Azov Treaty is reflected in its notably restrained language. Article 1, paragraph 1, provides: “The Sea of Azov and the Kerch Strait historically constitute internal waters of the Russian Federation and Ukraine.”²²¹ Both in English and in the authentic Ukrainian and Russian texts,²²² this language does not describe any present status for these waters — it instead records a historical fact as to their past status. If the Treaty had intended to provide that these waters presently constituted historic internal waters, as Russia claims, the Parties could have readily stated that the Sea of Azov

²¹⁹ See, e.g., *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-401/-3661 (30 September 2003) (expressing “concern” for, and requesting information on, Russia’s “unilateral operations involving construction of a dam in the Kerch Strait”) (UA-523); *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-410-3743 (4 October 2003) (reiterating same) (UA-524).

²²⁰ See *Russia PM Eases Ukraine Crisis*, *BBC News* (22 October 2003) (UA-525).

²²¹ Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait (24 December 2003), Art. 1 (UA-19).

²²² In the Russian and Ukrainian texts, the Russian adverb “исторически [*istoricheski*, historically]” and Ukrainian adverb “історично [*istorychno*, historically]” respectively modify the Russian verb “являются [*iavliaiutsia*, constitute]” and Ukrainian verb “є [*ye*, constitute].” If the Russian and Ukrainian texts intended to provide that these waters presently constitute historic internal waters, the Russian and Ukrainian text would have used the following texts: “являются историческими внутренними водами [*iavliaiutsia istoricheskimi vnutrennimi vodami*]” or “є історичними внутрішніми водами [*ye istorychnymy vnutrishnimy vodamy*],” both of which translate to “constitute historic internal waters.”

and Kerch Strait “constitute historic internal waters”; or, simply, that they “constitute internal waters.” It is notable that the Parties did not agree to either straightforward formulation in describing the present status of the waters.

111. Along with preserving a basis for Russia’s future assertion of its preference for an internal waters status, the 2003 Sea of Azov Treaty also preserved Ukraine’s position that the waters would need to be delimited. In particular, Article 1, paragraph 2, of the Treaty states: “The Sea of Azov shall be delimited by the state border line in accordance with an agreement between the Parties.”²²³ Just as the Parties have never finally agreed on an internal waters status for the Sea of Azov and Kerch Strait, they also have never agreed on a line of delimitation.²²⁴

112. Consistent with the interim nature of the 2003 Sea of Azov Treaty, after its execution, Ukraine and Russia continued to negotiate over “the legal status of the Azov-Kerch waters.”²²⁵ The existence of continued negotiations on the question of “legal status” is consistent with a good faith, ordinary reading of Article 1, paragraph 1 of the Sea of Azov Treaty; namely, that the Treaty did not determine the legal status of the Sea of Azov and Kerch Strait as internal waters, but instead simply provided a framework for further discussions between the Parties. In other words, the subsequent practice of the parties after the conclusion of the 2003 Sea of Azov Treaty establishes that both sides considered the legal status and delimitation of the Sea of Azov to be an outstanding issue for negotiation.

²²³ Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait (24 December 2003), Art. 1 (**UA-19**).

²²⁴ A contemporaneous declaration by the Presidents of both States, as well as the conduct of Ukraine and Russia in further negotiations, confirms that the Sea of Azov Treaty did not contain a normative statement on the legal status of these waters. The December 2003 Joint Statement of the Presidents of Ukraine and Russia repeated the careful formulation that “*historically* the Sea of Azov and the Strait of Kerch are inland waters of Ukraine and Russia.” Thus it, too, did not address the present legal status of the waters. Instead, tracking the preamble of the Sea of Azov Treaty, the Joint Statement provided only the assertion that “the Azov-Kerch area of water is preserved as an integral economic and natural complex used in the interests of both states.” Again, there is no explanation for this entirely hortatory language — except that the States had not yet reached any final agreement. See The Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch (24 December 2003), in U.N. Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, Law of the Sea, Bulletin No. 54 (2004), p. 131 (emphasis added) (**UA-530**).

²²⁵ See Minutes of the Seventeenth Meeting of the Delegations of the Russian Federation and Ukraine to Discuss Issues Pertaining to the Sea of Azov and Kerch Strait (29-30 January 2004), p. 1 (**UA-531**). See also Minutes of a Meeting of the Working Group on the Issues of Environmental Protection in the Framework of the 18th Round of the Ukrainian-Russian Negotiations on the Issues of Determination of the Legal Status of the Azov Sea and the Kerch Strait (25-26 March 2004), p. 1 (**UA-532**).

113. Despite these continuing negotiations — which took place between 1994 and 2010 — no agreement was reached on assertion of an internal waters status for the Sea of Azov and Kerch Strait, or on their delimitation. Any statements, or even provisional agreements, offered during such inconclusive negotiations cannot be treated as binding, particularly given Ukraine’s intention that a complete agreement would need to be reached that encompassed these two related issues.²²⁶

C. The Conduct of Ukraine and Russia Confirms the Absence of Agreement to an Internal Waters Status

114. The conduct of Ukraine and Russia vis-à-vis third States, as well as one another, confirms the absence of agreement to an internal waters status.

115. First, Ukraine’s conduct in the Sea of Azov vis-à-vis third States is inconsistent with an internal waters status. Ukraine has not adopted domestic legislation, nor circulated baselines, that put third States on notice of an internal waters claim.²²⁷ Indeed, contrary to Russia’s proffered interpretation of the 2003 Sea of Azov Treaty, Ukraine has made no attempt to rescind its previously deposited baselines in the Sea, and neither Ukraine nor Russia has registered the Treaty with the United Nations Secretariat. Instead, Ukraine has consistently accepted and encouraged the international use of the Sea of Azov.

116. As described in Chapter Four, the Kerch Strait and Sea of Azov provide crucial, international access to two significant Ukrainian ports, and to Russia’s riverine ports. Even before Ukraine’s independence, there was significant maritime traffic through the Kerch Strait.²²⁸ Since independence, Ukraine has promoted continuous access by

²²⁶ See, e.g., *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar)*, ITLOS Case No. 16, Judgment of 14 March 2012, ¶¶ 92-93, 98 (finding that a conditional understanding rather than a legally binding agreement existed between the Parties because “[f]rom the beginning of the discussions Myanmar made it clear that it did not intend to enter into a separate agreement on the delimitation of territorial sea and that it wanted a comprehensive agreement covering the territorial sea, the exclusive economic zone and the continental shelf”) (UAL-63); *Case Concerning the Factory at Chorzów (Germany v. Poland)*, PCIJ Judgment of 13 September 1928, p. 51 (“[T]he Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement.”) (UAL-27).

²²⁷ See *supra* Chapter Five, Section IV.A.

²²⁸ See generally Alexander Skaridov, *The Sea of Azov and the Kerch Straits* in David D. Caron and Nilufer Oral (eds.), *Navigating Straits: Challenges for International Law* (2014), p. 229 (Noting that, “[f]or centuries, the Sea of Azov has been an important waterway for the transport of goods and passengers,” and explaining certain of its uses during the Imperial and Soviet eras.) (UA-528).

foreign-flagged vessels to these waters and to Ukraine's Sea of Azov ports. Even in the midst of the Tuzla Island crisis, for example, the 2003 Sea of Azov Treaty safeguarded the free access of foreign commercial vessels to Ukrainian ports²²⁹ — access that would not have been guaranteed as part of an internal waters regime — and it also contemplated opportunities for foreign military and government navigation, while taking account of historical security concerns with respect to such navigation.²³⁰ Ukraine's desire to preserve and facilitate third-State navigation in the Kerch Strait is reflected also in its continuation of the pre-independence pilotage regime through the Strait. Established under the Soviet Union, the pilotage regime responded to unique safety and environmental considerations in the Strait.²³¹ Ukraine's post-independence management of the pilotage program has facilitated the safe and efficient transit of large numbers of foreign vessels through the Strait, and thus is consistent with the UNCLOS regime rather than an internal waters status.

117. Second, Ukraine's conduct towards Russia with respect to both navigation and fisheries also evinces an absence of agreement on an internal waters status and shows Ukraine's periodic invocation of rights under UNCLOS. Contrary to Russia's assertion that the status of the Kerch Strait as "common internal waters" outside the UNCLOS regime has been settled since 1991, Ukraine has in diplomatic communications and treaties asserted its rights under UNCLOS since that time. For example, on 15 September 2002, Ukraine protested that Russia's "unilateral changes to the navigation conditions for vessels in the Kerch Strait . . . were in violation of the provisions of Paragraphs 4 and 5 of Article 41 and Subparagraph (k) of Paragraph 2 of Article 19 of the Convention on the Law of the Sea of 1982."²³² Similarly, Ukraine's approach in bilateral negotiations over a potential Kerch Strait

²²⁹ Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait (24 December 2003), Art. 2(2) (UA-19).

²³⁰ *Id.* Art. 2(3).

²³¹ See [REDACTED] Report, ¶ 3.8; Expert Report of [REDACTED] Report"), ¶¶ 53-61.

²³² *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-446-2110 (15 September 2002), pp. 1-2 (UA-516). Ukraine has also protested Russian dredging activities on the Ukrainian side of the Strait numerous times. See *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-446-933 (8 May 2002) ("There are continued unauthorized attempts to conduct dredging and hydraulic operations in Ukrainian internal waters of the Kerch Strait by dredging vessels flying the flag of the Russian Federation.") (UA-538); *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-446-2304 (27 June 2003) ("[D]raw[ing] the attention of the Russian Side to the unlawful unilateral activities involving the dredging operations in the *Ukrainian sector* of the Kerch Strait . . . by the Russian dredging vessel Urengoy.") (emphasis added) (UA-539); *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-410-897 (23 February 2004) ("[E]xpress[ing] concern over unlawful activities conducted by the Russian vessel Urengoy, which has been performing dredging operations in internal waters of Ukraine in the Kerch Strait since February 7, 2004 without

crossing was aimed at safeguarding free passage through the Strait.²³³ And, as noted above, in a fisheries-related agreement applicable to the Sea of Azov signed in the early 1990s, Ukraine and Russia invoked “the relevant articles of the UN Convention on the Law of the Sea” governing “commercial fishing of stocks encountered in the zones of two or more states.”²³⁴

118. Prior to 2014, and notwithstanding its desire for an internal waters status, Russia also had accepted (including through the 2003 Sea of Azov Treaty) the extensive international navigation in the Sea of Azov and Kerch Strait. It also benefited from navigation through the Kerch Strait to its own Sea of Azov ports.²³⁵ Since 2014, however, Russia has begun to interfere with the freedom of navigation in the Sea of Azov and Kerch Strait, as set out in Chapter Six. Yet, even Russia’s post-2014 conduct has been at odds with its claim in these proceedings that Ukraine and Russia reached an agreement to treat the Sea of Azov and Kerch Strait as “common internal waters” not subject to UNCLOS.²³⁶ Specifically, rather than respect the claimed agreement between the parties on such a status, Russia has since 2014 declared that the Kerch Strait is not common internal waters, but instead “under the full sovereignty of Russia.”²³⁷ As set out above and in Chapter Six, Russia has taken concrete steps to enforce that view, interfering with the navigation of both Ukrainian and third-State vessels. Russia has justified its actions in the Kerch Strait by asserting that “[it] is a Russian strait” and “is not subject to any regulation by international law.”²³⁸

119. In sum, neither Party has acted in a manner consistent with an agreed joint internal waters status in the Sea of Azov and Kerch Strait, and any claim that Ukraine has consented to such status lacks support in Ukraine’s conduct. Notwithstanding Ukraine’s

approval from the Ukrainian Side, and in doing so commits regular illegal crossings of the state border of Ukraine.”) (UA-540).

²³³ See *supra* Chapter Four, Section I.A.

²³⁴ *Id.*

²³⁵ [REDACTED] Report, ¶¶ 3.1-3.4.

²³⁶ See, e.g., Preliminary Objections, ¶¶ 67, 70.

²³⁷ Foreign Ministry: Kyiv’s Draft Law on the Maritime Territory Is Not Applicable to the Sea of Azov, *RIA News* (15 November 2018) (UA-541).

²³⁸ Ministry of Foreign Affairs of the Russian Federation, Foreign Minister Sergey Lavrov’s Remarks and Answers to Media Questions at a Joint News Conference Following Talks with Italian Minister of Foreign Affairs and International Cooperation Enzo Moavero Milanesi, Rome, November 23, 2018 (23 November 2018) (“Let me also remind you that the Kerch Strait is not subject to any regulation by international law. It is a Russian strait.”), p. 2 (UA-470).

openness to negotiations over an internal waters status in the Sea of Azov and Kerch Strait, Ukraine has in multiple respects acted in a manner *inconsistent* with such status, providing further confirmation that no agreement on an internal waters status was ever reached. For its part, Russia has in the past accepted rights of international navigation in the Sea of Azov and Kerch Strait. More recently, it has claimed absolute sovereignty over the Kerch Strait — a claim that also cannot be reconciled with its assertion before this Tribunal that, prior to 2014, Ukraine and Russia had agreed on and were bound by a regime of common or co-equal sovereignty. The conduct of the Parties underscores that — even if, contrary to the legal principles set out in Parts I-III of this Chapter, the Parties did have the legal right to jointly extend their sovereignty to the Sea of Azov and Kerch Strait — they never agreed to do so.

V. The Sea of Azov and Kerch Strait Are Not Subject to a Claim of Pluri-State Historic Title

120. Not only does UNCLOS bar any form of pluri-State internal waters status for the Sea of Azov, but the Sea of Azov and Kerch Strait also are not subject to a claim of pluri-State historic title. Instead, until the dissolution of the Soviet Union, the Sea Azov and Kerch Strait formed a single-State juridical bay, a distinct status under international law that cannot give rise to a claim of historic title.

121. Historic and juridical bays have long been considered distinct under international law.²³⁹ Historic title is closely related to the concept of prescription. It is established through effective (rather than juridical) control over an area of water, combined with the acquiescence of other States.²⁴⁰

122. Accordingly, historic title is established only where a State exercises rights or sovereignty over an area of water to which it otherwise would not have title. As the ICJ articulated in *Fisheries (UK v. Norway)*, and as it reiterated in *Gulf of Fonseca*: “By ‘historic waters’ are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title.”²⁴¹

²³⁹ See Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, 516 U.N.T.S. 205, Art. 7 (**UAL-106**).

²⁴⁰ Coalter G. Lathrop, *Baselines* in Donald R. Rothwell et al. (eds.), *The Oxford Handbook of the Law of the Sea* (2015), p. 84 (citing Ian Brownlie, *Principles of Public International Law* 157 (2003)) (**UAL-123**).

²⁴¹ *Fisheries Case (United Kingdom v. Norway)*, ICJ Judgment of 18 December 1951, p. 130 (**UAL-124**); *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, ICJ Judgment of 11 September 1992, p. 588 (**UAL-58**).

123. A mere exercise by a State of *de jure* rights under international law does not establish historic title. Thus, for example, in the *Gulf of Maine* case, the United States sought to rely on its historical fishing activities in the gulf to claim ongoing fishing rights. Analogizing the United States' position "to the invocation of historic rights," a Chamber of the ICJ rejected the U.S. position, in part because the United States had at the time enjoyed a *de jure* right to fish, and thus had not acquired any rights by prescription.²⁴²

124. Here, while the Soviet Union exercised sovereignty over the Sea of Azov and Kerch Strait prior to 1991, the Soviet Union did so in reliance on the longstanding customary principle (codified in Article 7 of the 1958 Geneva Convention on the Territorial Sea) that States can claim as internal waters bays with narrow mouths, generally ranging from six to twelve miles across, so long as those bays are entirely surrounded by a single State.²⁴³ Since the Soviet Union's historical exercise of sovereignty was supported by then-applicable law, the Soviet Union did not accrue any form of prescriptive, historical title.

125. In fact, in his seminal work, *Le Droit International Public de la Mer*, Gilbert Gidel, who is credited with establishing the concept of historic bays, observed:

We have omitted from the above description of historical waters a certain number of bodies of water that are sometimes listed as historical waters but should not be included in that category since, under the rules of common international maritime law, they are inland waters. *Examples include the Sea of Azov (the Kerch Strait is 10 miles wide) . . .*²⁴⁴

126. Accordingly, upon dissolution of the Soviet Union, no claim to historic title to the Sea of Azov or Kerch Strait existed. Instead, as described in Part I, what was once a single-State juridical bay simply ceased to exist, and these bodies of water became subject to

²⁴² *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, ICJ Judgment of 12 October 1984, pp. 340-342 (UAL-125).

²⁴³ See e.g., *Historic Bays: Memorandum by the Secretariat of the United Nations*, U.N. Doc. A/CONF.13/1, in *Official Records of the United Nations Conference on the Law of the Sea, Vol. I (Preparatory Documents)* (24 February to 27 April 1958), ¶ 9 (tracing the origin of allowing single States to enclose narrow-mouthed bays as internal waters to at least the nineteenth century, and setting forth various options for the required narrowness of the mouth, in particular six to twelve miles in length) (UA-547).

²⁴⁴ Gilbert Gidel, *Le Droit International Public de La Mer, Le Temps de Paix, Tome III: La Mer Territoriale et La Zone Contigue* (1934), p. 663 (emphasis added) (UAL-109); see also Leo J. Bouchez, *The Regime of Bays in International Law* 215-237 (1964) (providing an extensive list of claimed historic bays that does not include the Sea of Azov) (UAL-126).

the general regime of the law of the sea.

VI. UNCLOS Governs Internal Waters in Important Respects

127. Even if the Sea of Azov were (incorrectly) considered internal waters, those internal waters would still be governed by UNCLOS in important respects.²⁴⁵ As the Tribunal observed in its Award on Preliminary Objections, Russia has adopted the unsupported and “rather sweeping premise . . . that the Convention does not regulate a regime of internal waters.”²⁴⁶ In fact, there are a number of UNCLOS provisions that have a bearing on the legal regime governing internal waters. For example, Article 8(2) guarantees the right of innocent passage for foreign vessels in areas that were not considered internal before drawing straight base lines pursuant to UNCLOS Article 7. Relatedly, Articles 34 and 35 of the Convention recognize a right of transit passage for foreign vessels in internal waters contained within an international strait where the waters were not considered internal before drawing straight base lines pursuant to UNCLOS Article 7.²⁴⁷

128. Other UNCLOS provisions apply to all maritime areas, including internal waters. As the Tribunal noted, “the obligation to protect and preserve the marine environment under Article 192 applies to ‘all maritime areas’ . . . includ[ing] internal waters.”²⁴⁸ Relatedly, as discussed in Chapter Six, Section II.A, the obligation under Articles 204-206 to assess and surveil the risks or effects of pollution of the marine environment applies to activities in internal waters, and even to activities on land. And, as discussed in Chapter Six, Section III, “the duty to protect objects of an archaeological and historical nature found at sea” and to “cooperate for this purpose” also applies to all maritime areas, including the internal waters of State Parties. Questions concerning internal waters that are regulated by the foregoing provisions of UNCLOS would therefore be properly before this Tribunal even if one were to conclude that Russia’s unique assertion of “common internal waters” is consistent with UNCLOS (which it is not).

²⁴⁵ See Marcelo G. Kohen, *Is the Internal Waters Regime Excluded from the United Nations Convention on the Law of the Sea?* in Lilian del Castillo (ed.), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea* (2015), p. 123 (“As part of the seas, [internal waters] are governed by the law of the sea and the Convention that comprehensively deals with it.”) (UAL-67).

²⁴⁶ Award on Preliminary Objections, ¶ 294. See Marcelo G. Kohen, *Is the Internal Waters Regime Excluded from the United Nations Convention on the Law of the Sea?* in Lilian del Castillo (ed.), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea* (2015), pp. 117-118 (UAL-67).

²⁴⁷ UNCLOS Arts. 34-35.

²⁴⁸ Award on Preliminary Objections, ¶ 295.

**Chapter Six: The Russian Federation's Violations of UNCLOS
in the Black Sea, Sea of Azov, and Kerch Strait**

129. Russia's violations of the Convention are brazen, and implicate core rights and obligations under the Convention. Russia has undermined free navigation in the Black Sea and Sea of Azov and hampered transit passage in the Kerch Strait, harming Ukrainian and foreign vessels and impeding access to two significant Ukrainian ports. It has failed in its responsibility to protect the marine environment, including by ignoring the risks stemming from major construction projects in the Kerch Strait, which lies at the center of the Black Sea Basin ecosystem. And it has placed at peril sites containing rich archeological and historical objects that span centuries, with officials at the highest levels of government encouraging the disturbance of such objects by amateurs. Russia's pervasive violations of UNCLOS in each of these three areas are detailed in the sections that follow.

I. Russia's Interference With Freedom of Navigation in the Black Sea, Sea of Azov, and Kerch Strait

130. In the Black Sea, and throughout the Sea of Azov and Kerch Strait, Russia has flouted its obligations to respect the rights of all vessels to freedom of navigation and transit passage. Russia has sought to divide these integrally connected bodies of water by impeding navigation through the Kerch Strait, it has undermined Ukraine's access to the oceans and the access of international shipping to Ukraine, and it has seized and harassed Ukrainian-flagged vessels, threatening their ability to navigate freely in these resource-rich seas.

131. In so doing, the Russian Federation has acted and continues to act inconsistently with three pillars of the UNCLOS regime of free navigation. First, in violation of Articles 38, 43, and 44 and their guarantee of unimpeded transit passage through international straits, Russia has sought to turn the Kerch Strait from a thoroughfare for maritime traffic into a choke point, including by building a low-clearance bridge and hampering the passage of vessels heading to and from Ukraine's Sea of Azov ports. Second, beyond the Kerch Strait, Russia has violated Articles 2, 58, 87, and 92 and the principle of freedom of navigation in the seas, by delaying and interfering with Ukrainian and third-State vessels navigating in the Sea of Azov. Third, in violation of the principle of exclusive flag-State jurisdiction and Articles 2(3) and 91, Russia has targeted vessels that Ukraine relies on to develop and exploit its natural resources in the Black Sea and Sea of Azov — in particular, it has seized two Ukrainian-flagged JDRs and re-flagged them.

A. Russia Has Violated Articles 38, 43, and 44 by Impeding Navigation in the Kerch Strait to and From Ukrainian Ports

132. The law of the sea has long recognized international straits as, in the words of the ICJ, the ocean’s “international highways.”²⁴⁹ States bordering straits are bound under UNCLOS not to interfere with traffic transiting through them. In the Kerch Strait, Russia has violated this pillar of the UNCLOS navigational regime in multiple ways: It has constructed a bridge at half the height required for proper clearance, thereby preventing larger vessels from passing through the Strait and violating its obligations under Articles 38 and 44 not to impede or hamper transit passage. It has failed to share information with Ukraine about potentially significant threats to safe navigation posed by its hasty construction of the Kerch Strait bridge, in violation of its obligations under Articles 43 and 44. It has, from June 2018 to the present day, targeted and disproportionately inspected and/or delayed — by an average of 40 hours — those merchant vessels that are able to still pass under the Kerch Strait bridge and are traveling to or from Ukraine’s Sea of Azov ports,²⁵⁰ further violating its obligations not to impede or hamper transit passage under Articles 38 and 44. And, most recently, Russia has unilaterally asserted that it is restricting the navigation of all foreign government vessels through the Kerch Strait for a period of more than six months, resulting in yet another intrusion into the transit passage regime in the Strait.

1. Russia Has Violated Articles 38 and 44 by Unlawfully Impeding Transit Passage Through the Construction of the Kerch Strait Bridge

i. Russia is Obligated Under Articles 38 and 44 Not to Impede, Hamper, or Suspend Transit Passage Through the Kerch Strait

133. In recognition of the critical role of straits in enabling free navigation, UNCLOS Articles 38 and 44 place an obligation on Russia, as a State bordering the Kerch Strait, not to impede, hamper, or suspend transit passage through the Strait. Specifically, Article 38(1) states that “all ships and aircraft enjoy the right of transit passage” in international straits, and that such passage “shall not be impeded.”²⁵¹ Article 44 further

²⁴⁹ *The Corfu Channel Case (UK v. Albania)*, ICJ Judgment of 9 April 1949, p. 29 (UAL-15).

²⁵⁰ ██████████ Statement, ¶ 12; see also Witness Statement of ██████████, ¶¶ 3-5.

²⁵¹ UNCLOS Art. 38(1) (emphasis added).

provides that “States bordering straits shall not hamper transit passage,” and that “[t]here shall be no suspension of transit passage.”²⁵² As a State whose ships transit the Kerch Strait, and that relies on transit through the Strait for access to its ports on the Sea of Azov, Ukraine has an important interest in transit passage for both Ukrainian and foreign-flagged vessels.²⁵³

134. Articles 38 and 44 preclude a State bordering a strait from erecting physical structures that would impede or hamper transit passage. This proposition was accepted by both parties in the *Passage Through the Great Belt* case, in which Finland and Denmark agreed that international law requires a bridge over an international strait to be built at a height that accommodates all ships that use the strait.²⁵⁴ Consistent with the position adopted in State practice,²⁵⁵ Finland further observed that such a bridge must also accommodate all ships that “may reasonably be foreseen to use” the relevant strait in the future.²⁵⁶

²⁵² UNCLOS Art. 44.

²⁵³ See *The Corfu Channel Case (UK v. Albania)*, ICJ Judgment of 9 April 1949, p. 29 (recognizing the “special importance” to a State that relies on a strait for “traffic to and from [its] port”) (UAL-15); Virginia Commentary, pp. 282-83 (negotiating history of UNCLOS confirming that “[m]aintenance of the freedoms of navigation and of overflight through and over straits used for international navigation” was of interest to “States whose international sea-borne trade has to pass through such straits,” and “States bordering enclosed or semi-enclosed seas”) (UAL-16). In other words, Ukraine is an important user State of the Strait (in addition, of course, to being a State bordering the Strait).

²⁵⁴ *Passage through the Great Belt (Finland v. Denmark)*, ICJ, Memorial of the Government of the Republic of Finland (December 1991), ¶ 421 (UAL-13); *Passage through the Great Belt (Finland v. Denmark)*, ICJ, Counter-Memorial of the Government of the Kingdom of Denmark (May 1992), ¶¶ 20, 37, 57 (UAL-14).

²⁵⁵ See, e.g., Hugo Caminos & Vincent P. Cogliati-Bantz, *The Legal Regime of Straits: Contemporary Challenges and Solutions* (2014), p. 341 (noting that the IMO Sub-Committee on Safety of Navigation endorsed an Italian proposal to build a bridge over the Strait of Messina in part because the height of the bridge “should be more than adequate for ships likely to use the Strait of Messina, so far as can be foreseen”) (UAL-127); William L. Schachte, Jr. & J. Peter A. Bernhard, *International Straits and Navigational Freedoms*, Va. J. Int’l L., Vol. 33, p. 529 (1993) (stating the official U.S. position that “[t]he United States believes [that] . . . an acceptable fixed span bridge should clearly accommodate ship designs which exist and those which are reasonably foreseeable in light of the navigational requirements of the particular strait”) (UAL-128); see also Erik Brüel, *International Straits*, Vol. II (1947), p. 43 (“Bridges and embankments must be so constructed that practically all ships can pass under, respectively through them without such difficulties in manoeuvring [sic], that the strait ceases to be a navigable waterway.”) (citations omitted) (UAL-129).

²⁵⁶ *Passage through the Great Belt (Finland v. Denmark)*, ICJ, Memorial of the Government of the Republic of Finland (December 1991), ¶ 427 (UAL-13).

- ii. Russia's Construction of the Kerch Strait Bridge Permanently Prevents Large Vessels from Navigating Through the Strait and Accessing Ukraine's Sea of Azov Ports, Violating Russia's Obligations Not to Impede or Hamper Transit Passage Under Articles 38 and 44

135. Contrary to its obligations under Articles 38 and 44 not to impede or hamper transit passage, Russia has constructed a low-clearance bridge across the Kerch Strait that permanently prevents large vessels that have historically transited the Strait, and vessels that may foreseeably transit the Strait, from accessing Ukraine's Sea of Azov ports. Notably, the Kerch Strait bridge impedes traffic by large vessels to Ukraine's Sea of Azov ports, without interfering with smaller vessels that transit the Strait to reach Russia's Sea of Azov ports, which cannot handle large, seagoing vessels.²⁵⁷

136. As depicted in **Map 5**, the Kerch Strait bridge begins on the Taman Peninsula in southern Russia, crosses Tuzla Island and, passing over the principal Kerch-Yenikale navigation channel in the Strait, terminates on the Crimean Peninsula proper.²⁵⁸ While construction of the bridge was not completed until December 2019, construction began in 2016 and the railway and roadway arches across the Kerch-Yenikale navigation channel were put in place between August and October 2017.²⁵⁹

137. These arches, which mark the highest point of the bridge, sit 35 meters above the water.²⁶⁰ On 24 May 2017, Russian authorities issued a notice that, beginning in July or August of 2017, vessels with an air draft over 33 meters would no longer be able to safely

²⁵⁷ See ██████ Report, ¶ 3.2 ("The Russian Federation ports in the Sea of Azov range from 3.6 to 5 metres in water depth. Hence, these ports are generally used by smaller merchant vessels. However, the Ukrainian ports of Mariupol and Berdyansk have a greater depth, around 8 metres. As a result, they are capable of handling considerably larger vessels than the Russian Federation's Sea of Azov ports.") (citations omitted).

²⁵⁸ About the Project, *Official Information Site for the Construction of the Crimean Bridge* (UA-188).

²⁵⁹ Putin Train Ride Bridges Crimea-Russia Gap, *DW* (23 December 2019) (UA-606); All Piles Have Been Sunk on the Crimean Bridge's Road Section, *Official Information Site for the Construction of the Crimean Bridge* (16 August 2017) (UA-190); Railway Arch of Crimean Bridge Raised to Design Height, *Official Information Site for the Construction of the Crimean Bridge* (29 August 2017) (UA-191); Marine Operation to Install Roadway Arch of Crimean Bridge Completed, *Official Information Site for the Construction of the Crimean Bridge* (13 October 2017) (UA-192).

²⁶⁰ About the Project-Bridge Height, *Official Information Site for the Construction of the Crimean Bridge* (UA-196); see also SC Institute Giprostroymost-Saint-Petersburg, *The Cities Where Structures Have Been Constructed on SC 'Institute Giprostroymost-Saint-Petersburg' Projects* (2016), p. 35 (UA-197). Stroigazmontazh, which was awarded the contract for designing and building the bridge, subcontracted with SC Institute Giprostroymost-Saint-Petersburg in April 2015 for the bridge design. Chronology of Bridge Construction, *Official Information Site for the Construction of the Crimean Bridge* (UA-198).

transit through the Kerch Strait because of the bridge.²⁶¹ As shown in **Figure 2** below, this height restriction has a direct impact on larger commercial cargo vessels, including Panamax freighters, which are no longer able to transit the Strait. Russia reaffirmed the 33-meter height restriction in March 2018.²⁶²

²⁶¹ Ministry of Transport of the Russian Federation, Federal Agency for Sea and River Transport, Administration of the Sea Ports of the Black Sea in the City of Kerch, Captain of the Sea Port of Kerch, Order No. 842 SKP 0251 (24 May 2017) (**UA-199**). In this order, Russia also stated that vessels exceeding 160 meters in length would not be permitted to transit the Strait beginning in July or August 2017. *Id.* However, that restriction appears not to have been enforced.

²⁶² *See* Russian Federation Ministry of Transportation, Order No. 99 of March 2018 (**UA-607**).



Kerch Strait Bridge and Maximum Panamax Freighter

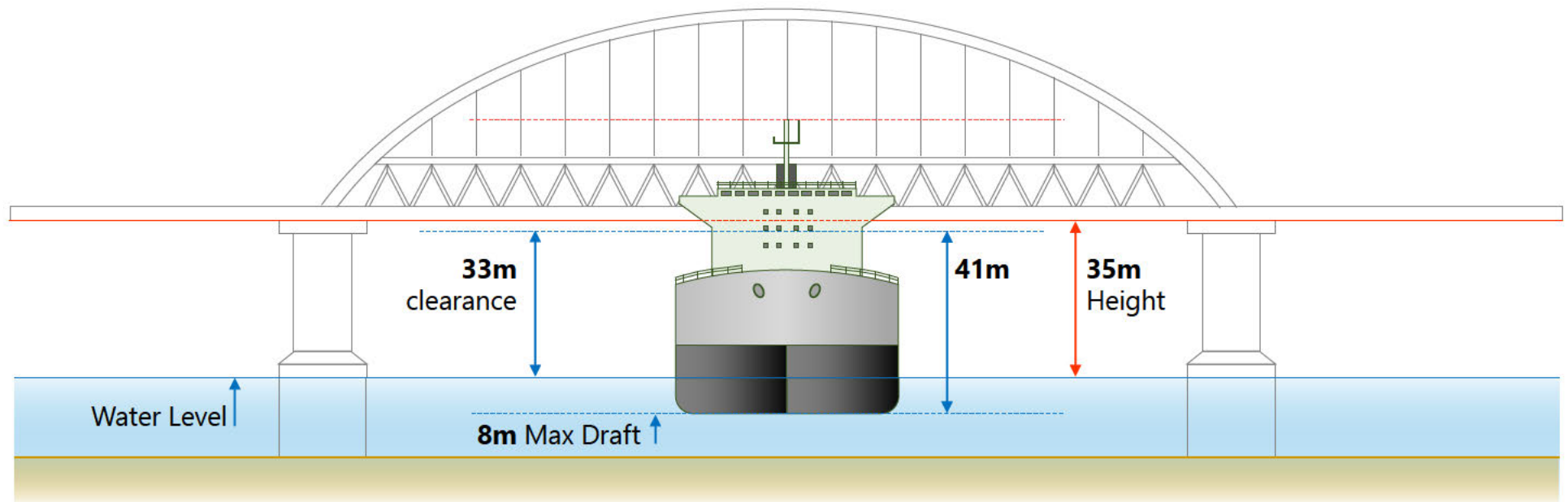


Figure 2

138. In building similarly-situated bridges, other States have accepted an obligation to consult with affected user States.²⁶³ Before determining the height of the bridge over the Great Belt, for example, Denmark formally advised all diplomatic missions in Denmark that it was preparing to construct a bridge with a 62-meter clearance.²⁶⁴ At the time, the USSR responded to Denmark's notification, taking the position that the bridge should allow for the passage of vessels with an air draft of at least 65 meters.²⁶⁵ Subsequently, Denmark conducted further studies on the air-draft of merchant vessels, and determined to revise its plans and build a 65-meter bridge.²⁶⁶ Similarly, Italy notified the Sub-Committee on Safety of Navigation of the IMO of its proposed project to construct a bridge across the Strait of Messina, seeking "advice on the navigational aspects of the bridge with special reference to its minimum clearance above sea level,"²⁶⁷ which was proposed to be greater or equal to 64 meters.²⁶⁸ Russia, in contrast, consulted *no* other States in selecting the 33-meter clearance for the Kerch Strait bridge.

139. Russia's 33-meter clearance is dramatically lower than the 65-meter clearance of the Great Belt bridge and the proposed 64-meter clearance of the Strait of Messina bridge. As explained by Ukraine's navigation expert, [REDACTED], extensive

²⁶³ See generally William L. Schachte Jr. (Rear Admiral, Judge Advocate General's Corps, U.S. Navy), *International Straits and Navigational Freedoms*, 24 *Ocean Dev. & Int'l L.*, Vol. 24 (1993), p. 193 ("the United States does not believe that customary international law permits a state unilaterally and without prior international approval to construct a fixed bridge over an international strait that in many instances is the sole practical deep water route available") (UAL-130).

²⁶⁴ *Passage through the Great Belt (Finland v. Denmark)*, ICJ, Counter-Memorial of the Government of the Kingdom of Denmark (May 1992), ¶¶ 66-69 (UAL-14).

²⁶⁵ *Id.* ¶¶ 69-70.

²⁶⁶ *Id.* ¶ 124.

²⁶⁷ International Maritime Organization, *Navigational Aspects of a Bridge Over the Straits of Messina*, Note by the Government of Italy, IMO Doc. NAV/35/Inf.4 (1988) (UA-608) (inviting the IMO subcommittee to "consider the attached information on a project for the construction of a bridge over the Straits of Messina between the Italian mainland and the Island of Sicily"); International Maritime Organization, Subcommittee on Safety of Navigation, Report to the Maritime Safety Committee, IMO Doc. NAV/35/14, § 3.7 (1989) (indicating that the IMO Subcommittee on Navigation responded to Italy's invitation to comment on the construction of a bridge over the Strait of Messina by expressing an opinion "that such a bridge would not create problems for safety of navigation") (UA-609); see Fabio Spadi, *The Bridge on the Strait of Messina: Lowering the Right of Innocent Passage*, *Int'l & Comp. L. Q.*, Vol. 50 (2001), p. 416 (reflecting that Italy consulted other States even though it takes the position that the Strait of Messina is subject to the regime of non-suspendable innocent passage rather than the regime of transit passage) (UAL-131).

²⁶⁸ International Maritime Organization, *Navigational Aspects of a Bridge Over the Straits of Messina*, Note by the Government of Italy, IMO Doc. NAV/35/Inf.4 (1988) (UA-608).

practice in both straits and internal waterways used by international ocean-going vessels “strongly suggests that the clearance under a bridge spanning [such] a waterway . . . could be expected to be in a range of approximately 60 to 70 metres.”²⁶⁹ To illustrate this range, [REDACTED] provides the following examples of bridges spanning international waterways or waterways linking international waters. Certain of [REDACTED] examples are illustrated to scale in **Figure 3**.

Table 1: Bridges Spanning International Waterways or Linking International Waters

Name	Clearance	Main Span Length	Construction Year	Location
International Waterways (or Linking International Waters)				
15 July Martyrs Bridge	58 m	1,074 m	1973	Bosporus Straits, Istanbul
Faith Sultan Mehmet Bridge	64 m	1,090 m	1988	Bosporus Straits, Istanbul
Yavuz Sultan Selim Bridge	66 m	1,408 m	2016	Bosporus Straits, Garipçe
Mubarak Peace Bridge	70 m	404 m	2001	Suez Canal, Egypt
Centennial Bridge	80 m	420 m	2004	Panama Canal, Panama
Atlantic Bridge	75 m	530 m	2019	Panama Canal, Panama
Bridge of Americas	61.3 m	344 m	1962	Panama Canal, Panama
Great Belt Bridge	65 m	1,624 m	1991	Great Belt Strait, Baltic Sea, Denmark
Øresund Bridge	57 m ²⁷⁰	490 m	2000	Øresund Strait, Baltic Sea (Sweden-Denmark)

²⁶⁹ See [REDACTED] Report, ¶ 4.7.

²⁷⁰ Ships with an air draft in excess of the 57-meter clearance for the Øresund Bridge may instead enter and exit the Baltic Sea by passing under the 65-meter Great Belt Bridge. The distance between these two possible approaches is approximately 64 nautical miles from center point to center point. See Map Showing Distance Between Possible Approaches for Øresund Bridge (**UA-610**).

International Waterway Bridges vs. The Kerch Strait Bridge

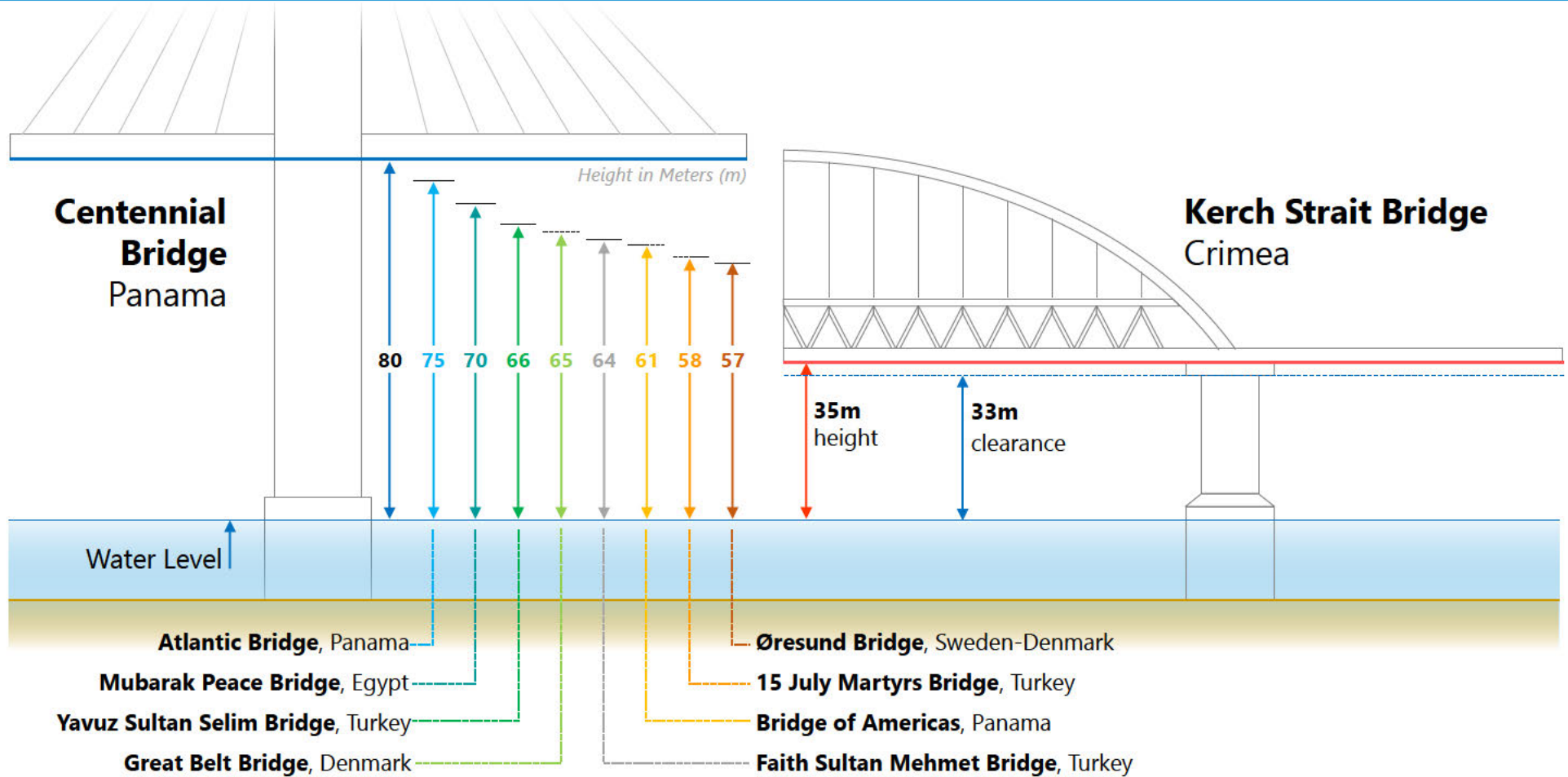


Figure 3

140. Only two of these bridges — the Great Belt Bridge and the Øresund Bridge — span international straits, with the remainder extending over waterways not subject to UNCLOS. The paucity of bridges over international straits is unsurprising in light of the strictures that apply to their construction under international law, including the requirement that they accommodate all existing and foreseeable maritime traffic, and the requirement of consultation with affected States.²⁷¹ Given the small number of bridges over international waterways, [REDACTED] also surveyed bridges spanning channels that provide access to working ports for ocean-going vessels.²⁷² While these are not direct comparators for the Kerch Strait bridge, the examples nevertheless further corroborate the bridge height needed to accommodate international merchant vessels. [REDACTED] identified the following examples:

Table 2: Bridges Spanning Channels that Provide Access to Working Ports for Ocean-Going Vessels

Name	Clearance	Main Span Length	Construction Year	Location
Approaches to International/Deep Sea Ports				
Akashi Kaikyo Bridge	65.7 m	1,991 m	1998	Akashi Strait, Kobe, Japan
Busan Harbour Bridge	60 m	540 m	2014	Busan, South Korea
QEII Bridge	58 m	450 m	1991	River Thames, Dartford, UK
Stonecutters Bridge	74 m	1,018 m	2009	Rambler Channel, Hong Kong
Sunshine Skyway	55 m	366 m	1987	Port Tampa Bay, Florida, USA
Talmadge Memorial Bridge	56 m	335 m	1991	Port of Savannah, Georgia, USA
Ravenel Bridge	57 m	471 m	2005	Port of Charleston, South Carolina, USA
Bayonne Bridge	66 m	510 m	1931	Port of New York, USA
Verrazano Narrows Bridge	69.5 m	1,298 m	1969	Port of New York, USA
Russky Bridge	70 m	1,104 m	2012	Eastern Bosphorus, Vladivostok

²⁷¹ See Hugo Caminos & Vincent P. Cogliati-Bantz, *The Legal Regime of Straits: Contemporary Challenges and Solutions* (2014), p. 338 (citing a joint Franco-British report on a possible bridge over the Strait of Dover stating that “[b]esides the serious disadvantages to shipping which it would involve, the bridge project could not be carried out, having regard to the principles of international law, until Great Britain and France had sought the concurrence of the States principally concerned with navigation in the Channel”) (UAL-127).

²⁷² See [REDACTED] Report, ¶ 4.7, Table 2.

141. Taking **Tables 1 and 2** together, the clearances of the bridges identified vary between 55 and 80 meters and concentrate above 60 meters. Notably, the most recent bridges over the Bosphorus are approximately 65 meters in height, and the most recent bridges over the Panama and Suez Canals meet or exceed an even higher clearance of 70 meters. As [REDACTED] notes with regard to the Bosphorus and the Panama Canal, the higher clearances of the more modern bridges may reflect an expectation by their designers that the waterways in question will need to accommodate increasingly tall vessels in the future.²⁷³

142. In constructing bridges at its principal Pacific and Baltic ports, Russia has followed the international practice identified by [REDACTED]. At Russia's principal Pacific port, Vladivostok, the Russky Bridge has a 70 meter clearance²⁷⁴; larger vessels can reach the port by simply navigating around the island to which the bridge connects.²⁷⁵ In St. Petersburg, Russia's principal Baltic port, Russia built a tunnel rather than a bridge across the principal navigation channel, allowing vessels of any height to enter the port.²⁷⁶ It is only in the Kerch Strait, where it is Ukraine rather than Russia that has an interest in large-ship navigation, that Russia has built a bridge with a 33-meter clearance.

143. This height limit effectively closes the Kerch Strait to entire classes of large vessels commonly used in international shipping. As [REDACTED] explains, and as set out in Chapter Four, prior to the construction of the Kerch Strait bridge, Handy-size, Handymax, and Panamax vessels regularly transited the Strait *en route* to the Ukrainian ports of Mariupol or Berdyansk.²⁷⁷ [REDACTED]

[REDACTED] An analysis of vessel design plans conducted by [REDACTED] indicates that such vessels generally require an air clearance above 33 meters.²⁷⁹ Based on his analysis, [REDACTED] concluded that, because of the construction

²⁷³ See *id.* ¶ 4.7.

²⁷⁴ See *id.* Table 2.

²⁷⁵ See Map of Vladivostok Port (**UA-611**).

²⁷⁶ See [REDACTED] Report, ¶ 4.8.

²⁷⁷ See *id.* ¶¶ 2.6, 4.23-4.24, 4.36-4.49.

²⁷⁸ See *id.* ¶¶ 2.10, 5.1.

²⁷⁹ As [REDACTED] explains, the air clearance or "air draft" of a vessel varies based on how heavily it is loaded. See *id.* ¶ 4.14. When heavily loaded, the vessel will sit lower in the water and thus have a deeper underwater "draft," but a smaller "air draft." Accordingly, [REDACTED] analysis focused on the overall height ("keel-to-mast" height or "KtM") of the relevant vessels. Because the Kerch Strait is 8 meters deep, any vessel that has an overall height ("keel-to-mast" height or "KtM") of 41 meters or

of the Kerch Strait bridge, he would expect that “vessels capable of passing under the Bridge since its construction will be, in general, less than 30,000t DWT.”²⁸⁰ Indeed, this is precisely what the data shows.²⁸¹

144. In particular, as set out in **Table 3**, data on vessels able to reach the Mariupol and Berdyansk ports shows a dramatic drop in vessels of this size. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

higher will be unable to pass under the 33-meter bridge, regardless of how heavily it is loaded. *Id.* ¶¶ 4.13-4.19.

²⁸⁰ *See id.* ¶ 4.34.

²⁸¹ *See id.* ¶ 4.38-4.50.

²⁸² *See id.* ¶ 4.48, Table 9.

²⁸³ *See id.*

[REDACTED]

146. [REDACTED]

[REDACTED]

[REDACTED] This is highly suggestive of a more restricted choice of vessels within the 30,000t – 40,000t DWT range.²⁸⁷

147. In addition to impeding merchant traffic, the restrictions associated with the Kerch Strait bridge also impede the navigation of many specialized vessel types, and undermine Ukraine’s ability to develop its hydrocarbon resources in the Sea of Azov. As [REDACTED] explains, specialized classes of vessels that require greater clearance than the bridge affords include vessels “regularly used in the offshore energy sectors and would include, among others, pipe layers, cable layers, crane barges, and heavy lift vessels.”²⁸⁸ He further explains, “[m]any specialist vessels, including vessel types used for offshore exploration and exploitation of hydrocarbons, are also foreseeably affected by the Bridge, given that their KtM heights and/or their related deck machinery often require a clearance above 35 metres,”²⁸⁹ and will therefore be precluded from crossing the Strait.

148. Among the affected hydrocarbon service vessels are CNG-UA’s JDRs. As [REDACTED] [REDACTED] explains, these JDRs “required greater clearance than is allowed” by the Kerch Strait bridge.²⁹⁰ When navigating, the legs of these JDRs are elevated

²⁸⁴ [REDACTED]

²⁸⁵ *Id.* ¶ 4.42.

²⁸⁶ *Id.* ¶¶ 4.42, 4.49.

²⁸⁷ *See id.* ¶¶ 4.42, 4.49.

²⁸⁸ *Id.* ¶ 4.56. *See also* [REDACTED] Statement, ¶ 8.

²⁸⁹ [REDACTED] Report, ¶ 2.11.

²⁹⁰ [REDACTED] Statement, ¶ 8.

above the bodies of the vessels, requiring an aerial clearance between 76 and 158 meters.²⁹¹ Thus, in order to pass under the Kerch Strait bridge and enter the Sea of Azov, parts of the legs of the JDRs would have to be removed and reattached, which if repeated, would compromise the integrity of the leg structure.²⁹² As ██████████ explains, “[a]lthough removal and replacement of jack-up legs is a possibility . . . jack-up leg removal by cutting sections is not a desirable option, as the repeated hot work to cut and re-weld the legs may reduce the durability of the leg structure.”²⁹³ A requirement to cut into and detach parts of the JDRs at sea so as to enable their passage through the Kerch Strait cannot be reconciled with the notion of unimpeded passage.

149. None of the effects of the bridge come as a surprise. Russia was on ample notice of the harm the bridge would cause to navigation. For example, on 12 July 2016, Ukraine notified the Russian Federation that its “plans to impose restrictions on maritime navigation through the Kerch Strait infringe Ukraine’s rights in the Kerch Strait under UNCLOS,” and that the “reported restrictions [on vessels in the 24 May 2017 notice to mariners] will cause significant ongoing damage to Ukrainian seaports in the Sea of Azov, will hinder the future development of such seaports, and will interfere with Ukraine’s use and enjoyment of its territorial waters and Exclusive Economic Zone in the Sea of Azov.”²⁹⁴ The Russian Federation entirely ignored these concerns — likely because Russia did not share these concerns, since Russia’s ports in the region cannot accommodate the large, seagoing vessels whose passage has been impeded by the new height limits. As ██████████ explains, “a simple study” undertaken in the early design phases of the bridge “would have indicated that a crossing height restriction of 33 metres air draft would very likely exclude vessels that would have previously, or could have in future, transited the Kerch Strait into the Sea of Azov.”²⁹⁵

²⁹¹ See ██████████ Report, ¶ 4.67.

²⁹² See *id.* ¶ 4.68.

²⁹³ *Id.*

²⁹⁴ *Note Verbale from Ukraine to the Russian Federation*, No. 72/22-663-1651 (12 July 2016) (UA-211). See also *Note Verbale from Ukraine to the Russian Federation*, No. 72/22-194/510-485 (23 February 2016) (“The Foreign Ministry of Ukraine yet again objects to Russia’s construction of the bridge across the Kerch Strait without permission from Ukraine as a coastal state.”) (UA-212-AM).

²⁹⁵ ██████████ Report, ¶ 5.5.

2. Russia Has Violated Articles 43 and 44 by Failing to Cooperate with Ukraine as to Threats to Safe Navigation Posed by Russia’s Hasty Construction of the Kerch Strait Bridge

- i. Articles 43 and 44 of UNCLOS Require that Russia, a State Bordering a Strait, Must “By Agreement Cooperate” with Ukraine, an Important User State, Concerning Navigational Safety in the Kerch Strait, Including by Sharing Information on Potential Dangers to Navigation

150. In recognition of the critical role international straits play in facilitating international navigation, Part III of UNCLOS imposes obligations on States bordering straits to cooperate and share information about threats to safe navigation. Article 43 requires States bordering straits to “by agreement cooperate” with user States “in the establishment and maintenance . . . of necessary navigational and safety aids or other improvements in aid of international navigation.”²⁹⁶ Article 44 requires that “States bordering straits . . . shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge.”²⁹⁷ Ukraine plainly qualifies as a user State under the ordinary meaning of the term,²⁹⁸ as Ukrainian-flagged vessels regularly use the Strait and, more broadly, access to Ukraine’s ports requires transit through the Strait.²⁹⁹ Read together, therefore, these articles require that Russia, as a State bordering the Kerch Strait, cooperate with Ukraine, an important user State of the Strait, concerning navigational safety in the Kerch Strait, including through the sharing of information relating to dangers to navigation.

²⁹⁶ UNCLOS, Art. 43.

²⁹⁷ UNCLOS, Art. 44.

²⁹⁸ Oxford English Dictionary, “user, *n.* (Law)” (online ed.) (“user” – “[c]ontinued use, exercise, or employment of a right, property, practice, etc.”) (**UAL-132**). Ukraine’s status as a user State, and its assertion of attendant rights, is without prejudice to its concurrent status as a coastal State in the Strait.

²⁹⁹ See Robert Beckman, *The Establishment of a Cooperative Mechanism for the Straits of Malacca and Singapore under Article 43 of the United Nations Convention on the Law of the Sea in The Future of Ocean Regime Building* (2009), p. 239 (**UAL-133**); see also Bernard H. Oxman, *Observations on the Interpretation and Application of Article 43 of UNCLOS With Particular Reference to the Straits of Malacca and Singapore*, *Sing. J. Int’l & Comp. L.*, Vol. 2, No. 2 (1998), p. 418 (“Greek registry regularly engaged in carrying oil from Saudi Arabia to South Korea through the Straits of Malacca and Singapore, it is clear that Greece enjoys the relevant rights and duties of the flag state with respect to the operation of the tankers, but it is equally clear that Saudi Arabia and South Korea have economic interests that might justify considering them user states for the co-operative purposes of Article 43.”) (**UAL-134**).

- ii. Russia's Failure to Share Information with Ukraine About Threats to Safe Navigation Posed by the Kerch Strait Bridge Violates Articles 43 and 44

151. In the best of times, construction of a bridge over a sensitive waterway presents complex engineering and planning challenges. Rather than consult on these challenges, Russia followed a rushed process that dispensed with customary precautions and emphasized speed over safety and environmental protection in violation of Articles 43 and 44. The risks to the marine environment posed by Russia's rushed construction of the bridge are discussed in Chapter Six, Section II, below; this Section focuses on the serious risk the hasty construction process poses to navigational safety, as well as Russia's refusal to cooperate with Ukraine or share information to understand and mitigate those risks.

152. The timeline of the bridge construction process was determined not by engineers, but by politicians. According to the head of a Russian expert advisory council for the bridge, the deadline for the bridge was set by the President of the Russian Federation – and was so aggressive that no contractor would agree to construct the bridge until a close ally of President Putin did so.³⁰⁰ Initial preparatory work began on the bridge even before its construction was authorized by the Russian Duma.³⁰¹ The Russian law authorizing construction continued this pattern, providing for simultaneous design and preparatory work for construction of the bridge,³⁰² and largely making the process for obtaining required site planning documentation to begin construction an empty formality. Under Article 3 of this law, this documentation had to be approved within 15 days; if not approved in that timeframe, the documentation was considered automatically approved.³⁰³

³⁰⁰ See Neil MacFarquhar & Ivan Nechepurenko, Putin's Bridge to Crimea May Carry More Symbolism Than Traffic, *New York Times* (11 November 2017) (UA-213).

³⁰¹ See Chronology of Bridge Construction, *Official Information Site for the Construction of the Crimean Bridge* (UA-214). The State Duma approved construction of the Kerch Strait bridge in July 2015. See Duma Approves Construction of \$4 Billion Kerch Bridge to Crimea, *The Moscow Times* (6 July 2015) ("The State Duma has approved plans to build a bridge from the Russian mainland to Crimea, paving the way for Kremlin ally and builder Arkady Rotenberg to begin construction on the \$4 billion mega-project . . .") (UA-215).

³⁰² Russian Federation Federal Law No. 221-FZ, "On Aspects of the Regulation of Certain Legal Relations Arising in Connection with the Construction and Upgrading of Transport Infrastructure Facilities of Federal and Regional Significance Designed to Provide Transport Links between the Taman and Kerch Peninsulas and Utility Infrastructure Facilities of Federal and Regional Significance on the Taman and Kerch Peninsulas, and on Amendments to Certain Legislative Acts of the Russian Federation" (13 July 2015), Art. 6(12) (UA-187-AM).

³⁰³ *Id.* Art. 3(6).

153. As discussed in Chapter Six, Section II.A.2.i, below, the dangers posed by the hasty construction process are compounded by the geological and climatic challenges of the construction site.³⁰⁴ These conditions raise the possibility of deterioration or even collapse,³⁰⁵ which poses an obvious threat to the safety of navigation through the Strait. Even if the bridge remains standing, however, it raises significant navigational risks. As discussed by ██████████, an environmental expert with significant experience in the assessment and mitigation of the environmental impacts of major construction projects, the bridge changes the hydrodynamics of the Kerch Strait and increases the likelihood of the build-up of sea ice.³⁰⁶ ██████████, in turn, explains that the environmental changes described by ██████████ would have an adverse impact on navigation.³⁰⁷ In particular, sedimentation would prevent vessels from making use of the full 8 meter depth of the Kerch-Yenikale navigation channel, further restricting the size of vessels able to pass through the Strait.³⁰⁸ With respect to build-up of sea ice, ██████████ notes that any potential increase in sea ice concentration or the length of the ice season may impact navigation, particularly as a result of restrictions on the use of non-ice class vessels for longer periods.³⁰⁹ Finally, traffic congestion may also increase because only a finite number of ice-breakers are available, and they may be required for longer periods.³¹⁰

154. Given the indications that the bridge construction process posed serious risks to safe navigation through the Kerch Strait, Ukraine demanded in a diplomatic note dated 12 July 2016 that Russia promptly provide it with (1) “all available information relating to the construction of the Kerch Strait bridge, [and] any associated threats to the marine environment”; (2) information about the risk of ice jams and related navigational obstacles posed by the Kerch Strait bridge; and (3) technical design specifications and assessments in

³⁰⁴ See Chapter Six, Section II.A.2.i.

³⁰⁵ See ██████████ Report, ¶¶ 119-125; Institute of Water Problems and Land Reclamation, NAAS, About Some Environmental Consequences of Kerch Strait Bridge Construction, *Hydrology*, Vol. 6, No. 1 (2018), p. 3 (UA-220); Aleksei Baturin, Russian Bridge Across the Kerch Strait Will Not Stand Long - Georgiy Rosnovsky, *Focus* (18 April 2016), pp. 4-8 (UA-221).

³⁰⁶ See ██████████ Report, ¶¶ 110-116.

³⁰⁷ See ██████████ Report, ¶ 4.3.

³⁰⁸ See *id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

order to assess the risk of collapse.³¹¹ Russia failed to provide Ukraine any of this information,³¹² and continues not to provide any such information to this day. This violates Russia's obligations under Articles 43 and 44 to cooperate with Ukraine to ensure safe navigation in the Kerch Strait, including sharing information about potential dangers to navigation.³¹³

3. Russia Has Violated Articles 38 and 44 by Delaying and Otherwise Hampering Passage Through the Kerch Strait, Including for Vessels Travelling to or From Ukrainian Ports

i. Russia's Obligation Not to "Impede" or "Hamper" Transit Passage Under Articles 38 and 44 Bars Russia from Imposing Delays on Vessels Seeking to Transit the Strait

155. As discussed above, Russia is under a strict obligation not to "impede" or "hamper" transit passage through the Kerch Strait under Articles 38 and 44. Any actions taken by a State bordering a strait that impose delays on vessels before they are permitted to transit a strait fall within the ordinary meaning of "impede" or "hamper" under Articles 38 and 44. The Oxford English dictionary defines "impede" as "[t]o retard in progress or action by putting obstacles in the way,"³¹⁴ and defines "hamper" as including any step that

³¹¹ Note Verbale of the Ministry of Foreign Affairs of Ukraine, No. 72/22-663-1651 (12 July 2016) (UA-211).

³¹² See Note Verbale from the Russian Federation to Ukraine, No. 10352/2DSNG (4 August 2017) (making the conclusory assertion that "[i]n addition to other weather factors, the structural design of the bridge has factored in the ice conditions in the Kerch Strait") (UA-223).

³¹³ See, e.g., Hugo Caminos & Vincent P. Cogliati-Bantz, *The Legal Regime of Straits: Contemporary Challenges and Solutions* (2014), p. 233 (writing that Article 44 "should arguably receive a broad interpretation and not be restricted to natural dangers. A bridge could certainly constitute a danger to navigation or overflight") (UAL-127).

³¹⁴ Oxford English Dictionary, "impede, v." (online ed.) (emphasis added) (UAL-135).

“impede[s] or obstruct[s] in action.”³¹⁵ This reading accords with one of the purposes of UNCLOS, namely to “facilitate international communication” through the oceans.³¹⁶

156. Discriminatory delays are particularly suspect. The language of Part III, Section 2 of UNCLOS underscores this point. Article 38 states that “*all* ships and aircraft enjoy the right of transit passage”³¹⁷ Article 42(2) further provides that “laws or regulations [that a State bordering a Strait may pass under Article 42(1)] shall not discriminate in form or in fact among foreign ships”³¹⁸ Against this backdrop, it is clear that imposing delays on vessels based on the country to which they are traveling is a particularly grievous violation of the regime of transit passage.

ii. Russia Has Violated Articles 38 and 44 by Imposing Delays on Vessels Seeking to Transit the Kerch Strait *En Route* to or from Ukraine’s Sea of Azov Ports

157. Beyond precluding transit passage through the Kerch Strait for large vessels, Russia has targeted the vessels still able to travel to or from Ukraine’s Sea of Azov ports for delays and, in many cases, has subjected them to inspections before they are permitted to transit the Strait.

158. As explained by [REDACTED], [REDACTED], [REDACTED], since 2014, the Russian Federation has assumed control over the entire Strait, including the Kerch-Yenikale navigation channel.³¹⁹ In order to transit the Strait, vessels must communicate in advance their port of destination, and generally must obtain permission before proceeding to the entrance, waiting in designated anchorage areas adjacent to the Strait until they receive

³¹⁵ Oxford English Dictionary, “hamper, *v.*” (online ed.) (UAL-136); see also Hugo Caminos and Vincent P. Cogliati-Bantz, *The Legal Regime of Straits* (2014), p. 232 (“In all of these [definitions of ‘impede,’ ‘impair,’ ‘obstruct’ or ‘hamper’] is the notion of the imposition of a *restriction either in time (‘retard’)* or space or both”) (emphasis added) (UAL-127); see also *id.* pp. 232-233 (“The duty involved is a duty of abstention, for the coastal State is required to refrain from engaging in activities that will result in the impairment or impediment of the right of transit. Such activities are not limited to the placing of physical obstacles in a strait or archipelagic sea lane, although material obstacles were singled out during the negotiations. . . . [T]he duty not to impair or hamper refers more broadly to acts, measures or activities of the coastal State.”).

³¹⁶ UNCLOS, preamble.

³¹⁷ *Id.* Art. 38 (emphasis added).

³¹⁸ *Id.* Art. 42(2).

³¹⁹ [REDACTED] Statement, ¶ 11.

approval to proceed.³²⁰ Many vessels are required to take a pilot on board to transit the Strait, although Russian-national captains of vessels flying the Russian flag may be exempted from this requirement.³²¹ In addition to the pilotage requirement, merchant vessels are now frequently subject to one-way traffic in the channel,³²² which requires greater use of caravanning in the Strait than was necessary in the past.³²³

159. Russia has used its control over the Kerch Strait to impose significant delays on vessels bound for or returning from Ukraine's Sea of Azov ports.³²⁴ The extent of the delays imposed by Russia is stark. As ██████████ explains, Ukrainian government monitoring of Automatic Identification System (AIS) data tracking the location of vessels transiting the Strait between July 2018 and March 2021 shows an average wait time of 40 hours, or the better part of two full days.³²⁵ Tellingly, Russia has not imposed similar delays on vessels traveling to or from Russia's Sea of Azov ports.³²⁶ While the Ukrainian Navy does not comprehensively monitor wait times for Russia-bound vessels, data analyses conducted from time to time by the Navy indicate that the average waiting time for vessels traveling to or from Russian ports is approximately 3 hours.³²⁷

160. While being forced to wait to transit the strait, a substantial proportion of vessels traveling to or from Ukraine have also been subjected to inspections by the Russian Border Guard.³²⁸ Indeed, interviews of vessel captains conducted by the Ukrainian Border Service units at Mariupol and Berdyansk between April 2018 and April 2021 document over 1,600 cases of inspections by the Russian Border Guard, affecting both Ukrainian³²⁹ and

³²⁰ ██████████ Statement, ¶ 11.

³²¹ Ministry of Transport of the Russian Federation, Order No. 313, On Approval of the Bylaws of the Kerch Sea Port (21 October 2015) (with updates as of March 2018), ¶¶ 31-32 (UA-612). See also ██████████ Statement, ¶ 11.

³²² See Ministry of Transport of the Russian Federation, Order No. 313, On Approval of the Bylaws of the Kerch Sea Port (21 October 2015) (with updates as of March 2018), ¶¶ 47, 64 (UA-612).

³²³ See ██████████ Statement, ¶ 11.

³²⁴ *Id.* ¶¶ 11-12.

³²⁵ *Id.* ¶ 12.

³²⁶ *Id.* ¶¶ 13-14.

³²⁷ *Id.* ¶ 13.

³²⁸ *Id.* ¶¶ 12, 14.

³²⁹ See e.g., ██████████
██████████
██████████

foreign commercial vessels.³³⁰ Among these: the *MV Selecta*, a Liberia-flagged cargo carrier, which was delayed for the better part of two days and inspected by four Russian officers before being allowed to proceed;³³¹ the *Lyubov*, a Cook Islands-flagged cargo carrier, which was delayed by at least 21 hours and boarded and inspected by Russian authorities before being permitted to travel to Berdyansk³³²; the *MV Able*, a Panama-flagged cargo carrier headed to Mariupol, which was boarded for inspection by Russian officers after waiting more than eight hours to proceed to the Strait, and was delayed a further six hours after the inspection concluded³³³; and the *Dunay*, a Moldova-flagged vessel which, in addition to being delayed, was inspected for three full hours by no fewer than eleven Russian Border Guard officers.³³⁴

161. Notwithstanding the substantial number of inspections the Ukrainian Border Service has been able to identify, the true frequency of such inspections is likely much higher. First, the Border Service interviews are conducted at Mariupol and Berdyansk, and so do not capture inspections that take place when vessels leave those ports and travel out of the Sea of Azov. Second, it is likely that vessel crews under-report inspections, perhaps for fear of Russian reprisals.³³⁵ In fact, Russia's own data suggests that, between April and December 2018, at least two-thirds of the vessels traveling to or from Ukrainian ports were subjected to Russian inspections.³³⁶ In comparison, Russia inspected a far smaller proportion of vessels traveling to or from Russian ports — approximately 10 percent.³³⁷

162. Russia's discriminatory delays and inspections of merchant vessels traveling through the Kerch Strait to and from Ukraine's Sea of Azov ports have sparked protests from around the world, reflecting the wide range of states with legal and practical interests in free

³³⁰ [REDACTED] Statement, ¶ 4. As described *infra* at Chapter Six, Section I.B, some of these inspections may have taken place in the Sea of Azov, although a substantial majority took place in the Kerch Strait.

³³¹ See [REDACTED].

³³² See [REDACTED] (showing that the inspection occurred between 16:45 and 17:45).

³³³ See [REDACTED] (showing that the inspection occurred between 13:00 and 13:15 after the vessel had waited more than 8 hours to proceed through the strait).

³³⁴ See [REDACTED].

³³⁵ See [REDACTED] Statement, ¶ 5.

³³⁶ [REDACTED] Statement, ¶ 14.

³³⁷ *Id.*

navigation in these waters. As catalogued in Chapter Five, other Black Sea littoral States — Turkey, Romania, and Bulgaria (the latter two through the European Union) — forcefully protested Russia’s actions in the Kerch Strait and the Sea of Azov.³³⁸ So too did the European Parliament, which “condem[ned] the excessive stopping and inspection of commercial vessels, including both Ukrainian ships and those with flags of third-party states, including ships under flags of various EU Member States.”³³⁹ The protests also included a statement from the United States,³⁴⁰ and United Nations General Assembly resolutions condemning Russia’s behavior in 2018, 2019, and 2020.³⁴¹

163. The international condemnation of Russia’s actions is unsurprising. In hindering vessels seeking to transit the Kerch Strait, and in frequently boarding and inspecting such vessels, Russia has engaged in a further, fundamental breach of the regime of transit passage under Articles 38 and 44 of UNCLOS. Russia’s actions are particularly suspect in that they discriminatorily target vessels that are heading to and from the ports of Ukraine.

iii. Russia’s Announced Closure of the Kerch Strait to Navigation by Foreign Military and Other Government Vessels Constitutes Yet Another Violation of Articles 38 and 44

164. Russia has in recent months shown no sign of changing its policies. To the contrary, in early April 2021, Russia announced that parts of the Black Sea, including the entirety of the southern entrance to the Kerch Strait, would be closed to navigation by foreign military and other government vessels from April 2021 through the end of October

³³⁸ See European Union, Statement by the Spokesperson on the Escalating Tensions in the Azov Sea (25 November 2018) (UA-486); Republic of Turkey, Ministry of Foreign Affairs, No. 321, Press Release Regarding the Tension in the Azov Sea and Kerch Strait (26 November 2018) (UA-477).

³³⁹ See European Parliament, Resolution of 25 October 2018 on the Situation in the Sea of Azov (2018/2870(RSP)) (UA-544).

³⁴⁰ See United States Department of State, Press Statement, Russia’s Harassment of International Shipping Transiting the Kerch Strait and Sea of Azov (30 August 2018) (UA-543).

³⁴¹ U.N. General Assembly Resolution 73/194, U.N. Doc. No. A/RES/73/194, Problem of the Militarization of the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, as well as Parts of the Black Sea and the Sea of Azov (17 December 2018), ¶¶ 6-7 (UA-549); U.N. General Assembly Resolution 74/17, U.N. Doc. No. A/RES/74/17, Problem of the Militarization of the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov (9 December 2019), ¶¶ 12-13 (UA-595); U.N. General Assembly Resolution 75/29, U.N. Doc. No. A/RES/75/29, Problem of the Militarization of the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov (7 December 2020), ¶¶ 16-18 (UA-596).

2021.³⁴² As a consequence of these unlawful closures, Ukrainian and other foreign government vessels will be completely blocked from accessing the Kerch Strait for over six months, and unable to travel to and from Ukraine's critical Sea of Azov ports during the spring and summer months when travel is most common. Russia has offered Ukraine and other countries no justification for these announced closures, which constitute yet another brazen and serious violation of the regime of transit passage guaranteed under Articles 38 and 44 of the Convention.

165. Russia's actions in the Kerch Strait are in flagrant disregard of UNCLOS. As explained in Section I.B of this Chapter, however, Russia's harassment of vessels navigating to Ukraine's ports has not been confined to the Strait, but also has extended to the Sea of Azov itself.

B. Russia Has Violated Articles 2, 58, 87, and 92 by Impeding Navigation in the Sea of Azov to and From Ukrainian Ports

166. Beyond the Kerch Strait, Russia has undermined another pillar of the UNCLOS navigation regime: the freedom of navigation in the seas. In particular, Russia has harassed merchant vessels as they traveled to or from Ukraine's Sea of Azov ports. As explained below, over the course of a six-month period from April 2018 through November 2018 — *i.e.*, immediately prior to, and during the early part of, its campaign of harassment, inspections and delays in the Kerch Strait itself that are described above — Russia stopped and inspected vessels both in the exclusive economic zone, thereby violating its obligations under Articles 58 and 87, and within 12 nautical miles of mainland Ukraine, violating Ukraine's sovereignty over its territorial sea under Article 2.³⁴³ For those stoppages and inspections in the exclusive economic zone that involved Ukrainian-flagged vessels, Russia

³⁴² While initial notices transmitted on 7 April 2021 announced a closure beginning 24 April 2021, subsequent notices transmitted on 16 April revised the start date to 16 April 2021. Certain Russian news sources have reported statements by the Russian government that the closure does not apply to the approach to the Kerch Strait, but these statements are inconsistent with the notices themselves. *See* Coastal Warning of the Department of Navigation and Oceanography of the Ministry of Defense of the Russian Federation No. 152/21 (7 April 2021) (UA-619); Coastal Warning of the Department of Navigation and Oceanography of the Ministry of Defense of the Russian Federation No. 169/21 (16 April 2021) (UA-620). *See also* Notice to the Mariners, Department of Navigation and Oceanography of the Ministry of Defence of the Russian Federation, Weekly Bulletin Issue 17/21 (UA-621); Statement by the Ministry of Foreign Affairs of Ukraine in Connection with the Russian Federation's Restriction of Freedom of Navigation in the Black Sea (15 April 2021) (UA-622).

³⁴³ *See* ██████████ Statement, ¶ 9.

further violated Ukraine's exclusive jurisdiction under Articles 58 and 92.

1. Russia Has an Obligation Not to Interfere with Free Navigation in the Exclusive Economic Zone Under Articles 58, 87, and 92, and in Other States' Territorial Seas Under Article 2

167. Freedom of navigation is a “pillar of the law of the sea,” and of fundamental importance to international maritime trade and commerce.³⁴⁴ Articles 58 and 87 enshrine the principle of freedom of navigation in the regime of the high seas and the exclusive economic zone. The freedom of navigation protected under Articles 58 and 87 reflects the bedrock principle that no State can subject a vessel of a foreign State to its jurisdiction on the high seas.³⁴⁵

168. Specifically, Article 87 provides that “[t]he high seas are open to all States, whether coastal or land-locked,” and that “[f]reedom of the high seas . . . comprises, *inter alia*, both for coastal and land-locked States (a) freedom of navigation”³⁴⁶ Similarly, Article 58 provides that “all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms.”³⁴⁷

169. Articles 58 and 87 establish a collective obligation between and among all UNCLOS States Parties. Both Articles 58 and 87 speak of “all States” (including “land-locked States”) without exception. They incorporate the long-standing concept of “freedom of navigation” at customary international law, which has consistently been understood as an

³⁴⁴ Judge Rüdiger Wolfrum, *President of the International Tribunal for the Law of the Sea, Freedom of Navigation: New Challenges* (8 January 2008), p. 1 (“Freedom of navigation is one of the oldest and most recognized principles in the legal regime governing ocean space. It may safely be said that, since it was enshrined in the chapter ‘*De mare liberum*’ (‘On the freedom of the sea’) in the treatise – actually it was a legal opinion – of Hugo Grotius ‘*De iure praedae*’ of 1609, this principle constitutes one of the pillars of the law of the sea and was at the origins of modern international law.”) (UAL-137).

³⁴⁵ See, e.g., *M/V Norstar Case (Panama v. Italy)*, ITLOS Case No. 25, Judgment of 10 April 2019, ¶ 216 (“The Tribunal notes that another corollary of the open and free status of the high seas is that, save in exceptional cases, no State may exercise jurisdiction over a foreign ship on the high seas. Freedom of navigation would be illusory if a ship – a principal means for the exercise of the freedom of navigation – could be subject to the jurisdiction of other States on the high seas.”) (UAL-138).

³⁴⁶ UNCLOS, Art. 87.

³⁴⁷ UNCLOS, Art. 58.

obligation owed to (and enforceable by) the international community as a whole.³⁴⁸ Moreover, as a specially affected State, Ukraine has a particular interest in ensuring free navigation in the Black Sea, Sea of Azov, and Kerch Strait.³⁴⁹

170. Ukraine has additional rights when navigational interference is targeted at Ukrainian-flagged vessels. Under Article 92(1) of the Convention, “[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”³⁵⁰ Article 58(2) makes that rule applicable to the exclusive economic zone.³⁵¹

171. Russia is also prevented from interfering with navigation in Ukraine’s territorial sea. Within the limits of its territorial sea, including in the 12-miles extending from Ukraine’s mainland baselines into the Sea of Azov, Ukraine enjoys sovereignty under Article 2 of the Convention.³⁵² It thus enjoys the exclusive right to take enforcement measures against foreign-flagged vessels there.³⁵³ Absent Ukraine’s consent, no other State may impede the passage of ships through Ukraine’s territorial sea.³⁵⁴

³⁴⁸ See, e.g., *S.S. Wimbledon (UK et al. v. Germany)*, PCIJ Judgment of 17 August 1923, p. 20 (holding the United Kingdom, France, Italy, and Japan had standing to bring a claim that Germany had illegally restricted navigation in the Kiel Canal by barring passage to the steamship *S.S. Wimbledon*, even though Italy and Japan had only a general interest in protecting navigation through the Canal) (**UAL-139**).

³⁴⁹ See ILC, Draft Articles on State Responsibility, Art. 42, cmt. ¶ 12 (**UAL-33**).

³⁵⁰ UNCLOS Art. 92(1).

³⁵¹ UNCLOS 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.”).

³⁵² To the extent one State’s entitlement to territorial sea overlaps with another State’s claimed entitlement to an exclusive economic zone, the territorial sea claim prevails. See *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS Case. No. 16, Judgment of 14 March 2012, ¶ 169 (**UAL-63**).

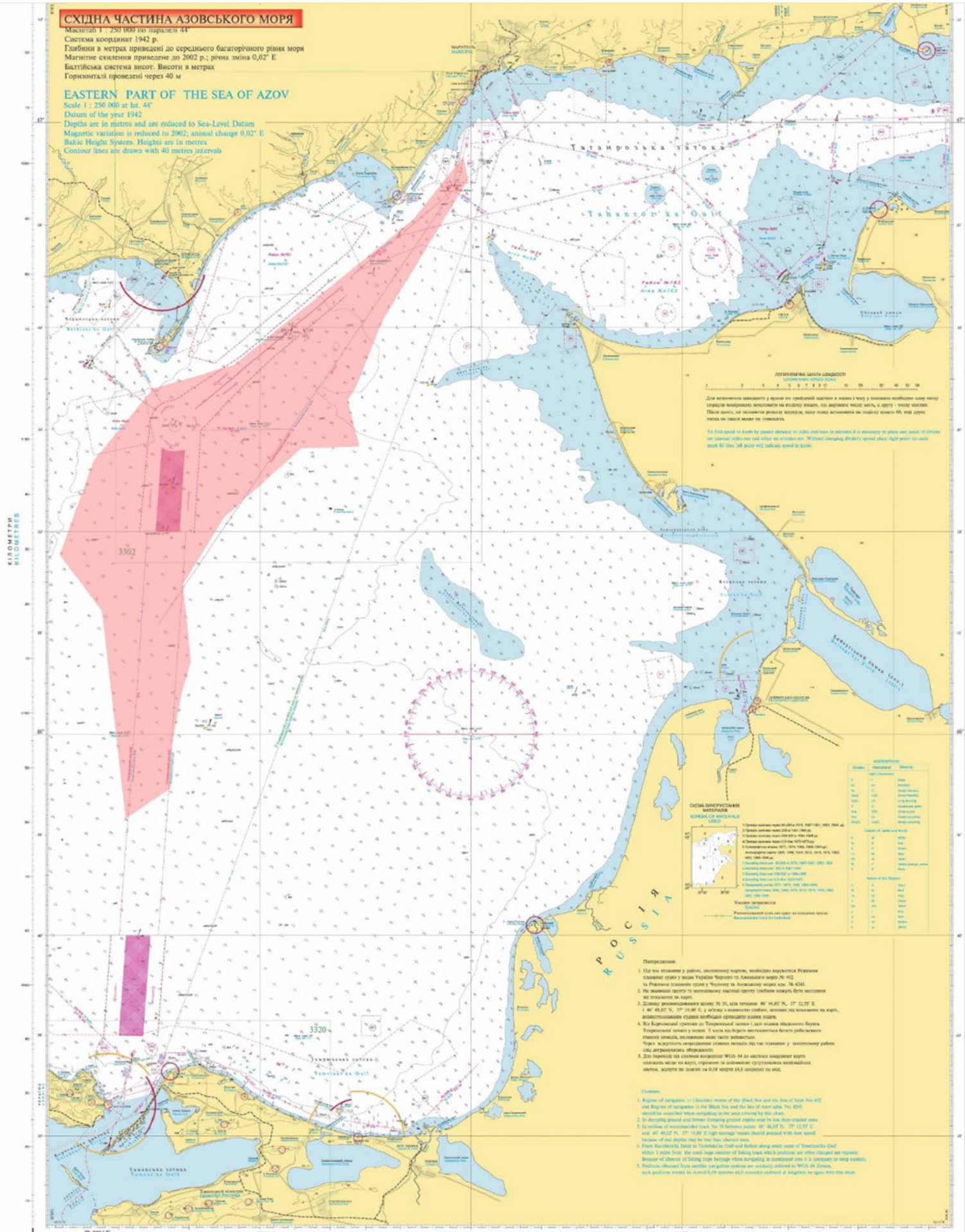
³⁵³ See Yoshifumi Tanaka, *The International Law of the Sea*, Cambridge University Press, p. 84 (2012) (“There is no doubt that the territorial sea is under the territorial sovereignty of the coastal State [T]erritorial sovereignty in international law is characterised by completeness and *exclusiveness*. Accordingly, the coastal State can exercise *complete* legislative and enforcement jurisdiction over all matters and all people in an exclusive manner unless international law provides otherwise.”) (emphasis added) (**UAL-141**).

³⁵⁴ Sarah Wolf, *Territorial Sea* in Max Planck Encyclopedia of Public International Law (August 2013), ¶¶ 20, 40, 43 (**UAL-142**).

2. Russia Has Violated Articles 2, 58, 87, and 92 by Stopping and Inspecting Merchant Vessels Traveling to and from Ukraine's Sea of Azov Ports in the Exclusive Economic Zone and in Ukraine's Territorial Sea

172. Russia has flouted and undermined the freedom of navigation by harassing merchant vessels engaged in international maritime trade as they travel in the Sea of Azov to and from Ukraine's ports. Over a period of at least six months from April through October 2018, Russia targeted merchant vessels bound to or from Mariupol and Berdyansk while travelling in the Sea of Azov. These stoppages and inspections occurred within an area extending from approximately four to well over 12 miles off the coasts of those ports. The relevant area is shown in a map prepared by [REDACTED], and reproduced as **Map 6** below.³⁵⁵

³⁵⁵ [REDACTED] Statement, ¶ 9.



173. As [REDACTED] explains, based on observation of AIS data and navigational patterns in the Sea of Azov, the Ukrainian government has estimated that there were over 100 instances in which Russian Border Guard vessels stopped and inspected cargo vessels traveling to or from Mariupol or Berdyansk.³⁵⁶ There is no evidence of a similar pattern of stoppages against vessels heading to and from Russian ports.

174. The Russian inspections lasted, on average, approximately two to four hours,³⁵⁷ and occurred in several areas of the Sea of Azov.³⁵⁸ As shown in **Map 6**, some inspections took place within Ukraine's territorial sea and adjacent to its mainland coast.³⁵⁹ Others occurred farther out at sea in the exclusive economic zone. These discriminatory inspections tapered off only in November 2018, at which time, as noted above,³⁶⁰ Russia began to increase the frequency and length of discriminatory inspections and delays in the Kerch Strait.³⁶¹

175. Russia's stoppages and inspections of merchant vessels traveling to or from Ukraine's Sea of Azov ports violated Russia's obligations to respect the freedom of navigation in multiple respects. In connection with the stoppages and inspections that occurred in the exclusive economic zone, Russia violated Articles 58 and 87 of the Convention.³⁶² Where such stoppages and inspections involved Ukrainian-flagged vessels, Russia's conduct further violated Ukraine's exclusive jurisdiction over its flagged vessels under Articles 58 and 92 of the Convention. As for Russia's stoppages and inspections of merchant vessels within 12 nautical miles of mainland Ukraine's Sea of Azov baselines, those actions constitute a brazen violation of Ukraine's sovereignty over its territorial sea under Article 2.

³⁵⁶ [REDACTED] Statement, ¶ 7-8.

³⁵⁷ *Id.* ¶ 7.

³⁵⁸ *Id.* As [REDACTED] explains, the [REDACTED] [REDACTED], identified vessel stops by tracking AIS data. *Id.*

³⁵⁹ *Id.* ¶ 9.

³⁶⁰ *See supra* Chapter Six, Section I.A.3.

³⁶¹ [REDACTED] Statement, ¶¶ 6, 10.

³⁶² *M/V Norstar Case (Panama v. Italy)*, ITLOS Case No 25, Award of 10 April 2019, ¶ 222 ("It goes without saying that physical or material interference with navigation of foreign ships on the high seas violates the freedom of navigation.") (**UAL-138**).

C. Russia Violated Articles 2(3) and 91 by Seizing Two Ukrainian-Flagged JDRs

176. In addition to impeding international navigation to and from Ukrainian ports, Russia has specifically targeted Ukrainian hydrocarbon vessels for seizure and harassment, thereby further undermining Ukraine’s exclusive flag State jurisdiction – another pillar of the law of the sea. Of particular note, Russia has seized and re-flagged two Ukrainian JDRs, the *Tavrida* and *Sivash*. In so doing, Russia has violated UNCLOS and taken aim at Ukraine’s ability to navigate freely to explore and develop the hydrocarbon resources of the Sea of Azov.

1. Russia Has an Obligation Under Articles 2(3) and 91 to Respect the Flag State’s Laws on Re-flagging its Vessels

177. UNCLOS requires Russia to respect Ukraine’s exclusive rights in connection with the de-registration and re-flagging of Ukrainian vessels. Specifically, as ITLOS has recognized, under the Convention and other relevant rules of international law, the removal of a vessel’s flag, and any other change in the status of a vessel’s flag, must be conducted in accordance with procedures stipulated by the flag State’s municipal law. As ITLOS stated in *M/V Saiga*, “[d]etermination of the criteria and establishment of the procedures for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of the flag State” and “disputes concerning such matters may be subject to the procedures under Part XV of the Convention.”³⁶³ In that case, to assess whether the ship at issue had lost its nationality as alleged by Guinea, ITLOS examined, among other things, the pertinent flag de-registration provisions of the St. Vincent and the Grenadines’ Merchant Shipping Act.³⁶⁴

178. The exclusivity of flag state authority over de-registration follows from Article 91,³⁶⁵ and is in keeping with the customary principle that “it is for the internal law of each

³⁶³ *M/V ‘Saiga’ (No. 2) (St. Vincent and the Grenadines v. Guinea)*, ITLOS Judgment of 1 July 1999, ¶ 65 (emphasis added) (UAL-28); see also *Lauritzen v. Larsen*, 345 U.S. 571, 584 (1953) (“The United States has firmly and successfully maintained that *the regularity and validity of a registration can be questioned only by the registering State.*”) (emphasis added) (UAL-144).

³⁶⁴ See *M/V ‘Saiga’ (No. 2) (St. Vincent and the Grenadines v. Guinea)*, ITLOS Judgment of 1 July 1999, ¶¶ 59-60, 67 (UAL-28); see also *The “Grand Prince” Case (Belize v. France)*, Prompt Release Judgment, 20 April 2001, ¶¶ 84-92 (determining whether the vessel had lost the nationality of Belize by reference to Belize municipal law) (UAL-145).

³⁶⁵ See *M/V ‘Saiga’ (No. 2) (St. Vincent and the Grenadines v. Guinea)*, ITLOS Judgment of 1 July 1999, ¶¶ 62-65 (UAL-28).

state to determine who is, and who is not, a national of the state.”³⁶⁶ In this connection, a vessel remains subject to its flag State’s registration laws regardless of whether another State exercises effective control over the vessel at the relevant time.³⁶⁷ Further, a State may not grant a vessel the right to sail its flag if the vessel already has a flag.³⁶⁸ Under Article 2(3), these strictures apply fully in the territorial sea, where a coastal State’s exercise of sovereignty must accord with the Convention and also with “other rules of international law.”³⁶⁹

2. Russia Violated Articles 2(3) and 91 by Seizing Two Ukrainian-flagged JDRs and Reflagging Them

179. In 2014, the Russian Federation seized control of two Ukrainian-flagged JDRs, the *Tavrida* and *Sivash*, which were used to develop the hydrocarbon resources of both the Black Sea and the Sea of Azov.³⁷⁰ These two vessels were registered with the IMO and flew the Ukrainian flag at the time of seizure.³⁷¹ When Russian troops seized them in mid-April 2014, the *Tavrida* and *Sivash* were undergoing servicing near the Yarylgach Bay

³⁶⁶ Robert Jennings & Arthur Watts, *Individuals, Acquisitions and Loss of Nationality* in Robert Jennings et al. (eds.), *Oppenheim’s International Law: Volume 1* (Oxford, 9th ed. 2008) (internal citation omitted) (UAL-146). Consistent with this principle, UNCLOS Art. 104 recognizes even with respect to pirate ships that, “The retention or loss of nationality is determined by the law of the State from which such nationality was derived.”

³⁶⁷ Rudiger Wolfrum, *Reflagging and Escort Operation in the Persian Gulf: An International Law Perspective*, Va. J. Int’l L., Vol. 29 (1989), pp. 392-393 (“A State’s failure effectively to exercise jurisdiction and control over a ship flying its flag therefore cannot invalidate the State’s registration of that ship”; “no State may challenge or refuse to recognize the registration of ships by another State. Moreover, no State has the right to look behind a ship’s flag.”) (UAL-147); Richard Barnes, *Flag States* in Oxford Handbook of the Law of the Sea 304, 309 (March 2015) (“Even if there is evidence of the absence of jurisdiction and control, States cannot refuse to recognize the right of a ship to fly the flag of the flag State.”) (internal citation omitted) (UAL-148).

³⁶⁸ *Id.* 304, 307; Robert Rienow, *The Test of Nationality of a Merchant Vessel* 16 (1937) (UAL-149).

³⁶⁹ UNCLOS Art. 2(3).

³⁷⁰ See ██████████ Statement, ¶¶ 12-15; see also IMO Circular Letter No. 3625, Communication from the Government of Ukraine (10 February 2016) (notifying IMO members of Russia’s illegal seizure of CNG-UA’s rigs, as well as Russia’s movement of the CNG-UA’s jack-up rigs *Petro Hodovanets* (identified by IMO No. 9522350), *Ukraine* (identified by IMO No. 8771241), and *Tavrida* (identified by IMO No. 8763373) on 14 December 2015) (UA-140).

³⁷¹ See CNG Vessel Patents (Jack-Up Drilling Rigs) (UA-53); CNG Vessel Patents (Service Vessels) (UA-54).

in Crimea's territorial sea, over which Russia claims sovereignty.³⁷² Since their seizure, the two JDRs have been renamed and re-registered to fly the Russian flag.³⁷³

180. Russia's registration of the *Tavrida* and *Sivash* as Russian vessels, entitled to fly the Russian flag, violated Articles 2(3) and 91 of the Convention. As vessels with Ukrainian nationality, the JDRs were subject to the law of Ukraine regarding the procedures that must be followed for a change in their flag status.³⁷⁴ Russia's registration of the vessels under its own flag notwithstanding the fact that Ukrainian vessel de-registration procedures were not followed is inconsistent with the rules on nationality of vessels in the Convention and in general international law, and thus amounts to a violation of Articles 2(3) and 91.

* * *

181. As the foregoing Parts demonstrate, Russia has undermined three pillars of the regime of navigation established by UNCLOS. It has turned an international strait from a thoroughfare to a chokepoint; it has harassed merchant vessels exercising the right to free navigation at sea; and it has intruded on Ukraine's exclusive jurisdiction as a flag State. Russia's violations not only continue, but have been compounded in recent months by an asserted prohibition on foreign government navigation through the Kerch Strait. Russia's conduct breaches multiple provisions of UNCLOS, and Russia should be ordered to cease its violations and abide by these fundamental pillars of freedom of navigation under the law of the sea.

II. Russia's Failure to Protect the Marine Environment

182. UNCLOS imposes on all States an affirmative duty to protect the marine environment. Since 2014, the Russian Federation has breached this duty by engaging in invasive construction projects in the Kerch Strait without regard for their impact on the

³⁷² ██████████ Statement, ¶¶13-14.

³⁷³ See ██████████

³⁷⁴ Cabinet of Ministers of Ukraine Resolution No. 1069, On approval of the Order of keeping of the State Ship Registers of Ukraine and the Ship Book of Ukraine (26 September 1997), Arts. 49, 52 (listing the mandatory procedures for permanent and temporary exclusion of a Ukrainian-flagged vessel from the State Ship Register of Ukraine or the Ship Book of Ukraine) (UA-570); see also Code of Commercial Shipping of Ukraine, Art. 29 (1995) Code Of Merchant Shipping Of Ukraine, Vidomosti Verkhovnoyi Rady Ukrayiny (VVR) [Ukrainian Parliament Bulletin], 1995 ("Ukraine does not recognize the entry of a vessel of Ukraine in the ship register of a foreign state, if the vessel is not excluded in the prescribed manner from the State Ship Register of Ukraine or the Ship Book of Ukraine.") (UA-571).

delicate marine ecosystem within the Black Sea, Sea of Azov, and Kerch Strait, and by flatly ignoring its obligation to cooperate with other States. Russia's conduct risks grave and enduring damage to the environment in these sensitive waters.

A. Russia's Construction Projects in the Kerch Strait Violate Articles 123, 192, 194, 204, 205, and 206

183. The Russian Federation undertook significant construction activities in the Kerch Strait without proper regard for the protection and preservation of the marine environment. Altogether, Russia deposited a reported 12.5 million tons of construction materials into the Kerch Strait to construct an almost 20-kilometer, multi-lane road and long-distance railway bridge.³⁷⁵ To the south of the Kerch Strait bridge, it constructed a 16-kilometer undersea liquid-natural-gas pipeline.³⁷⁶ To the north of the bridge, Russia laid across the bottom of the Kerch Strait no fewer than five undersea electric-power and fiber-optic-communication cables.³⁷⁷

184. The Russian Federation completed these construction projects without adequately assessing their impact on the marine environment of the Kerch Strait and larger Black Sea Basin; without taking proper precautions to prevent or mitigate potential environmental harms to those waters; and without adequately monitoring the ongoing impacts of those projects on the marine environment in a scientifically recognized manner. In so doing, Russia has likely caused lasting damage to the marine environment, and has violated its obligations under UNCLOS Articles 123, 192, 194, 204, 205, and 206.

³⁷⁵ See, e.g., Kerch Strait Bridge, *Road Traffic Technology* (undated) (UA-623); The Kerch Bridge: Engineering Protection From Design to Implementation, *Engineering Protection Magazine* (1 July 2016) (UA-624); Emily Pollock, Europe's Longest Bridge Spans Troubled Waters, *Engineering.com* (6 July 2018) (UA-625); Construction of the Century, Or How the Crimean Bridge is Being Built, *Union of Builders of the Republic of Crimea* (11 May 2017) (UA-626).

³⁷⁶ See, e.g., Krasnodar Territory-Crimea Main Gas Pipeline Launched, *President of Russia: Events* (27 December 2016) (UA-195); Pipeline to Crimea, *Construction: Russian Online Journal* (29 June 2015) (UA-627); Stephanie Roker, First Gas Flow from Kuban to Crimea, *World Pipelines* (9 January 2017) (UA-628).

³⁷⁷ See, e.g., Rostelecom Close to Completing Underwater Cable to Crimea, *The Moscow Times* (14 April 2014) (UA-629); Rostelecom Launches Fibre Link to Crimea, *Telecompaper* (25 April 2014) (UA-630); Joseph Cox, Russia Built an Underwater Cable to Bring Its Internet to Newly Annexed Crimea, *Vice Media Group* (1 August 2014) (UA-631); Oleg Budargin Takes Part in the Official Launch of the Fourth Line of the Energy Bridge to Crimea, *Rosseti* (12 May 2016) (UA-632); Russia May Start Laying Power Cable to Crimea on Thursday — Energy Ministry, *TASS* (15 October 2015) (UA-633).

1. Russia Has An Obligation to Protect and Preserve the Marine Environment, and to Monitor Environmental Harm

185. Article 192 — the first Article in UNCLOS Part XII on the Protection and Preservation of the Marine Environment — establishes that “States have the obligation to protect and preserve the marine environment.”³⁷⁸ This has been most recently interpreted by the *South China Sea* tribunal as an obligation that “impose[s] a duty on States Parties, the content of which is informed by the other provisions of Part XII and other applicable rules of international law.”³⁷⁹ Among other things, under Article 192, “States have a positive ‘duty to prevent, or at least mitigate’ significant harm to the environment when pursuing large-scale construction activities.”³⁸⁰

186. As the *South China Sea* tribunal also observed, “[t]he content of the general obligation in Article 192 is further detailed in the subsequent provisions of Part XII,” which include Articles 194, 204, 205, and 206.³⁸¹

187. Article 194 provides, *inter alia*, that:

1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.³⁸²

³⁷⁸ UNCLOS Art. 192.

³⁷⁹ *South China Sea Arbitration (Philippines v. China)*, Award of 12 July 2016, ¶ 941 (internal citations omitted) (UAL-11).

³⁸⁰ *Id.*

³⁸¹ *Id.* ¶ 942.

³⁸² UNCLOS Art. 194(1), (2).

188. Articles 204, 205, and 206 impose specific obligations on States to assess, observe, and report on the risks, effects, or likely impact on the marine environment resulting from any activities that the State permits within its jurisdiction.

189. Specifically, Article 204 requires, in relevant part, that “States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.”³⁸³ They must do so by “observ[ing], measur[ing], evaluat[ing] and analys[ing], by recognized scientific methods, the risks or effects of pollution of the marine environment.”³⁸⁴ Article 205 requires that States “shall publish reports of the results obtained pursuant to Article 204 or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States.”³⁸⁵ Finally, Article 206 requires that:

When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.³⁸⁶

190. These transparency obligations permit no exceptions; as the *South China Sea* tribunal found with regard to Article 206, the reporting obligation is “absolute” such that “Article 206 ensures that planned activities with potentially damaging effects may be effectively controlled and that other States are kept informed of their potential risks.”³⁸⁷ To “meet[] the requirements of Article 206,” the assessment communicated must be

³⁸³ UNCLOS Art. 204.

³⁸⁴ *Id.*

³⁸⁵ UNCLOS Art. 205.

³⁸⁶ This is also consistent with customary international law. *See, e.g., Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, ¶ 204 (“[I]t may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.”) (UAL-152).

³⁸⁷ *South China Sea Arbitration (Philippines v. China)*, Award of 12 July 2016, ¶ 948 (UAL-11) (emphasis added).

“comprehensive” and sufficiently adequate to ensure that environmental risks are properly mitigated.³⁸⁸ The same principle logically applies to the transparency obligations under Article 205, as well.

191. The principles of cooperation, communication, and transparency reflected in the above articles apply with particular force to States bordering enclosed seas, such as the Black Sea and Sea of Azov: under Article 123, such States are obliged “to cooperate with each other in the exercise of their rights and the performance of their duties” under the Convention, including specifically “to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment.”³⁸⁹

192. As described more fully below, Russia has violated both its general obligation under Article 192 to protect and preserve the marine environment, as well as its more specific obligations under the other aforementioned provisions, by unilaterally undertaking major construction projects in the Kerch Strait without first adequately considering the potential impacts of that construction on the immediate and neighboring marine environment, and by failing to keep other potentially affected States informed.

³⁸⁸ *Id.* ¶¶ 989-990. Specifically, the *South China Sea* tribunal indicated that Article 206 environmental assessments must “meet[] the requirements of Article 206” and generally should be as “comprehensive” as “EIAs reviewed by other international courts and tribunals,” or else they will “fall short of the[] criteria” demanded by Article 206. *Id.*; see also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, ICJ Judgment of 16 December 2015, ¶¶ 161, 173 (holding that an environmental assessment must be sufficient to “ensure that the design and execution of the project would minimize [*inter alia*] the risk of significant transboundary harm” and requiring an “appropriate environmental impact assessment” to satisfy the obligation to conduct an environmental assessment (emphasis added)) (UAL-153); cf. *Advisory Opinion OC-23/17 of November 15, 2017 Requested By the Republic of Colombia on the Environment and Human Rights*, Inter-American Court of Human Rights, ¶ 142 (noting that “the measures that a State must take to conserve fragile ecosystems will be greater and different from those it must take to deal with the risk of environmental damage to other components of the environment” and that “the measures to meet this standard may change over time, for example, in light of new scientific or technological knowledge”) (citations omitted) (UAL-154).

³⁸⁹ UNCLOS Art. 123. The *MOX Plant* tribunal observed that the “duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law . . .” *MOX Plant (Ireland v. United Kingdom)*, ITLOS Case No. 10, Provisional Measures, Order of 3 December 2001, ¶ 82 (UAL-17).

2. Russia Violated Article 206 By Not Conducting and Communicating an Environmental Impact Assessment Before Undertaking Construction Efforts in the Kerch Strait

193. Russia violated Article 206 by not conducting and communicating an adequate environmental impact assessment (“EIA” or, simply, “assessment”)³⁹⁰ before undertaking construction in the Kerch Strait. Specifically, to satisfy the requirements of Article 206, Russia needed to (i) determine whether there were “reasonable grounds for believing” that the planned construction projects might “cause substantial pollution of or significant and harmful changes to the marine environment” and, if so, (ii) adequately “assess the potential effects” of its construction projects in the Kerch Strait, and (iii) “communicate reports of the results of such assessments” in the manner provided in Article 205,³⁹¹ namely by publication or provision “to competent international organizations, which should make them available to all States.”³⁹² A failure to satisfy even one of these elements violates Article 206.

194. As this Section explains, Russia did not satisfy any of the aforementioned elements. First, Russia certainly did have “reasonable grounds for believing” that the construction of a bridge, submarine power and fiber optic cables, and a submarine natural gas pipeline might “cause substantial pollution of or significant and harmful changes to the marine environment,” thereby triggering the need for Russia to “assess the potential effects of such activities on the marine environment.”³⁹³ Second, while Russia claims to have conducted an environmental assessment, there is no public evidence to substantiate that claim. Moreover, even if such an assessment was in fact conducted, given the compressed time period available before construction began, the assessment would have fallen so far short of international standards, and, indeed, Russian standards, that it could not be deemed

³⁹⁰ Outside of the UNCLOS Article 206 context, current international construction and development standards call for the completion of an assessment of environmental *and social* impact, or an “ESIA.” See [REDACTED] Report, ¶ 3 n.1. As such, [REDACTED] report refers often to the need for an ESIA. However, consistent with UNCLOS Articles 204-206, Ukraine’s claim focuses only on the environmental aspect of this assessment. Therefore, Ukraine’s Memorial uses the abbreviation “EIA,” or simply refers to more general environmental “assessments.”

It should be noted further that past authorities and texts have variously referred to such assessments as, *e.g.*, EIAs, ESIA, “environmental impact statements” (“EIS”), and environmental assessments (“EA”). When quoting [REDACTED] or other authorities, Ukraine retains the original reference (*i.e.*, EIA, ESIA, EIS, or EA).

³⁹¹ UNCLOS Art. 206.

³⁹² UNCLOS Art. 205.

³⁹³ UNCLOS Art. 206.

a valid environmental impact assessment for the purposes of Article 206. And, finally, Russia never published or “communicate[d] [any] reports of the results of such assessments” “to the competent international organizations” so that they were made “available to all States.”³⁹⁴

i. Reasonable Grounds to Believe the Projects Would Impact the Environment

195. As explained by ██████████, there were patently obvious “reasonable grounds” for Russia to believe that the planned activities risked significant adverse impacts on the marine environment of the Kerch Strait, with potential repercussions across the Sea of Azov and the Black Sea.³⁹⁵ Indeed, the sheer scope of Russia’s construction projects in the Kerch Strait should have alerted any responsible actor to the need for a thorough, detailed assessment before any construction activities could commence.

196. The specific requirement under Article 206 of the Convention to conduct an assessment where “substantial pollution of or significant and harmful changes to the marine environment” are threatened and to communicate it to other States, is also reflected in customary international law. In this connection, the ICJ has explained that States are under a general international legal obligation to “exercise due diligence in preventing significant transboundary environmental harm.”³⁹⁶ Specifically, the Court has determined that it is “a requirement under general international law to undertake an environmental impact assessment.”³⁹⁷ If an assessment confirms the project risks harm to the environment of other interested parties, the ICJ further states that “the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk.”³⁹⁸ Such steps must be taken prior to

³⁹⁴ UNCLOS Arts. 205, 206.

³⁹⁵ See ██████████ Report, Part V.B.

³⁹⁶ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, ICJ Judgment of 16 December 2015, ¶ 153; *id.* at p. 707, ¶ 104 (**UAL-153**).

³⁹⁷ *Id.* p. 665, ¶ 104 (quoting *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, ¶ 204 (**UA-152**)).

³⁹⁸ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, ICJ Judgment of 16 December 2015, ¶ 104 (**UAL-153**).

beginning construction.³⁹⁹ The reason for these customary international obligations is straightforward: an EIA allows a State and all other interested stakeholders to evaluate the potential environmental impacts of a project *before* it is commenced so as to mitigate any likely problems it may cause.⁴⁰⁰

197. For the purposes of the Convention, Article 206 establishes an objective test for determining whether an EIA must be undertaken in relation to any particular project: namely that the State undertaking the project should “have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment.”⁴⁰¹ What constitutes “reasonable grounds” for the purpose of Article 206 is best determined by referring to the practice that would be adopted by an objective, reasonable decision-maker in comparable circumstances.⁴⁰² In this respect, a large body of consistent practice has developed over the past 40 years concerning the types of projects for which EIAs must be conducted. As [REDACTED] explains,⁴⁰³ the relevant practice is codified in international standards developed by public and private international organizations involved in construction projects

³⁹⁹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, ICJ Judgment of 16 December 2015, ¶ 161 ([“[T]he obligation to conduct an environmental impact assessment requires an ex ante evaluation of the risk of significant transboundary harm, and thus ‘an environmental impact assessment must be conducted prior to the implementation of a project.’” (quoting *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, ¶ 205) (UA-152)) (UAL-153).

⁴⁰⁰ UNEP, *Assessing Environmental Impacts: A Global Review of Legislation* (2018), p. 21 (“As a tool designed to assess a planned activity prior to its commencement, EIA approval is regularly a legal precondition for the final decision on whether to issue a permit or not, and if so, under which conditions. This way it not only assesses whether the planned project will have a significant impact on the environment, but it can also influence the design of the project and thus its impact.”) (UA-634). The ICJ previously held that “an environmental impact assessment *must be conducted prior* to the implementation of a project.” *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment of 20 April 2010, ¶ 205 (emphasis added) (UAL-152).

⁴⁰¹ UNCLOS Art. 206.

⁴⁰² See, e.g., *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, ICJ Judgment of 31 March 2014, ¶¶ 67, 97 (noting that the “standard of review” for determining whether something is reasonable “is an objective one” and “does not turn on the intentions of individual government officials, but rather on whether” the actions taken “are reasonable in relation to achieving the stated . . . objectives”) (UAL-155).

⁴⁰³ See [REDACTED] Report, ¶¶ 37-38 (noting that “together” “a variety of international standards” “reflect a common understanding shared between the international environmental policy community, international lender institutions, and the international construction industry” that “determine when an ESIA is needed or when a construction project is likely to cause significant harmful impacts on the marine environment”).

around the world, including, but not limited to, the United Nations Environmental Programme (“UNEP”), United Nations Development Programme (“UNDP”), World Bank, International Finance Corporation (“IFC”), European Bank for Reconstruction and Development (“EBRD”), and private financial institutions that serve as lenders to such projects. The application of Article 206 to any given project is informed by the consistent practice that has developed under the aforementioned standards.

198. Drawing on his extensive experience applying these international standards, ██████████ opines that EIAs would have been required for every one of the Kerch Strait construction projects. As he explains in his report, virtually any large, capital-intensive project will necessitate an EIA under accepted international standards and guidelines. This includes projects involving the construction of motorways, bridges, pipelines, tunnels, submarine cables, and similar commercial installations or infrastructure-development projects.⁴⁰⁴ Indeed, established international standards, including the Espoo Convention, the UNDP Social and Environmental Screening Procedure, the IFC Performance Standards, and other similar guidelines, all provide that new road construction, railway construction, pipeline construction, and comparable projects are considered to have a high risk of impact on the environment such that they require an EIA prior to approval and commencement of the project.⁴⁰⁵ Therefore, on the facts presented in this case, ██████████ concludes that international standards required an EIA prior to the commencement of construction of a bridge carrying a major road and railway and a pipeline carrying significant volumes of natural gas. Notably, Russia’s own domestic standards, which originally drew on international instruments like the Espoo Convention,⁴⁰⁶ also require that marine installations and the laying of submarine cables require an EIA.⁴⁰⁷

⁴⁰⁴ *Id.* ¶ 135.

⁴⁰⁵ *See, e.g., id.* ¶¶ 39-45, 135; United Nations Treaty Collection, XXVII 4: Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Finland, 25 February 1991, Status at 18 November 2020, Art. 4 & Appendix 1 [hereinafter “Espoo Convention”] (UA-635); UNDP, Guidance Note: UNDP Social and Environmental Standards (SES), Social and Environmental Screening Procedure Updated (2019), Annex 2 (UA-636); Council Directive of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment (85/337/EEC), Official Journal of the European Communities, No. L 175, 5.7.85 (UA-637); European Bank for Reconstruction and Development, Environmental and Social Policy, p. 11 (April 2019) (UA-638).

⁴⁰⁶ ██████████ Report, ¶ 49; Daria N. Ratsiborinskaya, *Russian Environmental Law - An Overview For Business in*, Environmental Finance and Socially Responsible Business in Russia - Legal and Practical Trends (Douma and Mucklow eds., 2010), pp. 1, 14 (UA-639).

⁴⁰⁷ Russian Federation Federal Law No. 155-FZ, On the Internal Waters, the Territorial Sea, and the Contiguous Zone of the Russian Federation (31 July 1998), Art. 34(3) (UA-640).

199. In this case, in addition to the fact that the projects involved the types of construction for which EIAs are generally required, the environmental specificities of the Kerch Strait also provide reasonable grounds to fear substantial pollution or significant and harmful changes to the marine environment as a result of construction activities.⁴⁰⁸ As [REDACTED] explains in his expert report, the Kerch Strait, together with the Black Sea and Sea of Azov, constitute a single and delicate marine ecosystem in which a highly localized event can have far-reaching effects.⁴⁰⁹ Indeed, as discussed in Chapter Four, Section II, above, the Kerch Strait is a particularly sensitive waterway.⁴¹⁰ It connects the Sea of Azov and the Black Sea, controlling the exchange of water between the world's shallowest sea and a uniquely anoxic one.⁴¹¹ The Kerch Strait plays a critical role in regulating the oxygen and salinity levels of *both* bodies of water.⁴¹² A slight change in how water is exchanged between the two bodies can have significant effects on the biodiversity and bioproductivity of the larger ecosystem.⁴¹³ It is thus unsurprising that prior agreements between Ukraine and Russia, when the States jointly considered transport projects in the Kerch Strait, expressly contemplated the conduct of an environmental impact assessment prior to the commencement of any construction.⁴¹⁴

200. In this case, [REDACTED] has studied the publicly available information concerning Russia's various construction projects in the Kerch Strait. He concludes that it would have been evident at the planning stage of the Kerch Strait projects that their construction and operation posed serious risks of significant harm to the marine

⁴⁰⁸ As has been noted by one other international tribunal, "the measures that a State must take to conserve fragile ecosystems will be greater and different from those it must take to deal with the risk of environmental damage to other components of the environment." *Advisory Opinion OC-23/17 of November 15, 2017 Requested By the Republic of Colombia on the Environment and Human Rights*, Inter-American Court of Human Rights, ¶ 142 (citing Agenda 21 adopted at the United Nations Conference on Environment and Development, Río de Janeiro, June 14, 1992, UN Doc. A/Conf.151/26 (Vol. II), para. 12.1) (**UAL-154**).

⁴⁰⁹ [REDACTED] Report, ¶¶ 27-35.

⁴¹⁰ *See supra* Chapter Four, Section II.

⁴¹¹ [REDACTED] Report, ¶¶ 19, 21, 37-39.

⁴¹² *Id.* ¶¶ 37-39.

⁴¹³ *See, e.g., id.* ¶¶ 37-39, 46, 50; [REDACTED] Report, Parts V.B.1-2.

⁴¹⁴ Agreement Between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on Joint Steps to Organize the Construction of a Transport Crossing Across the Kerch Strait, Arts. 5 & 8 (17 December 2013) (**UA-96-AM**); The Scope of Work for Engineering Surveys and the Development of a Feasibility Study for the Construction of a Transport Crossing Across the Kerch Strait, § 8.16 (31 January 2014) (**UA-100**).

environment.⁴¹⁵ Specifically, ██████████ explains that the Kerch Strait construction projects would reasonably have been expected to cause both immediate, short-term environmental impacts resulting from the construction process itself, and continuing environmental impacts associated with the operation of the projects. As he recognizes, these types of impacts are routinely addressed in EIAs and are the precise kinds of impacts that an assessment is meant to mitigate. Indeed, even in the absence of a properly conducted EIA, ██████████ believes that further measures continue to be available to Russia to mitigate the expected environmental damage resulting from its construction projects in the Kerch Strait. Russia's failure to address these likely impacts in an EIA, and its subsequent failure to continually assess the ongoing impacts of those projects and to take appropriate measures to mitigate them, has likely resulted in negative environmental effects on this fragile marine ecosystem that could have been avoided if Russia had exercised the necessary diligence.

201. Specifically, ██████████ notes that the short-term, immediate impacts on the marine environment would have reasonably been anticipated to include (i) significantly increased rates of surface and particulate disturbance; (ii) increased light, noise, and vibrations; and (iii) the introduction of hazardous, toxic, or otherwise harmful pollutants.⁴¹⁶

202. First, the increased surface and particulate disturbances associated with the construction of bridges, construction of pipelines, and laying of cables should have been expected to result in "sedimental deposition and erosion, disturbance, resuspension, and general disruption," which would lead to "an increase in suspended solids," in turn producing sediment transport and deposition.⁴¹⁷ These potential factors "must be considered carefully" for any project because such impacts can ultimately have significant effects on breeding, reproduction, and the marine food chain for key species of fish and shellfish.⁴¹⁸ ██████████ also opines that these threats are especially relevant to construction of the Kerch Strait bridge where the high number of pilings driven into the

⁴¹⁵ ██████████ Report, Parts V.B.2-3. In addition, Ukraine's National Academy of Agrarian Sciences also has assessed that the construction project poses significant risks to the ecosystems of the Black Sea and the Sea of Azov, which are fragile due to their shallow depths and poor water exchange between the seas. ██████████

██████████ Construction activities could also easily change the chemical composition of the water, which might cause the death of marine life. *Id.*

⁴¹⁶ *See* ██████████ Report, Part V.B.2.a.

⁴¹⁷ *Id.* ¶ 67.

⁴¹⁸ *Id.* ¶¶ 66-68.

seabed, combined with the shallow depth of the Strait, would most likely result in more sediment disturbed and less water to disperse it.⁴¹⁹ While ██████████ notes that a proper EIA conducted prior to construction could have allowed effective mitigation measures to be employed at the time of construction to reduce the magnitude of these short-term impacts, he also recognizes that prospective forward-looking mitigation measures may still be effective to address specific, lingering impacts.⁴²⁰ To identify any such impacts, a comprehensive erosional survey would need to be conducted and, depending on the environmental impacts identified, the Russia authorities could apply such measures as “targeted dredging and minor structural adjustments to direct problematic hydrodynamics [to] mitigate some harm that has resulted from the erosion and/or sedimental accretions.”⁴²¹

203. Second, the increased levels of light, noise, and vibration attendant to the construction projects should have been expected to have far-reaching effects on the marine environment. As pointed out by ██████████, “[n]oise and vibration can have demonstrable and significant impacts on resident species, including birds, fishes, and marine mammals” reaching distances of up to 50 kilometers.⁴²² While temporary avoidance of the area by those species would be expected to be the primary impact, ██████████ points out that reliable studies suggest that even short-term avoidance can have “long-term ecological impacts at the individual, population, and ecosystem levels.”⁴²³ A proper EIA could have identified simple mitigation measures such as “sound dampeners, specialized construction equipment that produces less vibration, and dormant work periods during which no work was to be conducted” that could have gone a long way to mitigating these effects.⁴²⁴ Nonetheless, further measures can still likely address ongoing environmental impacts resulting from the operation of the construction projects today, including the use of dimmers, hooded lights, and sound-barrier walls.⁴²⁵

⁴¹⁹ *Id.* ¶¶ 70-72, 173.

⁴²⁰ *Id.* ¶ 74.

⁴²¹ *Id.*

⁴²² *Id.* ¶ 75.

⁴²³ *Id.*

⁴²⁴ *Id.* ¶ 77.

⁴²⁵ *Id.*

204. Third, the introduction of pollutants into the marine environment would not only have been likely, but virtually guaranteed during the construction process.⁴²⁶ The kinds of projects undertaken in the Kerch Strait involve the convergence of great numbers of people and heavy equipment. Concentrated populations of people and heavy equipment lead to concentrated amounts of wastewater, sewage, and other hazardous wastes and chemicals.⁴²⁷ In ██████████ experience, and based on empirical evidence, the likelihood of a spill of any of those substances occurring during the construction process “is almost a certainty.”⁴²⁸ Such spills are capable of causing significant pollution or damage to the marine environment. For example, “[h]ydrocarbon spills and uncontrolled releases can be transported for many kilometers since they float and are easily dispersed by wind and currents,” and while “[s]ome hydrocarbons may quickly volatilize . . . other, heavier hydrocarbons can weather and persist as a mousse which can have long range impacts.”⁴²⁹ Similarly, the uncontrolled or unintended release of untreated waste can have “various acute and chronic impacts to a range of organisms, including humans.”⁴³⁰ Again, a properly conducted EIA could have identified these potential impacts and instituted a monitoring and response system to address them during the construction process.⁴³¹ Going forward, however, a reasonable measure to address pollution resulting from these impacts would be to conduct a hazardous contaminant assessment, and devise a mitigation plan based on those results.⁴³²

205. In addition to these construction-related impacts, the projects could also reasonably be expected to have continuing effects on the marine environment of the Black Sea Basin for their operational lifetimes. ██████████ has identified six continuing impacts on the marine environment that he would have anticipated and considered in light of the nature of the Kerch Strait construction projects: (i) changes to the hydrodynamics of the Kerch Strait; (ii) increased algal bloom; (iii) the creation of attractive nuisances; (iv) significantly larger or longer-lasting ice formations; (v) chronic and/or episodic pollution;

⁴²⁶ *Id.* ¶ 84.

⁴²⁷ *Id.* ¶¶ 78-89.

⁴²⁸ *Id.* ¶ 83 (citing Mace Baron, et al., Long-Term Ecological Impacts from Oil Spills: Comparison of Exxon Valdez, Hebei Spirit, and Deepwater Horizon, 54 *Environmental Science & Technology*, pp. 6456-6467 (2020) (UA-641)).

⁴²⁹ ██████████ Report, ¶ 84.

⁴³⁰ *Id.* ¶ 79.

⁴³¹ *Id.* ¶ 78, 137-142.

⁴³² *See id.* ¶ 78.

and (vi) the ongoing risk of failure of the construction projects themselves. To avoid significant harm to the marine environment, ██████████ opines that each of these impacts also should have been identified and addressed in any EIA conducted. Further, he notes that continuing mitigation measures, if needed, should be instituted at the earliest possible opportunity to avoid prolongation of these impacts. Similar to the construction-related impacts, above, Russia's failure to properly identify, address, and mitigate these impacts in an EIA or otherwise has potentially led to significant, avoidable environmental harm that must be addressed promptly.

206. First, the Kerch Strait bridge has likely altered the hydrodynamics (water flow) within the Kerch Strait, potentially leading to significant and continuing environmental effects. ██████████ notes that the introduction of 7,000 pilings and 595 broad stanchions "presents a formidable cross-section" which "would be expected to interact with [water] flow patterns and the general hydrodynamics of the strait."⁴³³ This is only logical: the Kerch Strait is a narrow, relatively shallow waterway. Inserting more than 7,100 man-made obstacles to the passage of water would understandably have an impact on flow patterns through the strait, reducing the outflow of water from the Sea of Azov into the Black Sea.

207. Such a hydrodynamic impact in the Kerch Strait is especially concerning given the role that the waterway plays in maintaining the ecological equilibrium between the Sea of Azov and the Black Sea. As ██████████ explains, and ██████████ confirms, even the slightest change in how water is exchanged between the Sea of Azov and the Black Sea can result in fluctuations in salinity levels in both bodies of water.⁴³⁴ Such fluctuations can have significant effects on the ecology of the area, affecting a wide variety of organisms, depending on their salinity tolerances. ██████████ explains that he considers it reasonably likely that such hydrodynamic changes have occurred and are impacting the marine environment of the Black Sea Basin, "including phytoplankton, zooplankton, ichthyoplankton, invertebrates, fishes, marine mammals, and perhaps other taxa."⁴³⁵

208. As is apparent from the foregoing, the enduring environmental harm caused by the altered hydrodynamics of the Kerch Strait is likely complex and multi-faceted. Proper testing and analysis is needed to identify the full extent of the potential damage, all of which should have been undertaken at the scoping and assessment stage. Depending on the results of such testing and analysis, ██████████ concludes that the types of measures that may be

⁴³³ *Id.* ¶ 90.

⁴³⁴ ██████████ Report, ¶¶ 37-38; ██████████ Report, ¶¶ 55, 59-60, 94-97, 112.

⁴³⁵ *Id.* ¶ 95.

needed to mitigate the likely environmental harm include “localized dredging to facilitate the flow of water through the bridge span,” “active re-engineering of the bridge supports to reduce the impediment they create to such flow,” and, “[t]o the extent that any biological effects are observed, the transplantation of certain species to other amenable ecosystems to ensure their survival.”⁴³⁶

209. Second, and relatedly, it is likely that the Kerch Strait bridge could cause increased rates of eutrophication and related algal blooms in the Sea of Azov. Eutrophication, in its most basic sense, means “nutrient enrichment.” As [REDACTED] explains, “[a]s nutrients (mostly nitrogen and phosphorus) accumulate in marine and estuarine ecosystems, different algal species can exert their competitive advantages to achieve high levels of growth (*e.g.*, bloom sequences).”⁴³⁷ The so-called algal “bloom sequences” can eventually overwhelm the local ecosystem and consume the available nutrients, rendering the ecosystem toxic to other aquatic and terrestrial organisms “including fishes and other marine organisms.”⁴³⁸

210. As [REDACTED] further explains, fed as it is by two major rivers carrying nutrient-rich organic run-off, the Sea of Azov has historically been susceptible to both eutrophication and severe algal blooms – a susceptibility that the construction of the Kerch Strait bridge could have reasonably been expected to exacerbate. That is because eutrophication is more likely to occur the more stagnant a body of water becomes.⁴³⁹ By restricting the flow of water from the Sea of Azov into the Black Sea, the bridge may tend to make the Sea of Azov more stagnant, thereby increasing the likelihood of future events of eutrophication and related algal blooms in that body of water.⁴⁴⁰ Ultimately, this potential impact could threaten the marine life of the Sea of Azov, including even the extinction of certain endemic species found nowhere else in the world.⁴⁴¹ For these reasons, adequate monitoring systems — as described by [REDACTED] and all of which should have been included in any adequate EIA — should be put in place immediately to alert relevant experts

⁴³⁶ *Id.* ¶ 98.

⁴³⁷ *Id.* ¶ 99.

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* ¶¶ 99, 103-104.

⁴⁴¹ *Id.* ¶ 103; *see also* [REDACTED] Report, ¶ 41.

of potential eutrophication issues at the earliest possible time.⁴⁴² To the extent that signs of problematic eutrophication are observed, a range of mitigation measures should be explored from identifying and eliminating its underlying cause to more direct approaches, including “point and nonpoint nutrient controls such as chemical treatments, flushing and dredging of problematic areas, phoslock coastal nutrient controls, wetland restoration efforts to effect nutrient uptake, and others.”⁴⁴³

211. Third, ██████████ expects that the Kerch Strait bridge has created and cultivated attractive nuisances. An attractive nuisance occurs when a structure (or some other phenomenon) creates “conditions [that] favor predation” thus attracting large numbers of piscivorous (fish-eating), predatory species such as dolphins.⁴⁴⁴ Bridges typically create a damming effect resulting in a favorable physical habitation for increased predation; in other words, fish species lower in the food chain are attracted to dams, and large populations of those fish attract more predators.⁴⁴⁵ This has likely occurred in the Kerch Strait as a result of the Kerch Strait bridge, considering that public source data suggests the bridge has attracted a significant number of predatory fish and mammals, especially dolphins.⁴⁴⁶ An increase in predation on fish species has, historically, resulted in material, lasting impacts on fish populations and the local marine ecosystem.⁴⁴⁷ Moreover, the increased concentration of dolphins in the Kerch Strait will make the dolphin population, itself, more susceptible to shipping-related harm, including both biological harm from associated pollutants and physical harm from interaction with, among other things, ship propellers.⁴⁴⁸ ██████████ explains that, because the Kerch Strait bridge structures are expected to remain for decades, these material impacts may be expected to be significant and endure over time.⁴⁴⁹

⁴⁴² ██████████ Report, ¶¶ 100-104.

⁴⁴³ *Id.* ¶ 104. As ██████████ explains, point and non-point nutrient controls are “mechanisms that control the release and/or presence of polluting nutrients such as nitrogen or phosphorous at both the point of introduction (‘point’) and throughout the Sea of Azov (‘nonpoint’), as necessary”; phoslock nutrient control is “[a] mineral application that attracts, binds, and thus effectively removes free reactive phosphorous from the water column.” *Id.* ¶ 104 nn. 110-111.

⁴⁴⁴ *Id.* ¶ 105.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* ¶ 106 n.112.

⁴⁴⁷ *Id.* ¶ 106 n.113.

⁴⁴⁸ *Id.* ¶ 108.

⁴⁴⁹ *Id.* ¶ 107.

212. A properly conducted EIA should have addressed the harmful impacts resulting from these attractive nuisances and potentially mitigated lasting harm on numerous marine species. Nonetheless, in the absence of such an assessment, [REDACTED] recognizes that mitigating measures can still be employed to address such harms. Indeed, simply addressing some of the underlying causes of excess fish congregation — such as increasing water flow to eliminate the damming effect of the bridge — may alleviate the problem altogether.⁴⁵⁰ Additionally, “structural attachments . . . can be erected around the bridge stanchions that make it difficult for fish to gather, and discourage concentrated populations.”⁴⁵¹ Alternatively, “certain operational procedures . . . can be put into place to reduce the potential impact of ships on dolphins crossing under the Kerch Strait bridge, drawing on best practice from marine mammal protection schemes that have been developed to protect sensitive species in many areas of the world.”⁴⁵²

213. Fourth, the Kerch Strait bridge has likely caused, and will continue to cause, an increase in seasonal ice formation on the northern side of the bridge. Each winter, ice forms in the Kerch Strait and the Sea of Azov.⁴⁵³ It is foreseeable that the hydrodynamic effects of the Kerch Strait bridge, discussed above, will foster additional ice formation, causing ice floes to become more numerous, thicker, and longer-lasting as compared to conditions which existed prior to construction of the bridge.⁴⁵⁴ These observations are consistent with a 2018 study conducted by the Institute of Water Problems and Land Reclamation in Ukraine, which found that significant ice floes were already forming around bridge pillars in February 2017, and concluded that the bridge — by disrupting water flow through the Strait — would continue to cause more and thicker ice to form in the future, as compared to the ice conditions pre-existing completion of the bridge.⁴⁵⁵ In a worst-case scenario, the pressure exerted on the bridge by such ice floes could cause it to collapse, with catastrophic environmental consequences. The last bridge built across the Kerch Strait,

⁴⁵⁰ *Id.* ¶ 109.

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ *See, e.g.*, United Kingdom Hydrographic Office, *Black Sea and Sea of Azov Pilot* (1st ed., 2003), § 8.18 (discussing ice accumulation in the Kerch Strait) (UA-222).

⁴⁵⁴ [REDACTED] Report, ¶¶ 110-116.

⁴⁵⁵ Institute of Water Problems and Land Reclamation, NAAS, *About Some Environmental Consequences of Kerch Strait Bridge Construction*, *Hydrology*, Vol. 6, No. 1 (2018), pp. 6-8 (UA-220).

during the Second World War, suffered precisely that fate in 1945.⁴⁵⁶ Like the current Kerch Strait bridge, the earlier bridge was built in a hurry and its premature collapse was attributed in part to “rushed nature of the work” resulting in insufficiently strong bridge support pillars.⁴⁵⁷

214. The buildup of significant ice floes poses larger environmental concerns, as well. Specifically, increased ice masses will melt at different rates than the normally-occurring ice floes before construction was completed. Because sea ice is significantly less saline than sea water, a longer melting period and increased levels of melt-off will have potential impacts on the salinity of the Kerch Strait, exacerbating the hydrological impacts discussed above.⁴⁵⁸ It would also likely change the temperature patterns of the relevant waters.⁴⁵⁹ As discussed by [REDACTED], and as [REDACTED] confirms, any alteration in the salinity or temperature of the Kerch Strait may have far-reaching effects on the overall marine ecosystem of the entire Black Sea Basin by, *inter alia*, altering migration patterns, population counts, and life histories of significant fish and other marine species found throughout the Black Sea Basin.⁴⁶⁰

215. Any adequate EIA would have considered and prepared for the potential of significant ice buildups, including by putting in place a monitoring regime to observe “ice formation, coverage, thickness, longevity, movement and backup, and melt off.”⁴⁶¹ Russia’s failure to collect the necessary data on hydrodynamic flow patterns before and during the construction and operation of the Kerch Strait bridge will significantly hinder future mitigation efforts, which [REDACTED] anticipates will likely need to include “the more regular deployment of ice breakers to break up thicker ice floes.”⁴⁶²

216. Fifth, the Kerch Strait bridge has virtually assured that significantly higher levels of pollutants will be introduced into the Kerch Strait waters, and through them, the Black Sea Basin more generally. [REDACTED] opines that the increase in traffic across the bridge itself — both road and rail traffic — is reasonably likely to cause more frequent

⁴⁵⁶ Russian Federal Archive Agency, Chief Specialist of the Russian State Archive of Economics M.M. Kudyukina, Foreword: Bridge Across the Kerch Strait, p. 3 (2016) (UA-642).

⁴⁵⁷ *Id.* p. 4.

⁴⁵⁸ [REDACTED] Report, ¶¶ 112-113.

⁴⁵⁹ *Id.* ¶ 112.

⁴⁶⁰ [REDACTED] Report, ¶¶ 37-41; [REDACTED] Report, ¶¶ 55, 59-60, 94-96, 112-113.

⁴⁶¹ *Id.* ¶ 114.

⁴⁶² *Id.* ¶ 116.

uncontrolled releases of hazardous chemicals into the marine environment, whether through leakages, spills, or accidents.⁴⁶³ As [REDACTED] notes, pollutants released into the Kerch Strait are very likely to be quickly transported across the Black Sea Basin, and will not enjoy the dispersive effects one would expect in other large bodies of water because of the limited mixing between the upper water layer containing the pollutants and the thicker anoxic water below.⁴⁶⁴ As such, the harmful effects to the marine environment caused by the introduction of such pollutants into the Kerch Strait are likely to be felt across the Black Sea Basin.

217. For these reasons, a typical EIA would generally include a comprehensive Environmental and Social Monitoring and Management Plan (“ESMMP”) which would, itself, include a Spill Prevention, Control, and Countermeasures (“SPCC”) plan.⁴⁶⁵ These plans would provide for an initial hazardous materials risk assessment to identify areas of operation particularly vulnerable to potential spills and impacts, and to identify the likelihood and nature of necessary responses. [REDACTED] notes that, even now, the Russian Federation could perform a hazardous materials risk assessment in light of current operational conditions and create an SPCC plan based on current circumstances. He anticipates that such an assessment would facilitate the intelligent design of a response program comprised of “highway and marine-based response groups” with “emergency response capabilities” that should be “located at each end of the bridge, with some capabilities at a centrally located facility on the bridge.”⁴⁶⁶ Such an option may address some of the harms resulting from the Kerch Strait bridge construction projects and mitigate future environmental harm.

218. Finally, the Kerch Strait bridge is subject to a higher-than-normal risk of failure, which, as [REDACTED] explains, is a risk to the marine environment that should and would be considered at every stage of an environmental impact assessment. According to [REDACTED], the Kerch Strait bridge is built upon a seabed subject to considerable seismic risk and punctuated by volatile mud volcanoes.⁴⁶⁷ Industry experts have repeatedly questioned the longevity of the bridge in view of these geological conditions.⁴⁶⁸ The

⁴⁶³ *Id.* ¶¶ 78-89, 117-125.

⁴⁶⁴ [REDACTED] Report, ¶¶ 27-35.

⁴⁶⁵ *See, e.g.*, [REDACTED] Report, ¶¶ 117-118, 144-145.

⁴⁶⁶ *Id.* ¶ 118.

⁴⁶⁷ *Id.* ¶¶ 119-125.

⁴⁶⁸ Putin’s Bridge To Crimea Is Doomed To Collapse, *Newsweek* (13 January 2017) (consolidating statements from Yury Medovar of the Russian Academy of Sciences, Russian construction engineer

vulnerability of the bridge to failure will likely only increase when combined with other long term impacts — in particular, increases in seasonal ice formation which could exert significant physical pressure on the structure during the winter months.⁴⁶⁹ The risk that the current bridge could fail poses a significant ongoing threat to the marine environment that, in ██████████ view, should have been considered, planned for, and mitigated with a thorough and well-publicized emergency response plan.⁴⁷⁰ Such an emergency response plan can still be devised and implemented to mitigate the catastrophic environmental harm associated with bridge failure, and should be undertaken as soon as possible.

219. In light of the foregoing, and as both ██████████ and ██████████ have confirmed, these potential impacts risk serious, localized environmental damage in the Kerch Strait.⁴⁷¹ Further, the above risks also suggest serious potential harm to the marine ecosystem throughout the Black Sea Basin, including the marine environments of other States. Such potential transboundary harm, alone, necessitates the conduct of an EIA.⁴⁷²

220. Given these diverse and numerous potential impacts, the Article 206 threshold for requiring an EIA was comfortably exceeded in this case. Not only did Russia have “reasonable grounds” for believing that the Kerch Strait construction projects might “cause substantial pollution of or significant and harmful changes to the marine environment” in the short-term, during the construction process, but it also had reasonable grounds for believing that the long-term operation and existence of the projects would have lasting impacts on the environment. According to ██████████, the existence of these environmental risks would have been obvious to any qualified environmental assessor, and should have been addressed directly, and comprehensively, in order to protect and preserve

Yury Sevenard, and George Rosnovsky — the creator of two Ukrainian Kerch Strait bridge designs — concerning the inadequacy of the bridge’s design and potential for collapse in the future) (UA-643).

⁴⁶⁹ ██████████ Report, ¶¶ 122-123.

⁴⁷⁰ *Id.* ¶¶ 119-125.

⁴⁷¹ *See, e.g., id.* Part V.B; ██████████ Report, ¶¶ 48-51.

⁴⁷² “[B]efore embarking on an activity having the potential adversely to affect the environment of another State,” the ICJ has determined that it is “a requirement under general international law to undertake an environmental impact assessment.” *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, ICJ Judgment of 16 December 2015, ¶ 104 (UAL-153); *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment of 20 April 2010, ¶ 204 (UAL-152).

the marine environment.⁴⁷³

ii. Assessment of the Potential Effects on the Marine Environment

221. Despite these obvious risks giving rise to the need for a full and transparent environmental assessment, there is no evidence that Russia ever conducted a public EIA process. Nor, to Ukraine's knowledge, did Russia ever publish or otherwise share an EIA with any relevant international organization for dissemination to member States in order to solicit international input.⁴⁷⁴ Notably, although Russia claims to have performed an environmental impact assessment, the results of any such assessment have never been published or produced.⁴⁷⁵

222. Where circumstances demand an environmental assessment, relevant international standards and best practices for effective environmental assessments require open, transparent, and deliberate public participation in the EIA process.⁴⁷⁶ Here, it necessitated consultation with other littoral States.

223. For example, the UNEP maintains that:

At a minimum, the EIA process should provide for public notification, disclosure of information on a proposal, access to EIA documentation and comment by affected and interested parties on scoping and EIA reports. In addition, the procedures for public consultation should allow for all interested and affected parties to express their views. EIA procedures for implementing public involvement in accordance with international good practice will emphasise "active" rather than "passive" engagement of stakeholders, beginning early in the process and continuing throughout. These arrangements may include measures for identification of different stakeholders or interests and ensuring that minority and disadvantaged communities are able to voice their concerns.⁴⁷⁷

⁴⁷³ [REDACTED] Report, ¶ 62.

⁴⁷⁴ See UNCLOS Art. 205.

⁴⁷⁵ See Rosprirodnadzor Approves Environmental Protection Measures for Construction of Crimean Bridge, Official Information Site for the Construction of the Crimean Bridge (24 November 2015) (UA-217).

⁴⁷⁶ See [REDACTED] Report, Part V.A-V.B.

⁴⁷⁷ Hussein Abaza et. al, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, UNEP, p. 28 (2004) (UA-644).

224. ██████ notes further that, for this very reason, applicable international standards require that the State in whose jurisdiction the activities are taking place notify and solicit input from nearby States whose own marine environments may be affected by the activities.⁴⁷⁸ In other words, the collection and consideration of a wide range of stakeholder opinions is not merely a suggestion, but a requirement for adequate environmental assessments — including notification of potentially affected States.⁴⁷⁹

225. However, even if such notifications and consultations were performed, given the accelerated timetable for the construction of the bridge authorized by special new Russian legislation, any environmental impact assessment would have been rushed, inadequate, and therefore unreliable from an environmental science perspective.⁴⁸⁰ Indeed, in Russia's haste to complete construction, it went so far as to amend its own legislation so as to relieve the projects of the requirement under Russian law to conduct an EIA for purposes

⁴⁷⁸ ██████ Report, ¶¶ 147-148, 166-168. Such notification requirements are integrated into virtually all applicable international standards set by, *inter alia*, international agreements (including the Espoo Convention, upon which Russian environmental law was originally based) and authoritative international organizations such as the UNEP, UNDP, World Bank, OECD, International Financial Corporation, and European Bank for Reconstruction and Development. *See* Convention on Environmental Impact Assessment in a Transboundary Context, 1989 U.N.T.S. 309 (25 February 1991), Arts. 2-3 (UA-443); Russian Federation Federal Law No. 174-FZ, On Environmental Expert Reviews (23 November 1995), Art. 11 (UA-218-AM); UNEP, Annex III: Goals and Principles of Environmental Impact Assessment, UNEP/GC.14/17 (2 April 1987) (UA-645); UNDP, Guidance Note: UNDP Social and Environmental Standards (SES), Social and Environmental Screening Procedure Updated, pp. 12-13 (2019) (UA-636); World Bank, Operation Manual: OP 4.01 – Environmental Assessment (January 1999), ¶¶ 3, 14-16 (UA-646); OECD Legal Instruments, Recommendation of the Council on the Assessment of Projects, Plans and Programmes with Significant Impact on the Environment, OECD/LEGAL/0172, §§ I.4-I.6 (14 November 2019) (UA-647); IFC, World Bank Group, International Finance Corporation's Guidance Notes: Performance Standards on Environmental and Social Sustainability (1 January 2012) (UA-648); European Bank for Reconstruction and Development, Environmental and Social Policy (April 2019), ¶ 4.13 (UA-638).

⁴⁷⁹ The obligation to notify other potentially affected States is further consistent with approaches taken by other tribunals. *See, e.g., South China Sea Arbitration (Philippines v. China)*, Award of 12 July 2016, ¶ 948 (“Article 206 ensures that planned activities with potentially damaging effects may be effectively controlled and *that other States are kept informed of their potential risks.*”) (emphasis added) (UAL-11). Further, ITLOS has suggested that in *Pulp Mills*, the ICJ not only confirmed that the conduct of an EIA is a “general obligation under customary international law,” but that the “Court’s reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction” and that “in light of the customary rule mentioned by the ICJ, it may be considered that environmental impact assessments should be included in the system of consultations and prior notifications” contained elsewhere in UNCLOS. *Responsibilities and Obligations of States with respect to Activities in the Area*, ITLOS Reports 2011, Advisory Opinion, 1 February 2011, ¶¶ 145, 148 (citing *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment of 20 April 2010, p. 14) (UAL-156).

⁴⁸⁰ *See* ██████ Report, ¶¶ 148-158.

of environmental approval. Specifically, the public record shows that the Russian Duma rushed through legislation — Federal Law No. 221-FZ on authorizing the construction of “transport infrastructure facilities” and “utility infrastructure facilities” between the Taman and Kerch Peninsulas⁴⁸¹ — which removed various environmental protections in the interests of accelerating construction. According to the head of a Russian expert advisory council for the Kerch Strait bridge, the deadline for construction was set not by engineering or environmental concerns but by the President of the Russian Federation, and was so aggressive that no contractor would agree to construct the bridge until a close ally of President Putin finally said he would do so.⁴⁸² In order to fast-track construction, the legislation called for simultaneous design and preparatory work for construction, meaning that construction activities and project implementation could commence *before* an EIA was completed.⁴⁸³

226. Further, the law provided that “[t]he absence of a positive decision by the state environmental expert review panel regarding the design documents” would not be an “impediment to continuing with the construction.”⁴⁸⁴ In other words, Federal Law No. 221-FZ expressly superseded Russia’s own environmental regulatory requirements for these projects, and these projects only.⁴⁸⁵ In so doing, the Russian Federation allowed the construction of a major transportation system, at least four undersea cables, and an undersea gas pipeline to proceed without adequate environmental assessment or approval.

⁴⁸¹ Russian Federation Federal Law No. 221-FZ, On Aspects of the Regulation of Certain Legal Relations Arising in Connection with the Construction and Upgrading of Transport Infrastructure Facilities of Federal and Regional Significance Designed to Provide Transport Links between the Taman and Kerch Peninsulas and Utility Infrastructure Facilities of Federal and Regional Significance on the Taman and Kerch Peninsulas, and on Amendments to Certain Legislative Acts of the Russian Federation (1 July 2015) (**UA-187-AM**) [hereinafter “Russian Federation Federal Law No. 221-FZ”].

⁴⁸² See Neil MacFarquhar & Ivan Nechepurenko, Putin’s Bridge to Crimea May Carry More Symbolism Than Traffic, *New York Times*, 11 November 2017 (**UA-213**).

⁴⁸³ Russian Federation Federal Law No. 221-FZ, Art. 6(12) (**UA-187-AM**). It appears that such an amendment may also violate customary international law, as the ICJ previously held that “an environmental impact assessment must be conducted prior to the implementation of a project.” *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment of 20 April 2010, ¶ 205 (**UAL-152**).

⁴⁸⁴ Russian Federation Federal Law No. 221-FZ, Art. 6(5) (**UA-187-AM**).

⁴⁸⁵ See Order of the State Environmental Protection Committee of the Russian Federation, No. 372, On Approving the Regulation on Environmental Impact Assessments of Planned Economic and Other Activity in the Russian Federation (16 May 2000), Pt. IV, ¶¶ 4.1-4.11 (**UA-216**).

227. Moreover, to the extent an environmental assessment could even be attempted, the law required it to be completed in just 45 days, whereas such assessments are otherwise allowed up to four months under Russian law.⁴⁸⁶ [REDACTED] concludes that a properly conducted EIA for the Kerch Strait construction projects should have benefited from at least a full year's worth of observational data to account for how the seasons may factor into the potential impacts of the projects.⁴⁸⁷ Thus, even if Russia did conduct an environmental study as it claims it did (and Ukraine notes the lack of any evidence to substantiate Russia's claim), no study compatible with Federal Law No. 221-FZ could have properly assessed the potential effects of Russia's construction activities on the marine environment consistent with the requirements of Article 206.

228. Overall, this public record shows a pattern of conduct by the Russian Federation in relation to its Kerch Strait construction projects that amounts to a brazen disavowal of its obligation to assess potential environmental impacts. The Russian law even goes so far as to suspend enforcement of provisions concerning the "prevention of adverse environmental impact" contained in certain water sanitization laws.⁴⁸⁸ Taken together, the lengths to which the Russian authorities went to relieve themselves of their duty under domestic legislation to assess the impacts of the Kerch Strait construction projects, and the absence of any public evidence of such an assessment, strongly suggest that no adequate assessment was ever conducted.

iii. Communication of Reports on Environmental Assessments

229. Nor is there any evidence that the Russian Federation published or communicated any EIA or similar assessment to "competent international organizations" before commencing construction in the Kerch Strait.⁴⁸⁹ Certainly, Ukraine has not been

⁴⁸⁶ *Id.* Arts. 6(4), 10 (**UA-187-AM**); Russian Federation Federal Law No. 174-FZ, On Environmental Expert Reviews (23 November 1995), Art. 14(1) (**UA-218-AM**).

⁴⁸⁷ [REDACTED] Report, ¶¶ 142-143, 148-151.

⁴⁸⁸ Russian Federation Federal Law No. 221-FZ, Art. 14 (**UA-187-AM**) (amending various articles of the federal law "On Water Supply and Wastewater Disposal, and stating that "the operation of Part 3(4) of Article 21, Part 7 of Article 26, Part 6 of Article 27, Part 1 of Article 28 and Part 2 of Article 29 shall be suspended until January 1, 2019"); Russian Federation Federal Law No. 416-FZ, On Water Supply and Wastewater Disposal (29 November 2011), Arts. 26(7), 27(6), 28(1), 29(2) (**UA-649**).

⁴⁸⁹ Although not defined in the Convention itself, some — including Counsel for Russia — have concluded that the "competent international organization" relevant to marine environmental issues would be the United Nations Environmental Programme. *See* Tullio Treves, *The Law of the Sea "System" of Institutions*, Max Planck Yearbook of United Nations Law, Vol. 2 (1998), pp. 328-329

provided with a copy of any such assessment. As such, Russia has violated its duty under Article 206 to “communicate reports of the results of such assessments in the manner provided in article 205.”⁴⁹⁰

230. Ultimately, by failing to require, conduct, and communicate an acceptable EIA, Russia deprived Ukraine of its right under UNCLOS to receive information on the potential harmful effects of Russia’s construction projects on a marine ecosystem that provides livelihoods and sustenance to countless Ukrainian nationals.⁴⁹¹

3. Russia Violated Articles 204 and 205 By Failing to Monitor the Risks and Effects of Its Construction Projects In a Scientifically Recognized Manner

231. Russia has also violated, and continues to violate, Articles 204 and 205 of the Convention by not adequately monitoring the risks and effects of its construction projects on the marine environment in the Kerch Strait.

232. Construction in the Kerch Strait commenced in 2015 and continued until at least 30 June 2020, when the railway system fully opened to freight train traffic.⁴⁹² As construction progressed, the Taman Federal Highways Administration Federal Budgetary Institution (“Federal Highways Administration”), a subsidiary body of the Russian Federal Road Agency, began to publish quarterly environmental monitoring reports concerning the construction of the Kerch Strait bridge.⁴⁹³ Ukraine is not aware of any reports monitoring the effects of the undersea cables or gas pipeline.⁴⁹⁴

(“ . . . [I]t seems to be undisputed that . . . that for fisheries the competent international organization is the FAO, for the protection and preservation of the marine environment it is the UNEP, for scientific research it is the International Oceanographic Commission and for navigational matters it is the IMO.”) (UAL-157).

⁴⁹⁰ UNCLOS, Art. 206; *South China Sea Arbitration (Philippines v. China)*, Award of 12 July 2016, ¶ 991 (“To fulfil the obligations of Article 206, a State must not only prepare an EIA but also must communicate it.”) (UAL-11).

⁴⁹¹ *See, e.g., id.* ¶ 948 (“Article 206 ensures that planned activities with potentially damaging effects may be effectively controlled and that other States are kept informed of their potential risks.”)

⁴⁹² TASS, Putin Not To Take Part In Launching Cargo Railway Traffic Along Crimean Bridge – Spokesman (28 June 2020) (UA-650).

⁴⁹³ *See* Russian Federal Highways Administration, Environmental Monitoring Homepage (last accessed 30 March 2020) (UA-651).

⁴⁹⁴ ██████████ Report, ¶ 152.

233. Altogether, the Russian Federal Highways Administration published approximately twenty-five reports.⁴⁹⁵ These reports purport to contain the “[r]esults of environmental monitoring . . . at the site of the construction and operation of the bridge to Crimea” on a quarterly basis starting in the third quarter of 2015.⁴⁹⁶ Additionally, the Russian agency published various other *ad hoc* reports, including a report on the comparative analysis of the results of environmental monitoring for the fourth quarter of 2016 with previous periods for the construction of the bridge to Crimea.⁴⁹⁷

234. Despite their titles, however, none of these reports publish actual results from the alleged monitoring efforts. Instead, they are high-level summaries of unsubstantiated conclusions drawn from alleged, but unspecified and unpublished, environmental monitoring results. As ██████████ explains, they “contain only generalizations and basic, stated conclusions” and “there is a minimal amount of relevant or useable physical, chemical, biological, or social data presented.”⁴⁹⁸ Overall, the body of information available falls far short of demonstrating that Russia observed, measured, evaluated, or analyzed the effects of pollution or damage to the marine environment caused by the construction projects as required by Articles 204 and 205.

235. Based on his review of the reports, ██████████ concludes that “the Russian authorities have failed to sufficiently monitor and report upon the ongoing marine environmental impacts resulting from the Kerch Strait bridge or other construction projects in a scientifically acceptable manner.”⁴⁹⁹ He further states that it is his “opinion that the monitoring efforts and reports thereon lack any scientific rigor and fail to provide adequate data for others to make reasoned or scientifically sound observations.”⁵⁰⁰ In light of this finding, it is clear that the reports do not “observe, measure, evaluate [or] analyse, by recognized scientific methods, the risks or effects of pollution of the marine environment” of

⁴⁹⁵ ██████████ Report, ¶¶ 213-214.

⁴⁹⁶ See, e.g., Russian Federal Highways Administration, Environmental Monitoring Homepage (last accessed 30 March 2020) (UA-651).

⁴⁹⁷ See, e.g., Russian Federal Highways Administration, Comparative Analysis of the Results of Environmental Monitoring for the Fourth Quarter of 2016 with Previous Periods for the Construction of the Bridge to Crimea (21 February 2017) (UA-652); Russian Federal Highways Administration, Results of Environmental Monitoring at the Site of the Construction of the Crimean Bridge Over a 3-Year Period (2018) (UA-653).

⁴⁹⁸ ██████████ Report, ¶ 215.

⁴⁹⁹ *Id.* ¶ 211.

⁵⁰⁰ *Id.*

the Black Sea Basin.⁵⁰¹ Instead, the so-called monitoring reports are unsupported, conclusory documents that follow no recognized scientific methodology.

236. Importantly, [REDACTED] explains that recognized scientific methods require a reliable, contemporaneous baseline of data from the period *immediately before* the activities commenced — such as would be collected in the course of an EIA — in order for subsequent monitoring to determine whether harm is actually occurring to the marine environment.⁵⁰² Without such a baseline, it is difficult to determine whether the health of the environment has worsened, improved, or remained the same.⁵⁰³ As regards the available reports, there is no indication of, or reference to, any such baseline or standardized data against which the conditions can be measured.⁵⁰⁴

237. [REDACTED] observed additional deficiencies as well, noting:

The results of monitoring programs are typically published so that the scientific community and interested stakeholders can independently evaluate the environmental impact of a given project. To evaluate the results, the raw data is required, as are explanations of the methodologies for the collection of that data. This is because data is only as good as, and its interpretation can sometimes hinge upon, the methodologies used to collect it. Without access to raw data (or, at a minimum, comprehensive summaries of that data) and an understanding of the collection methodologies used to generate that data, any conclusions or opinions drawn are scientifically useless.⁵⁰⁵

Notwithstanding this bedrock scientific principle, in the available Russian reports, “[a]ll conclusions have been offered against undefined maximum tolerable or acceptable limits,” “[t]he overall monitoring plan design used to generate supposed data points is not presented,” and “[t]here is no mention of the analytical protocols, equipment, or methodologies used to collect, analyze, interpret, and/or report on the supposed data

⁵⁰¹ UNCLOS Art. 204 (emphasis added).

⁵⁰² [REDACTED] Report, ¶¶ 138, 141-43, 159-163.

⁵⁰³ *Id.* ¶¶ 159-162.

⁵⁰⁴ *Id.* ¶¶ 159-161. As [REDACTED] points out, some secondary sources appear to suggest that, instead of conducting contemporaneous baseline studies, Russia may have relied on data that was more than a decade old. *See id.* ¶¶ 160-161 (quoting and discussing Natalya Aleksandrovna Sytnik et al., Assessment of the Impact of the Construction of the Crimean Bridge on the Eco-System of the Kerch Strait, Eurasian Union of Scientists: Biological Sciences, Vol. 10, No. 43, p. 14 (2017) (UA-654)).

⁵⁰⁵ [REDACTED] Report, ¶ 210 (emphasis added).

collected.” Together, these conspicuous deficiencies amount to the total “absence of any scientific methodology underpinning the set of monitoring reports as a whole.”⁵⁰⁶

238. As regards the actual conclusions drawn, the alleged monitoring reports published by the Russian Federal Highways Administration are replete with unsubstantiated conclusions that no rational scientist could accept at face value. For example, in its First Quarter 2017 Report, the Federal Highways Administration concludes, without any reference to actual data or support, that “[t]he results of the environmental monitoring over January – March 2017 show the absence of any significant impact on the ecosystem. A number of changes are of anthropogenic origin, but are not significant.”⁵⁰⁷ However, as [REDACTED] points out, the few, actual findings reported are at odds with the conclusion put forward. Instead, the Russian report “provides details on the computation of a hydrochemical index of water pollution (‘WPI’) which indicated various classes of impact including ‘clean, moderately polluted, polluted, and dirty,’”⁵⁰⁸ and “indicate[d] that certain pollutants were detected, including industrial pollutants which were ostensibly linked to the construction projects such as oil products, phenols, and anionic synthetic surfactants.”⁵⁰⁹

239. While the report also states that concentrations of those pollutants “were on average, at most of the stations under investigation, lower than the maximum permissible values,”⁵¹⁰ [REDACTED] notes that “[s]uch generalized WPI classifications” “are meaningless without a scale against which to judge those classifiers” and thus any conclusions drawn from those observations are unscientific.⁵¹¹ As [REDACTED] opines:

[N]either the actual levels measured nor the “permissible limits” were provided anywhere in the report, and their significance cannot be established.

As a result, likely impacts on sensitive species or the ecosystem in general cannot be assessed. This section provides no useful, reliable, or verifiable scientific data or conclusions and

⁵⁰⁶ *Id.* ¶ 216.

⁵⁰⁷ Federal Highways Administration, Results of Environmental Monitoring Over the First Quarter of 2017 at the Site of the Construction of the Bridge to Crimea (2017) (UA-655).

⁵⁰⁸ [REDACTED] Report, ¶ 221.

⁵⁰⁹ *Id.* ¶ 222; Federal Highways Administration, Results of Environmental Monitoring Over the First Quarter of 2017 at the Site of the Construction of the Bridge to Crimea (2017) (UA-655).

⁵¹⁰ *Id.*

⁵¹¹ [REDACTED] Report, ¶¶ 221-223.

therefore deviates from accepted scientific methodology.⁵¹²

Moreover, the report appears to indicate that at least some of the concentrations of the mentioned pollutants were *above* the maximum permissible values, as only “*most*” of the stations under investigation “*were on average*” lower than the unspecified maximum permissible values.⁵¹³ The presence of dangerous pollutants at concentrations of higher-than-maximum-permissible values would appear to pose a significant threat to the ecosystem, and thus, again, directly contradicts the report’s stated conclusion.

240. In other parts of the reports, the Federal Highways Administration expressly states that it failed to monitor relevant environmental conditions for significant parts of the year. For example, while the Federal Highways Administration published reports quarterly, monitoring of “bottom sediments” was “only carried out twice a year”; monitoring of “aquatic bioresources” was “carried out on a quarterly basis, *except during the winter*”; and zoological monitoring was “carried out twice a year.”⁵¹⁴ ██████████ opines, however, that proper scientific protocols would require more frequent monitoring of those environmental conditions. For example, in the context of “bottom sediments,” ██████████ notes that monitoring should have been carried out on a “continual basis” because of the nature of the bridge construction, namely the “potential impacts of dredging, foundation preparation, pile driving, and construction” that were actively disturbing the sea floor during the entirety of the construction process.⁵¹⁵

241. Because they do not follow recognized scientific methods, Russia’s monitoring efforts do not satisfy Russia’s obligations under Articles 204 and 205 of the Convention, and Russia has therefore violated its duties and obligations to adequately monitor the risks and effects of pollution and publish reports thereon.

4. Russia’s Failure to Assess and Monitor the Harm to the Marine Environment of the Kerch Strait, Black Sea, and Sea of Azov

⁵¹² *Id.* ¶¶ 222-223.

⁵¹³ Federal Highways Administration, Results of Environmental Monitoring Over the First Quarter of 2017 at the Site of the Construction of the Bridge to Crimea (2017), p. 1 (emphasis added) (UA-655).

⁵¹⁴ *Id.*

⁵¹⁵ ██████████ Report, ¶ 225.

Caused By Its Construction Projects Constitute Independent Violations of Articles 123, 192, and 194 of the Convention

242. The foregoing sections establish that, by its conduct in the Kerch Strait, Russia has violated specific obligations under Articles 204, 205, and 206 related to the assessment and monitoring of potential harm to the marine environment. The same conduct also independently violates Russia's obligations under Articles 123, 192, and 194 to protect the marine environment and cooperate with its neighbors for that same purpose.

243. As explained above,⁵¹⁶ Articles 192 and 194 require States to "protect and preserve the marine environment" and to take "all measures" to "prevent, reduce and control pollution" and harm to the marine environment.⁵¹⁷ Tribunals have interpreted these obligations to require specific measures for protecting the environment, including requiring States to share information about potential threats to the marine environment with

⁵¹⁶ See *supra* Chapter Six, Section II.A.1.

⁵¹⁷ UNCLOS Art. 192 ("States have the obligation to protect and preserve the marine environment."); *id.* Art. 194 (requiring States to "take . . . all measures . . . necessary to prevent, reduce and control pollution of the marine environment from any source," and to "take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment"). Arbitral tribunals have interpreted Article 194 as "not limited to measures aimed strictly at controlling pollution and extend[ing] to measures focused primarily on conservation and preservation of ecosystems." *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, UNCLOS/PCA Case No. 2011-03, Award of 18 March 2015, ¶ 538 (UAL-18).

potentially affected States.⁵¹⁸ As also noted above,⁵¹⁹ Article 123 confirms and amplifies this obligation as it pertains to the express cooperation on the protection of the marine environment between States that border an enclosed sea, such as Ukraine and Russia.⁵²⁰

244. According to the *South China Sea* tribunal, the environmental protection requirements in Articles 192 and 194 obligate States to take “all measures necessary” to protect the marine environment and demand a “certain level of vigilance” and “the exercise of administrative control” over waters vulnerable to pollution and damage; they entail an “obligation to investigate” possible harm to the marine environment; and they oblige States to “take any action necessary to remedy” a potential threat to the undersea ecosystem.⁵²¹

⁵¹⁸ See, e.g., *South China Sea Arbitration (Philippines v. China)*, Award of 12 July 2016, ¶¶ 941-942, 944:

States have a positive duty to prevent, or at least mitigate significant harm to the environment when pursuing large-scale construction activities. The Tribunal considers this duty informs the scope of the general obligation in Article 192. The content of the general obligation in Article 192 is further detailed in the subsequent provisions of Part XII, including Article 194, as well as by reference to specific obligations set out in other international agreements, as envisaged in Article 237 of the Convention. . . .

Upon receipt from another State of reports of non-compliance, the flag State “is then under an obligation to investigate the matter and, if appropriate, take any action necessary to remedy the situation as well as inform the reporting State of that action.”

(quoting *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, ITLOS Reports 2015, ¶ 139) (UAL-11). See also *MOX Plant (Ireland v. United Kingdom)*, ITLOS Case No. 10, Provisional Measures, Order of 3 December 2001, ¶ 84 (requiring Ireland and the United Kingdom to “cooperate in exchanging information concerning risks or effects of the operation of the MOX plant [on the marine environment in the Irish Sea] and in devising ways to deal with them”) (UAL-17); *Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v. Singapore)*, ITLOS Case No. 12, Provisional Measures, Order of 8 October 2003, ¶ 106 (ordering Malaysia and Singapore to “exchange, on a regular basis, information on, and assess risks or effects of, Singapore’s land reclamation works” on the marine environment) (UAL-19).

⁵¹⁹ See *supra* Chapter Six, Section II.A.1.

⁵²⁰ UNCLOS Art. 123. The *MOX Plant* tribunal observed that the “duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law” *MOX Plant (Ireland v. United Kingdom)*, ITLOS Case No. 10, Provisional Measures, Order of 3 December 2001, ¶ 82 (UAL-17).

⁵²¹ *South China Sea Arbitration (Philippines v. China)*, Award of 12 July 2016, ¶ 944 (quoting *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, ITLOS Reports 2015, ¶ 139; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment of 20 April 2010, ¶ 197) (UAL-11). The Chagos tribunal confirmed that

245. In light of these obligations, Russia’s failure to conduct and communicate an EIA violates not only Article 206, but also its Article 192 obligation to protect and preserve the environment, its Article 194 obligation to take all measures necessary to prevent pollution of the marine environment, and its obligation to cooperate with Ukraine as a fellow coastal State in the enclosed Black Sea and Sea of Azov in violation of Article 123. Specifically, conducting and communicating an adequate environmental assessment is an internationally-recognized requirement precisely because such assessments help to protect and preserve the environment.⁵²² As the *South China Sea* tribunal explained, Article 206 assessments are an “essential part of a comprehensive environmental management system’ and as a ‘particular application of the obligation on states, enunciated in Article 194(2).”⁵²³ The ICJ noted that informing another State of potential environmental harms “allows for the initiation of co-operation between the Parties,” which is not only required by UNCLOS Article 123, but is also “necessary in order to fulfil the obligation of prevention.”⁵²⁴

246. More generally, Russia failed to inform Ukraine of any potential environmental harms, demonstrated no due diligence on its part, and took no effective action to remedy the harms it has likely caused, further cementing its violations of Articles 123, 192, and 194. It proactively passed legislation to allow construction before environmental approval, and to suspend enforcement of provisions concerning the “[p]revention of adverse environmental impact from wastewater disposal” contained in certain water supply and wastewater disposal laws.⁵²⁵ It failed to install a sufficient

Article 194 is “not limited to measures aimed strictly at controlling pollution and extends to measures focused primarily on conservation and the preservation of ecosystems.” *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, UNCLOS/PCA Case No. 2011-03, Award of 18 March 2015, ¶ 538 (UAL-18).

⁵²² See generally [REDACTED] Report, Part V; Responsibilities and Obligations of States with respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, ¶ 145 (“[T]he obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law.”) (UAL-156).

⁵²³ *South China Sea Arbitration (Philippines v. China)*, Award of 12 July 2016, ¶ 948 (quoting S. Rosenne & A. Yankov (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. IV, ¶ 206.6(b) (M. Nordquist, ed., 2002) (UAL-11).

⁵²⁴ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment of 20 April 2010, ¶ 102 (UAL-152).

⁵²⁵ Russian Federation Federal Law No. 221-FZ, Art. 14 (amending various articles of the federal law “On Water Supply and Wastewater Disposal, and stating that “the operation of Part 3(4) of Article 21, Part 7 of Article 26, Part 6 of Article 27, Part 1 of Article 28 and Part 2 of Article 29 shall be suspended until January 1, 2019”) (UA-187-AM); Russian Federation Federal Law No. 416-FZ, On Water Supply and Wastewater Disposal (29 November 2011), Arts. 26(7), 27(6), 28(1), 29(2) (UA-649).

monitoring regime to surveil the environmental impacts that its construction activities have had on the Kerch Strait and surrounding ecosystem.⁵²⁶ By all indications, Russia also failed altogether to conduct an environmental assessment for any of its undersea cables or undersea gas pipeline.

247. Where Russia allegedly did undertake any type of surveillance or evaluation of environmental impacts, it ignored serious warning signs of environmental harm. For example, in one of the environmental monitoring reports published by the Russian Federal Highways Administration described more fully above, in Chapter Six, Section II.A.3, Russian authorities observed “polluted” and “dirty” water with higher-than-maximum-permissible levels of contaminants,⁵²⁷ but blithely concluded that there was an “absence of any significant impact on the ecosystem.”⁵²⁸ Moreover, in reports by Russian academics that purport to summarize and rely on alleged, unpublished EIA documents relating to construction of the Kerch Strait bridge, it was revealed that Russian experts expected “potential pollution of the body of water with sludge deposits . . . hazardous for the marine mammals encountered on a virtually year-round basis,”⁵²⁹ “negative effect[s] on benthic organisms even where the layer is 1-5mm thick, whilst an increase in the layer to 15-20mm will be lethal for most organisms,”⁵³⁰ and “[i]ncreased turbidity [that] may lead to the death of fish, benthos and plankton.”⁵³¹ With full knowledge of each of these findings, however, it appears from this public report that the Russian authorities inexplicably concluded that the relevant construction activities “will not have a significant impact on the aquatic environment and biota.”⁵³² Where public reports alluded to vague mitigation measures to address other anticipated environmental harms, [REDACTED] unequivocally concludes that

⁵²⁶ See *supra* Chapter Six, Section II.A.3.

⁵²⁷ Federal Highways Administration, Results of Environmental Monitoring Over the First Quarter of 2017 at the Site of the Construction of the Bridge to Crimea (2017) (UA-655).

⁵²⁸ *Id.*

⁵²⁹ Natalya Aleksandrovna Sytnik et al., Assessment of the Impact of the Construction of the Crimean Bridge on the Eco-System of the Kerch Strait, Eurasian Union of Scientists: Biological Sciences, Vol. 10, No. 43, p. 15 (2017) (UA-654).

⁵³⁰ *Id.*

⁵³¹ *Id.*

⁵³² *Id.*

those purported mitigation measures “appear overstated, impractical, impossible, or illogical.”⁵³³

248. Together, these failures amount to plain and obvious violations of Russia’s obligation to take all necessary measures to protect and preserve the environment, and cooperate with Ukraine for such purposes, as set forth in Articles 123, 192, and 194.

B. Russia Has Violated Its Article 123, 192, 194, 198, 199, 204, and 205 Obligations to Notify Ukraine of Imminent or Actual Damage to the Marine Environment, Cooperate with Ukraine to Mitigate the Effects Thereof, Monitor Those Effects, and Report to Other States on the Results of Those Monitoring Efforts with Regard to the Sevastopol Oil Spill

249. UNCLOS mandates specific steps that States must take in response to episodes of pollution discharge. Article 198 provides that “[w]hen a State becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution, it shall immediately notify other States it deems likely to be affected by such damage, as well as the competent international organizations.”⁵³⁴ In such cases, the environmental protection and cooperation obligations of Articles 123, 192, and 194 (described above⁵³⁵) each come into play, and Article 199 further requires that “States in the area affected . . . shall cooperate, to the extent possible, in eliminating the effects of pollution and preventing or minimizing the damage.”⁵³⁶

250. The Russian Federation violated these obligations in relation to an oil spill in the Black Sea that reportedly occurred on 8 May 2016. On 11 May 2016, the Russian Federal Service for Supervision of Natural Resource Use (“Rosprirodnadzor”) recorded the presence of petroleum on a beach in Sevastopol resulting from the spill at sea, and announced that it would take investigative steps.⁵³⁷ Russia did not, however, provide any official notification to

⁵³³ [REDACTED] Report, ¶ 177. For [REDACTED] explanations and more fulsome analysis of these conclusions, see his report at paragraphs 176 to 182.

⁵³⁴ UNCLOS Art. 198.

⁵³⁵ See *supra* Chapter Six, Section II.A.1.

⁵³⁶ UNCLOS Art. 199.

⁵³⁷ Rosprirodnadzor News, Rosprirodnadzor: *The Federal Service for Supervision of Nature Resource Use* (11 May 2016) (UA-224); Rosprirodnadzor: *The Federal Service for Supervision of Natural Resource Use, Unidentified Vessel Spills Petroleum Products into Black Sea Near Towns of Uchkuyevka and Lyubimovka*, (11 May 2016) (UA-225).

Ukraine of the incident or its proposed response to it, despite Ukraine's obvious interest as a neighboring littoral state in the discharge of pollutants in such a delicate marine ecosystem.

251. Instead, and in violation of Article 198, Ukraine learned about the matter in the press. Ukraine promptly asked Russia for details of the incident. Specifically, in a *note verbale* of 12 May 2016, Ukraine requested that the Russian Federation provide all available information, including the location and magnitude of the reported spill, the environmental damage it caused, and any actions that were being taken or planned to control and prevent further environmental harm.⁵³⁸ In further violation of Article 198, the Russian Federation disregarded Ukraine's inquiry, and to date has provided no information concerning this oil spill in the Black Sea.

252. In addition to violating Article 198, Russia's failure to cooperate with Ukraine in responding to and mitigating any discharge resulting from the incident also violates Articles 123, 192, 194, and 199. Further, under Articles 204 and 205, Russia is obligated to share with Ukraine reports of environmental surveillance and monitoring prepared in response to this incident of pollution in the Black Sea, which Russia has failed to do.⁵³⁹

253. Combined with the environmental risks caused by the hasty and unilateral construction of the Kerch Strait bridge, Russia's failure to notify or cooperate with Ukraine regarding the Sevastopol oil spill is indicative of a pattern of disregard for Russia's duties under the Convention relating to the marine environment.

* * *

254. As described above, the Russian Federation's construction activities in the Kerch Strait violate numerous of its environmental obligations under the Convention. Moreover, Russia's conduct has created a serious risk of continuing harm to the environment, not only in the Kerch Strait but across the larger Black Sea Basin. Russia must be held to account for its breaches of the environmental obligations set out in the Convention.

⁵³⁸ *Note Verbale of the Ministry of Foreign Affairs of Ukraine to the Minister of Foreign Affairs of the Russian Federation*, No. 72/22-663-1146 (12 May 2016) (UA-226).

⁵³⁹ See *supra* Chapter Six, Sections II.A.1, II.A.3.

III. Russia’s Failure to Protect Underwater Cultural Heritage

255. Article 303(1) imposes on all States a “duty to protect objects of an archaeological and historical nature found at sea” and requires that all States “cooperate for this purpose.”⁵⁴⁰ As described below, this includes an affirmative duty of States to take the necessary steps to protect underwater cultural heritage (“UCH”) from any source of harm, including through the adoption of accepted scientific and technical methodologies. To the extent that a State fails to do so, it is in violation of Article 303(1).

256. Russia has breached its duty under the Convention by failing to use all means necessary to protect UCH in the Black Sea, Kerch Strait, and Sea of Azov. By its unlawful conduct, Russia has risked — and in some cases actually caused — harm to unique UCH that belongs not to Russia, but to all humankind.

A. The Duty to Protect Underwater Cultural Heritage Is a Duty Meant to Protect the Common Heritage of All Humankind

257. Since the first major multilateral convention on the protection of cultural heritage, objects of an archaeological and historical nature have been considered part of the “cultural heritage of all mankind.”⁵⁴¹ By imposing on all States a duty to protect “objects of an archaeological and historical nature found at sea,”⁵⁴² Article 303(1) of UNCLOS creates an obligation on States Parties to take affirmative action to conserve this precious and vulnerable common heritage.

258. Pursuant to the Vienna Convention on the Law of Treaties, the Article 303(1) duty must be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁵⁴³ As explained below, applying this interpretative framework to Article 303(1) shows that the duty to protect requires States Parties to take concrete steps to prevent harm to UCH, informed by international best practices in the field of underwater conservation.

259. The ordinary meaning of “protect” is to “defend or guard from danger or injury; . . . to preserve from attack, persecution, harassment; . . . to keep safe, take care of; . . .

⁵⁴⁰ UNCLOS Art. 303(1).

⁵⁴¹ Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 249 U.N.T.S. 215, 14 May 1954, Preamble (**UA-122**).

⁵⁴² UNCLOS Art. 303(1).

⁵⁴³ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 332, 23 May 1969, Art. 31(1) (**UAL-43**).

to shield from attack or damage.”⁵⁴⁴ This reading is corroborated by the context of the Convention, as the Convention elsewhere considers the concept of “protection” to include “tak[ing] the necessary steps to prevent” a specific, undesired result.⁵⁴⁵

260. This understanding of the Article 303(1) duty is consistent with the meaning ascribed to “protect” in Part XII of the Convention (“Protection and Preservation of the Marine Environment”). Under Article 192, discussed in Chapter Six, Section II.A.1, above, “States have the obligation to protect . . . the marine environment.”⁵⁴⁶ As the *South China Sea* tribunal noted, “the content [of that duty to protect] is informed by the other provisions of Part XII and other applicable rules of international law.”⁵⁴⁷ One of those “other provisions” is Article 194, under which States are *obliged* (i.e., have a duty) to “take . . . all measures consistent with th[e] Convention that are necessary to prevent, reduce, and control pollution of the marine environment from any source.”⁵⁴⁸ Thus, the duty to “protect . . . the marine environment” has been interpreted by tribunals to:

[R]equire[] “due diligence” in the sense of . . . not only adopting appropriate rules and measures, but also “a certain level of vigilance in their enforcement and the exercise of administrative control.” Upon receipt from another State of reports of non-compliance, [a] . . . State “is then under an obligation to investigate the matter and, if appropriate, take any action necessary to remedy the situation as well as inform the reporting State of that action.”⁵⁴⁹

Interpreted in light of this context, Article 303(1) of the Convention requires that States adopt appropriate rules and measures to prevent, reduce, and control harm to UCH, and exercise administrative diligence by not only investigating, but also remedying, potential threats once known. ITLOS has noted that “the content of ‘due diligence’ obligations” “may change over time as measures considered sufficiently diligent at a certain moment may

⁵⁴⁴ Oxford English Dictionary, *protect*, v. (online ed.) (UAL-158).

⁵⁴⁵ See UNCLOS, Art. 25 (“Rights of protection of the coastal state” . . . “the coastal State has the right to take the necessary steps to prevent any breach of the conditions . . .”).

⁵⁴⁶ UNCLOS Art. 192.

⁵⁴⁷ *South China Sea Arbitration*, Award of 12 July 2016, ¶ 941 (UAL-11).

⁵⁴⁸ UNCLOS Art. 194 (emphasis added).

⁵⁴⁹ *South China Sea Arbitration*, Award of 12 July 2016, ¶ 944 (quoting *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, ITLOS Reports 2015, ¶¶ 131, 139 (quoting *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment of 20 April 2010, ¶ 197)) (UAL-11).

become not diligent enough in light, for instance, of new scientific or technological knowledge.”⁵⁵⁰

261. Interpreting Article 303(1) as imposing an affirmative duty to protect UCH consistent with current scientific and technological knowledge aligns the Convention with other relevant rules of international law, including international and regional agreements in place when UNCLOS was drafted. For example, the 1972 Convention Concerning the Protection of the World and Natural Heritage (the “World Heritage Convention”) — a pre-UNCLOS treaty to which both Russia and Ukraine are parties and of which the drafters of the Convention were no doubt aware — identifies a broad duty to protect cultural heritage generally.⁵⁵¹ Specifically, it provides that States must take “effective and active measures” for the “protection” of cultural heritage by, *inter alia*:

- “tak[ing] the appropriate legal, scientific, technical, administrative, and financial measures necessary for the identification, protection, conservation, presentation, and rehabilitation of this heritage”⁵⁵²; and
- “develop[ing] scientific and technical studies . . . to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage.”⁵⁵³

262. Like the World Heritage Convention, Article 303(1) speaks to a general duty to protect. In such circumstances, relevant international standards inform the content of that duty.⁵⁵⁴ In the case of Article 303(1), international practice around the time of UNCLOS’s conclusion in 1982 sheds light on the types of rules and measures that would have been within the contemplation of States Parties as necessary for the protection of UCH when the Convention was adopted. In order to determine the content of the duty to protect in the 2010s, however, it is also necessary to consider how international standards have developed in the intervening period, as technologies and scientific understanding have progressed and

⁵⁵⁰ *Responsibilities and Obligations of States with respect to Activities in the Area*, ITLOS Reports 2011, Advisory Opinion, 1 February 2011, ¶ 117 (UAL-156).

⁵⁵¹ See Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 U.N.T.S. 151, 16 November 1972 (ratified by both the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics on 12 January 1989) [hereinafter “World Heritage Convention”] (UA-124).

⁵⁵² *Id.* Art. 5(d).

⁵⁵³ *Id.* Art. 5(c).

⁵⁵⁴ See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment of 20 April 2010, ¶ 204 (determining that the “obligation to protect and preserve” is a term with a “meaning or content capable of evolving” (citations and quotations omitted)) (UAL-152).

the conservation of UCH has become both a more urgent problem, and one on which governments around the world have become increasingly active.

263. As the predecessor state to both Russia and Ukraine, the Soviet Union’s legal regime relating to the protection of cultural heritage at the time of UNCLOS’s negotiation is relevant when considering the meaning or content of the duty to protect cultural heritage at the time of the Convention’s adoption. That regime set a relatively high bar for the degree of diligence required to satisfy an affirmative duty to protect cultural heritage, drawing from contemporaneous standards informed by regional and international expertise.

264. In particular, Soviet law around the time UNCLOS was negotiated shows that “to protect” cultural heritage was understood as encompassing significant efforts to prevent or reduce harm to cultural artifacts, including taking all steps necessary to prevent harm. As early as 1966, the Russian Soviet Federative Socialist Republic’s (“RSFSR”) Council of Ministers recognized that the adequate protection of cultural heritage can only be achieved by limiting direct access to such objects for official purposes to qualified personnel.⁵⁵⁵ Recognizing the need for more stringent cultural heritage protections at the federal level, in 1968 the USSR convened a “group of experts from various Soviet republics” to draft what ultimately became “a complete recodification” of Soviet law protecting cultural heritage sites.⁵⁵⁶ The resulting 1976 USSR law “On the Protection and Use of Monuments of History and Culture” counselled each individual Soviet republic to update republic-level heritage-protection legislation to reflect the expert-recommended model.⁵⁵⁷ In 1978, the RSFSR acted on this guidance by passing comprehensive legislation entitled “On the Protection and Use of Historical and Cultural Monuments.” Article 21 of that legislation considered that the duty of protection required a complete prohibition of activities around heritage sites unless those activities “do[] not harm the preservation of the monuments.”⁵⁵⁸ Ultimately, scholars

⁵⁵⁵ RSFSR Council of Ministers, Resolution No. 473 ““On the Status and Measures to Improve the Protection of Historical and Cultural Monuments in the RSFSR,” adopted 24 May 1966, ¶ 3 (UA-656).

⁵⁵⁶ Nelly Bukas, *Transnational Circulation of Cultural Form: Multiple Agencies of Heritage Making*, *International Journal of Heritage Studies*, Vol. 26 (2020), p. 1154 (UA-657).

⁵⁵⁷ *Id.*; see also Corinne Geering, *Protecting the Heritage of Humanity in the Cold War: UNESCO, the Soviet Union and Sites of Universal Value, 1945–1970s*, *International Journal of Heritage Studies*, Vol. 26 (2020), p. 1139 (UA-658).

⁵⁵⁸ Law of the RSFSR, *On the Protection and Use of Historical and Cultural Monuments* (15 December 1978), Art. 21 (UA-589). Further, Article 41 of the 1978 Law demonstrates how the Soviet Union understood that the protection of cultural heritage requires steps to preserve pieces of cultural heritage at risk of alteration or destruction, setting forth a “[p]rohibition of the demolition and relocation of and changes to historical and cultural monuments.” *Id.* Art. 41. Article 42 of the 1978

contend that the Soviet legislation on heritage protection of the 1970s “was built upon the ideas and concepts” developed by experts,⁵⁵⁹ and resulted from the USSR’s active engagement with international heritage-protection organizations and “a proliferation of international initiatives aimed at articulating international standards for protection.”⁵⁶⁰

265. On this basis, it appears that Soviet-era legislation generally was protective of the integrity of cultural heritage and, consistent with the language of the World Heritage Convention, emphasized the importance of and relied upon appropriate scientific and technical approaches in its management.⁵⁶¹

266. Relevant scholarship suggests that this approach was broadly in line with the meaning and content of Article 303(1) envisioned by the drafters. For example, in 1994, the then-Chair and Rapporteur of the International Law Association’s Committee on Cultural Heritage Law explained in a scholarly paper that a State’s specific UNCLOS Article 303(1) duties:

[W]ould seem to embrace . . . maintenance of known sites and monuments, excavation of archaeological sites in accordance

Law is entitled “[s]afeguarding of historical and cultural monuments during the performance of construction and other work,” and states that construction efforts that “may create a threat” to pieces of cultural heritage can be pursued “only with the approval of the state body responsible for the preservation of monuments *and after measures have been taken to safeguard the monuments*” of the monuments. *Id.* Art. 42 (emphasis added).

⁵⁵⁹ These include Soviet experts who “were members of the committee which drafted the World Heritage Convention.” Corinne Geering, *Protecting the Heritage of Humanity in the Cold War: UNESCO, the Soviet Union and Sites of Universal Value, 1945–1970s*, *International Journal of Heritage Studies*, Vol. 26 (2020), p. 1141 (UA-658).

⁵⁶⁰ Nelly Bukas, *Transnational Circulation of Cultural Form: Multiple Agencies of Heritage Making*, *International Journal of Heritage Studies*, Vol. 26 (2020), pp. 1154-1155 (UA-657); Corinne Geering, *Protecting the Heritage of Humanity in the Cold War: UNESCO, the Soviet Union and Sites of Universal Value, 1945–1970s*, *International Journal of Heritage Studies*, Vol. 26 (2020), p. 1140 (UA-658).

⁵⁶¹ See World Heritage Protection Convention, Art. 5(d) (noting that the duty of protection requires States to “take the appropriate legal, scientific, technical, administrative, and financial measures necessary for the identification, protection, conservation, presentation, and rehabilitation of this heritage”) (UA-124); Law of the RSFSR, On the Protection and Use of Historical and Cultural Monuments (15 December 1978), Arts. 21, 41-42 (prohibiting damage to heritage sites, and requiring “measures [to be] taken to safeguard monuments” when necessary) (UA-589); RSFSR Council of Ministers, Resolution No. 473 “On the Status and Measures to Improve the Protection of Historical and Cultural Monuments in the RSFSR,” adopted 24 May 1966, ¶ 9 (taking steps to strengthen the RSFSR’s competence in the protection of monuments and improving the “scientific and methodological management of the protection and restoration of historical and cultural monuments”) (UA-656).

with accepted standards, conservation and display of excavated material, and dissemination of information obtained.⁵⁶²

267. As noted above, the “accepted standards” have developed over time. Specifically, in the years since UNCLOS was adopted in 1982, a more sophisticated understanding of the specific practices needed to protect UCH has developed as technological advances have made the seabed more accessible to private parties, and States have been forced to become more proactive in their conservation efforts. Similar to the field of environmental assessment discussed in Chapter Six, Section II.A.2, increasingly detailed standards have been developed, which are generally recognized within the field as representing best practice. Foremost among these common standards are the “Rules concerning activities directed at underwater cultural heritage” (“UCH Rules”) set out in the Annex to the 2001 UNESCO Convention for the Protection of the Underwater Cultural Heritage (the “UCH Convention”),⁵⁶³ which require, among other things, that *in situ* preservation be considered the first option for preservation of UCH.⁵⁶⁴

268. Although some significant seafaring States, including Russia, have declined to ratify the UCH Convention itself, the UCH Rules have been widely recognized — including by non-ratifying States — as best practices for the preservation of UCH.⁵⁶⁵ The Rules “were adopted by consensus,” including by non-ratifying States such as the United States.⁵⁶⁶ As

⁵⁶² Patrick J. O’Keefe & James A. R. Nafziger, *The Draft Convention on the Protection of the Underwater Cultural Heritage*, 25 *Ocean Development and Int’l L.* 391 (1994), p. 393 (UA-151).

⁵⁶³ Convention on the Protection of the Underwater Cultural Heritage, 2562 U.N.T.S. 158 (2 November 2001), Annex: Rules Concerning Activities Directed at Underwater Cultural Heritage (UA-120).

⁵⁶⁴ *Id.* Rules 1, 4.

⁵⁶⁵ Hayley Roberts, *The British Ratification of the Underwater Heritage Convention; Problems and Prospects*, *Int’l & Comp. L.Q.*, Vol. 67, No. 4 (October 2018), p. 838 (“These guidelines are viewed as an excellent framework for the protection and responsible recovery of UCH, and are even supported by many States not party to the Convention.”) (UA-659); Jeanne-Marie Panayotopoulos, *The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage: Main Controversies in Ana Filipa Vrdoljak and Francesco Francioni (eds.), The Illicit Traffic of Cultural Objects in the Mediterranean* (2009), p. 55 (“The adoption of this part of the Convention was welcomed as a great success even by States having proven most skeptical for the main part of the major legal provisions”) (UA-660).

⁵⁶⁶ Ole Varmer, *Closing Gaps in the Law Protecting Underwater Cultural Heritage on the Outer Continental Shelf*, *Stanford Environ. L.J.*, Vol. 33, No. 2 (2014), p. 260 n.40 (“The Annex Rules to the Convention on the Protection of the Underwater Cultural Heritage were adopted with consensus, including support by the U.S.”) (UA-661); *see also id.* p. 260 (“there appears to be consensus that any salvage or recovery of UCH should be conducted in compliance with international scientific standards as reflected in the Annex Rules of the 2001 UNESCO Convention.”).

such, they are to be viewed as distinct technical standards separate from the legal rights and obligations set forth in the UCH Convention, itself.⁵⁶⁷ Notably, non-ratifying States with significant maritime interests, including Norway, the United Kingdom, and the United States, have expressly recognized the value of the UCH Rules as a statement of prevailing standards of UCH protection.⁵⁶⁸ In the 20 years since their adoption, the UCH Rules have only gained in stature. Today, UNESCO states that “[o]ver the years, they have become a reference document in the field of underwater excavations and archaeology” such that “[e]very professional working in the field of underwater cultural heritage should strictly comply with these Rules.”⁵⁶⁹

269. In sum, Article 303(1) imposes on States Parties an affirmative duty to protect UCH — a duty that encompasses accepted international standards of conduct. Those standards have been increasingly refined and have become the subject of international consensus over the years, a consensus reflected in the UCH Rules adopted in 2001. As the next section will establish, Russia has consistently failed to uphold those standards in the Black Sea, Sea of Azov, and Kerch Strait since 2014 and, as a result, has violated its duty under the Convention.

⁵⁶⁷ Guido Carducci, *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, *Am. J. Int'l L.*, Vol 96, No. 2 (2002), p. 423 (“While the Convention had to deal with the most delicate political and legal issues, the technical nature of the annex that was attached to it shielded it, in a way, from these complexities and resulted in a valuable codification of homogeneous and rigorous rules based on the 1996 International Charter on the Protection and Management of the Underwater Cultural Heritage.”) (**UAL-150**).

⁵⁶⁸ *See, e.g.*, United Nations General Assembly, Fifty-Sixth Session, 65th Plenary Meeting, UN Doc. A/56/PV.65 (27 November 2001), pp. 19, 23 (United States and Norwegian delegations commending the Rules, with the U.S. delegate stating “[m]any of the provisions of [the UCH Convention], most notably the annexed rules, will be helpful in addressing underwater cultural heritage” and Norwegian delegate stating “[t]he annex to the UNESCO Convention represents a major achievement and has our full support. We are aiming at unilateral application of the rules set out in the annex and would encourage other States to consider this as well”) (**UA-662**); Statement of United Kingdom Minister for the Arts, Heritage, and Tourism on Underwater Cultural Heritage, UK Parliament, Statement UINHCVS208 (31 October 2017) (“The [UK] government has adopted the principles set out in the annex to the [UCH] Convention as best practice in the management of underwater cultural heritage.”) (**UA-663**).

⁵⁶⁹ UNESCO, *The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage: Frequently Asked Questions*, p. 7 (**UA-664**).

B. Russia Has Violated its Article 303(1) Duty, Risking Permanent Harm to the Common Cultural Heritage of All Humankind

270. Russia's conduct in the waters of the Black Sea, Sea of Azov, and Kerch Strait since 2014 has consistently violated Article 303(1) by failing to protect UCH. Commonly accepted standards of UCH protection today require that access to and control over artifacts be limited to "qualified underwater archaeologist[s] with scientific competence appropriate to the project"⁵⁷⁰ and that UCH be preserved *in situ* to the extent possible.⁵⁷¹ Contrary to these accepted international standards, however, Russia has allowed unqualified persons to explore and, at times, excavate various UCH sites. In the process, numerous items of archaeological and historic interest have been removed from the seabed, thereby endangering the integrity of those sites and the artifacts they contain.

271. For example, in May 2017, a Russian "historical reconstruction group" lifted a World War II P40 "Kitty Hawk" fighter jet from the seabed of the Kerch Strait.⁵⁷² There is no indication that appropriate archaeological standards were met when lifting the aircraft, and press reports indicate that the aircraft suffered significant damage as it was extracted from the water: "Its wings were torn off by gravity as the crane pulled it out of the water and its

⁵⁷⁰ Convention on the Protection of the Underwater Cultural Heritage, 2642 U.N.T.S. 158 (2 November 2001), Annex, Rule 22 (**UA-120**). Cf. European Convention on the Protection of Archaeological Heritage (Revised) (1992), Art. 3(ii) (requiring States to "ensure that excavations and other potentially destructive techniques are carried out only by qualified, specially authorised persons") (**UA-121**).

⁵⁷¹ Convention on the Protection of the Underwater Cultural Heritage, 2642 U.N.T.S. 158 (2 November 2001), Annex, Rule 1 ("The protection of underwater cultural heritage through *in situ* preservation shall be considered as the first option. Accordingly, activities directed at underwater cultural heritage shall be authorized in a manner consistent with the protection of that heritage, and subject to that requirement may be authorized for the purpose of making a significant contribution to protection or knowledge or enhancement of underwater cultural heritage.") (**UA-120**); *Id.*, Annex, Rule 4 ("Activities directed at underwater cultural heritage must use nondestructive techniques and survey methods in preference to recovery of objects. If excavation or recovery is necessary for the purpose of scientific studies or for the ultimate protection of the underwater cultural heritage, the methods and techniques used must be as non-destructive as possible and contribute to the preservation of the remains."); International Council on Monuments and Sites, Charter on the Protection and Management of Underwater Cultural Heritage, ICOMOS General Assembly in Sofia, Bulgaria, Art. 10 (Oct. 1996) ("A programme of site management must be prepared, detailing measures for protecting and managing *in situ* underwater cultural heritage . . .") (emphasis added) (**UA-665**); European Convention on the Protection of the Archaeological Heritage (Revised) (1992), Art. 3 (**UA-121**).

⁵⁷² Drone Captures Lifting of U.S.-Made Warplane that Sank Near Russia In WW2, *Russia Today*, 6 May 2017 (**UA-237**); The Builders of the Crimean Bridge Lifted a Plane from the WWII Period from the Bottom of the Kerch Strait, *KP (Komsomolskaya Pravda)*, 6 May 2017 (**UA-236**).

tail was damaged as well.”⁵⁷³ This treatment stands in stark contrast to the accepted international standard requiring that “the methods and techniques used must be as non-destructive as possible and contribute to the preservation of the remains.”⁵⁷⁴

Figure 4: “Kitty Hawk” Fighter Jet⁵⁷⁵



272. Similarly, in May 2015, a large sunken Byzantine-era ship was reportedly discovered by the Rostov Dive club, a private Russian diving club.⁵⁷⁶ On its blog, the club boasts of its excavation of the site and removal of amphorae from the seabed.⁵⁷⁷ Photographs released by the club show a diver disturbing ancient amphorae at the site of the

⁵⁷³ Drone Captures Lifting of U.S.-Made Warplane that Sank Near Russia In WW2, *Russia Today*, 6 May 2017 (UA-237).

⁵⁷⁴ Convention on the Protection of the Underwater Cultural Heritage, 2642 U.N.T.S. 158 (2 November 2001), Annex, Rule 4 (“Activities directed at underwater cultural heritage must use nondestructive techniques and survey methods in preference to recovery of objects. If excavation or recovery is necessary for the purpose of scientific studies or for the ultimate protection of the underwater cultural heritage, the methods and techniques used must be as non-destructive as possible and contribute to the preservation of the remains.”) (UA-120); European Convention on the Protection of Archaeological Heritage (Revised) (1992), Art. 3(i)(b) (requiring “non-destructive methods of investigation [be] applied wherever possible”) (UA-121).

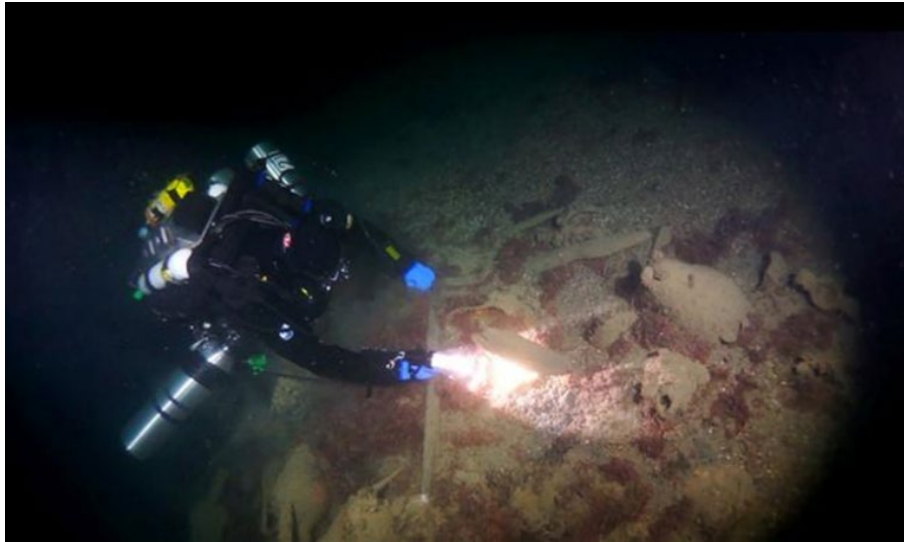
⁵⁷⁵ TASS, WW2 American Fighter Plane Recovered From Bottom of Kerch Strait, Getty Images (6 May 2017) (UA-666).

⁵⁷⁶ See Find of the Millennium: Huge Antique Ship Discovered at the Bottom of the Sea in Crimea, *TV Channel Zvezda (Star)*, 26 May 2015 (UA-228).

⁵⁷⁷ Rostov Dive, *Raising the First Artifacts* (22 August 2015) (UA-667).

wreck (see **Figure 5**, below)⁵⁷⁸ and excavated amphorae lying on top of each other, exposed in rough fish netting (see **Figure 6**, below).⁵⁷⁹ International standards, however, require that heritage objects should not be “uncovered or left exposed during or after excavation without provision being made for their proper preservation, conservation and management.”⁵⁸⁰

Figure 5: Dive Club Member at a Byzantine Shipwreck⁵⁸¹



⁵⁷⁸ Russian Divers Report Ancient Ship Find Near Crimea, *Daily News*, 28 May 2015 (UA-229).

⁵⁷⁹ Rostov Dive, *Raising the First Artifacts* (22 August 2015) (UA-667); contrast European Convention on the Protection of Archaeological Heritage (Revised) (1992), Art. 3(i)(b) (requiring that States ensure “the elements of the archaeological heritage are not uncovered or left exposed during or after excavation without provision being made for their proper preservation, conservation and management”) (UA-121).

⁵⁸⁰ European Convention on the Protection of Archaeological Heritage (Revised) (1992), Art. 3(i)(b) (UA-121); cf. Convention on the Protection of the Underwater Cultural Heritage, 2642 U.N.T.S. 158 (2 November 2001), Annex, Rule 24 (“The conservation programme shall provide for the treatment of the archaeological remains during the activities directed at underwater cultural heritage, during transit and in the long term. Conservation shall be carried out in accordance with current professional standards.”) (UA-120).

⁵⁸¹ Russian Divers Report Ancient Ship Find Near Crimea, *Daily News*, 28 May 2015 (UA-229).

Figure 6: Uncovered Excavated Amphorae⁵⁸²



273. Later posts on the club’s blog show the club members passing the amphorae around among themselves.⁵⁸³

Figures 7, 8, 9: Rostov Dive Club Members Handling, Viewing Ancient Amphorae⁵⁸⁴



274. There is no indication that the Rostov Dive club is technically competent to observe the proper archaeological, technical, and other necessary scientific protocols to have access to, let alone disturb, such sites. According to its website, the club “started from modest beginnings, from the very first, elementary steps of recreational diving,” and its stated purpose is to promote and teach “technical diving” to the masses.⁵⁸⁵ The club apparently did not consider leaving the artifacts undisturbed, so that they could be preserved

⁵⁸² Rostov Dive, *Raising the First Artifacts* (22 August 2015) (UA-667).

⁵⁸³ Rostov Dive, *Mysterious Graffiti on Amphoras* (6 September 2015) (UA-668).

⁵⁸⁴ *Id.*

⁵⁸⁵ Rostov Dive, *About Us* (1 September 2011) (UA-669).

in situ.⁵⁸⁶ The mere fact that the club would publish photographs of its members actively disturbing, lifting, and handling ancient amphorae from a site of such obvious historical and archaeological importance is evidence of its unfamiliarity with international best practice concerning the treatment of UCH.

275. Yet, instead of taking measures to punish and prevent future behavior of this kind, official organs of the Russian government — including the Ministry of Defense — came to the aid of the Rostov Dive club and provided assistance for further excavations.⁵⁸⁷ President Putin even showed his support by visiting the site for an in-person viewing via submersible.⁵⁸⁸ Subsequent expeditions of the Rostov Dive club sponsored by the Ministry of Defense allegedly led to the discovery by the Rostov Dive club of 150 additional UCH sites that are now vulnerable to the same kinds of careless excavation procedures.⁵⁸⁹

⁵⁸⁶ Rostov Dive, *Raising the First Artifacts* (22 August 2015) (**UA-667**). *Contrast with* International Council on Monuments and Sites, Charter on the Protection and Management of Underwater Cultural Heritage, ICOMOS General Assembly in Sofia, Bulgaria, Art. 10 (Oct. 1996) (“A programme of site management must be prepared, detailing measures for protecting and managing *in situ* underwater cultural heritage . . .”) (**UA-665**); European Convention on the Protection of Archaeological Heritage (Revised), Art. 3 (1992) (**UA-121**); Convention on the Protection of Underwater Cultural Heritage, 2563 U.N.T.S. 158 (2 November 2001), Preamble, Annex, Rule 4 (**UA-120**).

⁵⁸⁷ See Discovery of the Millennium: Russian Military to Recover Ancient Ship from Seafloor, *Zvezda*, 7 June 2015 (**UA-231**).

⁵⁸⁸ See Putin Made a Dive in a Bathyscaphe Near Sevastopol, *Interfax*, 18 August 2015 (**UA-230**).

⁵⁸⁹ See Discovery of the Millennium: Russian Military to Recover Ancient Ship from Seafloor, *Zvezda*, 7 June 2015 (**UA-231**). The head of the Rostov diving club said: “We have discovered over 150 sites on our expedition. One of them is a ship similar to the one we found in early May. This is all I can say at this point. Allow me to express tremendous gratitude to the Ministry of Defense for the invaluable assistance with our work, as well as to the Russian Geographic Society.” *Id.*

Figure 10: The President of the Russian Federation at a UCH Site⁵⁹⁰



276. This series of events is symptomatic of a larger pattern. Publicly-available information confirms that on numerous other occasions, UCH has been interfered with or removed from waters around the Crimean Peninsula, whether by Russian government officials or by private parties allowed to do so by the Russian authorities,⁵⁹¹ thereby contravening modern technical and archaeological standards that recommend UCH be preserved *in situ* to the extent possible.⁵⁹²

277. By way of example, during construction of the Kerch Strait bridge, divers discovered, excavated, and removed a terra-cotta sculpture of ancient Greek origin that is believed to be “unique for the North Black Sea area.”⁵⁹³

⁵⁹⁰ See Putin Made a Dive in a Bathyscaphe Near Sevastopol, *Interfax*, 18 August 2015 (UA-230).

⁵⁹¹ See, e.g., Head of Ancient Sculpture: A Unique Archaeological Find at Construction of Crimean Bridge, *Official Information Site for the Construction of the Crimean Bridge*, 22 March 2017 (UA-235); Rostov Dive, Mysterious Graffiti on Amphoras (6 September 2015) (UA-668); Discovery of the Millennium: Russian Military to Recover Ancient Ship from Seafloor, *Zvezda* (7 June 2015) (UA-231).

⁵⁹² International Council on Monuments and Sites, Charter on the Protection and Management of Underwater Cultural Heritage, ICOMOS General Assembly in Sofia, Bulgaria, Art. 10 (Oct. 1996) (“A programme of site management must be prepared, detailing measures for protecting and managing *in situ* underwater cultural heritage . . .”) (UA-665); European Convention on the Protection of Archaeological Heritage (Revised), Art. 3 (1992) (UA-121); Convention on the Protection of Underwater Cultural Heritage, 2563 U.N.T.S. 158 (2 November 2001), Preamble, Annex, Rule 4 (UA-120).

⁵⁹³ Head of Ancient Sculpture: A Unique Archaeological Find at Construction of Crimean Bridge, *Official Information Site for the Construction of the Crimean Bridge*, 22 March 2017 (UA-235).

278. And, as recently as 28 September 2020 — *after* already damaging one World-War-Two-era aircraft in a reckless excavation⁵⁹⁴ — the Russian Ministry of Defense assisted the Russian Geographical Society in removing from the sea floor a Bell P-39 Aircobra aircraft — another World-War-Two-era aircraft, similar to the “Kitty Hawk.”⁵⁹⁵ Photographs and video of the removal show a similar crane hoist system being used to excavate the Bell P-39 Aircobra that damaged the “Kitty Hawk.”⁵⁹⁶

Figure 11: A Bell P-39 Aircobra Removed from the Seafloor in September 2020⁵⁹⁷



⁵⁹⁴ See Drone Captures Lifting of U.S.-Made Warplane that Sank Near Russia In WW2, *Russia Today*, 6 May 2017 (UA-237); The Builders of the Crimean Bridge Lifted a Plane from the WWII Period from the Bottom of the Kerch Strait, *KP (Komsomolskaya Pravda)* (6 May 2017) (UA-236).

⁵⁹⁵ WWII Fighter Lifted From the Bottom of the Black Sea, *Russian Geographical Society* (1 October 2020) (UA-670); US Fighter Raised from the Black Sea, *Divernet* (28 September 2020) (UA-694).

⁵⁹⁶ See WWII Fighter Lifted From the Bottom of the Black Sea, *Russian Geographical Society* (1 October 2020) (UA-670); US Fighter Raised from the Black Sea, *Divernet* (28 September 2020) (UA-694); Drone Captures Lifting of U.S.-Made Warplane that Sank Near Russia In WW2, *Russia Today*, 6 May 2017 (UA-237); The Builders of the Crimean Bridge Lifted a Plane from the WWII Period from the Bottom of the Kerch Strait, *KP (Komsomolskaya Pravda)*, 6 May 2017 (UA-236).

⁵⁹⁷ WWII Fighter Lifted From the Bottom of the Black Sea, *Russian Geographical Society* (1 October 2020) (UA-670).

279. Russia’s casual and careless approach to UCH stands in stark contrast to the scientific rigor employed by other Black Sea littoral states to excavate and explore discovered UCH. For example, Bulgaria — through its National Cultural Institute Centre for Underwater Archaeology⁵⁹⁸ — participates in the Black Sea Marine Archaeology Project, together with international partners that include research institutes based in the United Kingdom, United States, Sweden, and Greece.⁵⁹⁹ Working together under the aegis of this project, Bulgaria and its partners have responsibly discovered and preserved over forty shipwrecks, including a virtually untouched medieval ship from the 13th or 14th century, likely serving Venetian outposts in the Black Sea.⁶⁰⁰ The rigor and responsibility with which the project has been conducted allowed the scientists to “capture some astonishing images without disturbing the seabed,” while maintaining “strict adherence to the UNESCO Convention on the Protection of the Underwater Cultural Heritage.”⁶⁰¹ The sites have been preserved *in situ* for the time being so as not to harm them and to allow for further analysis before any additional steps are undertaken.⁶⁰² By way of example, a 2,400 year old ancient Greek vessel discovered by the Black Sea Marine Archeology Project in 2018 — which is believed to be the oldest intact shipwreck in the world – has been left undisturbed, preserved by being maintained *in situ*.⁶⁰³

280. For its part, Ukraine has historically partnered with research universities and organizations from throughout the world in order to explore, research, preserve, and

⁵⁹⁸ *About the CUA Sozopol*, Centre for Underwater Archaeology (2020) (“The main tasks of the Institute include the study, protection and management of underwater cultural heritage in the Bulgarian territorial waters and exclusive economic zone in the Black Sea as well as in the internal water basins of the Republic of Bulgaria.”) (UA-671).

⁵⁹⁹ Black Sea Map, The Black Sea Maritime Archaeology Project (the Black Sea Marine Archaeology Project describes itself as “[m]aritime archaeology and marine geophysics . . . work[ing] together recording, dating and understanding the submerged cultural heritage of Bulgaria, contributing to our knowledge of the prehistoric and historic environmental record of human activity in this region.”) (UA-672).

⁶⁰⁰ William J. Broad, ‘We Couldn’t Believe Our Eyes’: A Lost World of Shipwrecks Is Found, *New York Times* (11 November 2016) (UA-587).

⁶⁰¹ University of Southampton, Maritime Archaeology Expedition in Black Sea, *Phys.org, part of the Science X Network* (14 October 2016) (quoting Professor Jon Adams, Founding Director of the University of Southampton’s Centre for Maritime Archaeology and Principle Investigator on the Black Sea Maritime Archaeology Project) (UA-673).

⁶⁰² Josh Hrala, Dozens of Ancient Shipwrecks Have Been Spotted Beneath the Black Sea, *Science Alert* (25 October 2016), p. 4 (UA-674).

⁶⁰³ Kevin Rawlinson, World’s Oldest Intact Shipwreck Discovered in the Black Sea, *The Guardian* (22 October 2018) (UA-588).

properly excavate UCH. A partnership between Ukraine, the Institute of Classical Archaeology at the University of Texas at Austin, and the Institute of Archaeological Oceanography at the University of Rhode Island used sediment core samples to analyze organic materials in mud to determine how to safely excavate various UCH sites.⁶⁰⁴ In 2010, an expedition led by the Ukrainian Academy of Sciences took “months” to “meticulously clean[]” a single fragment discovered at another UCH site.⁶⁰⁵

281. Russia could have taken similarly rigorous steps to protect the UCH discovered in the waters under its control, but it did not. Instead, the Russian Federation seems content to outsource its responsibility for protecting the common heritage of all humankind to self-described amateurs with no obvious expertise in the field of underwater archaeology. Russia’s tolerance of these sub-standard archaeological practices has directly resulted in the irresponsible excavation of historical artifacts and, indeed, direct damage to UCH.

282. The above facts, considered in light of prevailing, accepted standards for protecting UCH, establish that Russia has not satisfied its duty under the Convention. Instead, Russia has recklessly extracted fragile UCH with floating cranes, thereby damaging it; allowed amateur dive club members unfettered access to culturally significant sites; and repeatedly disturbed and removed UCH from the seabed — all in a manner contrary to international best practice. For these reasons, the Tribunal should find that Russia’s conduct with regard to UCH in the Black Sea, Sea of Azov, and Kerch Strait since 2014 violates Article 303(1).

⁶⁰⁴ Archaeologists Unearth a Graveyard of Ancient Shipwrecks in the Black Sea, *UT News*, 27 October 2008 (UA-126); Bridget Buxton and Robert Ballard et al., Byzantium Beneath the Black Sea, Poster presented at 2008 Annual Meeting Archaeological Institute of America Chicago Ill. 3 8 Jan(2008) (UA-675).

⁶⁰⁵ Crimean Ship Found Off Balaclava, *BBC News*, 17 March 2010 (UA-127).

Chapter Seven: Russia's Aggravation of the Dispute Between the Parties

283. Ukraine initiated this arbitration in September 2016. Since that time, Russia has substantially compounded its violations of the Convention. In addition to breaching the substantive rights and obligations set out in the preceding Chapter, Russia's conduct has aggravated the dispute between the parties in violation of UNCLOS Articles 279 and 300.

284. Article 279 of the Convention requires States Parties to “settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations.”⁶⁰⁶ Article 300 requires Parties to “fulfil in good faith the obligations assumed under this Convention and . . . exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.”⁶⁰⁷ As the *South China Sea* tribunal concluded, these provisions mean that a party to a dispute is prohibited from taking steps that — rather than attempt to settle the dispute — risk “aggravating or extending the dispute . . . during the pendency of the settlement process.”⁶⁰⁸ Actions that risk aggravating or extending a dispute, the *South China Sea* tribunal recognized, include actions that: (i) “render the alleged violation more serious”; (ii) “frustrate the effectiveness of a potential decision”; (iii) “render [. . .] implementation [of a potential tribunal decision] by the parties significantly more difficult”; or (iv) make the work of the tribunal “significantly more onerous” or otherwise “decrease the likelihood of the proceedings in fact leading to the resolution of the parties’ dispute.”⁶⁰⁹

285. Here, Russia has failed to engage meaningfully with Ukraine's efforts to settle this dispute.⁶¹⁰ But Russia has done more than this. Its continued, overt violations of UNCLOS since the filing of this arbitration have deepened and compounded the dispute between the Parties, in violation of Russia's obligations under Articles 279 and 300.

286. Russia's construction activities in the Kerch Strait are a prime example of its aggravation of the dispute. When Ukraine formally protested Russia's violations of

⁶⁰⁶ UNCLOS Art. 279.

⁶⁰⁷ UNCLOS Art. 300.

⁶⁰⁸ *South China Sea Arbitration* Award of 12 July 2016, ¶¶ 1169, 1172 (relying on Articles 279, 296, and 300 of UNCLOS) (UAL-11); see also *LaGrand (Germany v. United States of America)*, ICJ Judgment of 27 June 2001, p. 503 (UAL-23).

⁶⁰⁹ *South China Sea Arbitration*, Award of 12 July 2016, ¶ 1176 (UAL-11).

⁶¹⁰ See *supra* Chapter Three.

Ukraine's rights under the Convention in 2015,⁶¹¹ work on the Kerch Strait bridge had not yet commenced.⁶¹² And when Ukraine submitted its Notification and Statement of the Claim in September 2016, Russia had only just begun work on the portion of the bridge that was to cover the navigable channel in the Kerch Strait.⁶¹³ But at no point did Russia stop its work on the bridge or even modify its plans or timeline. As a result, Russia's bridge has, since mid-2017, obstructed the passage of larger vessels through the Kerch Strait, in violation of Articles 38, 43, and 44.⁶¹⁴ Moreover, since receiving Ukraine's Notification, Russia has also proceeded to complete a submarine gas pipeline and lay undersea cables across the Kerch Strait.⁶¹⁵ The continuation of Russia's construction activities in the absence of any apparent environmental assessment or monitoring program has risked further, potentially lasting harm to the marine environment.⁶¹⁶

287. Taken together, Russia's construction activities have increased the gravity of the Parties' dispute concerning activities in the Kerch Strait – including by converting Russia's threatened violations of Articles 38, 43, and 44 into actual violations of those articles and, quite possibly, causing lasting harm to the fragile marine ecosystem of the Black Sea Basin. Russia's actions show disregard for the dispute resolution process established by the Convention.

288. Beyond its construction activities, Russia also has aggravated the dispute by interfering with Ukrainian and international navigation in the Kerch Strait and Sea of Azov through illegal and discriminatory vessel stoppages and delays, and through restrictions on the transit of important categories of vessels. Even for vessels that can clear the bridge's height restriction of 33 meters, transiting the Kerch Strait to reach Ukrainian ports has since

⁶¹¹ Ukraine sent two diplomatic notes specifically protesting Russia's construction of the Kerch Strait bridge on 29 July 2015 (No. 610/22-110-1132) (**UA-233**) and 23 February 2016 (No. 72/22-194/510/485) (**UA-212-AM**); see also *Note Verbale from Ukraine to the Russian Federation*, No. 72/22-620-518 (10 March 2015), pp. 1, 3 (engaging Russia "in connection with Russian Federation's violation of the United Nations Convention on the Law of the Sea" and "demand[ing] that the Russian Federation immediately take all practically feasible steps to stop its internationally wrongful acts . . .") (**UA-9**).

⁶¹² Chronology of Bridge Construction, Official Information Site for the Construction of the Crimean Bridge (**UA-198**).

⁶¹³ Russia Installs Crimea Bridge Railway Arch in Unique Operation, *Russia Today* (27 August 2017) (**UA-676**).

⁶¹⁴ See *supra* Chapter Six, Section I.A.1-I.A.2.

⁶¹⁵ See *supra* Chapter Six, Section II.A.

⁶¹⁶ See *supra id.*

2018 become considerably more arduous. As explained in Chapter 6, vessels travelling to or from Ukrainian ports have been forced to wait an average of 40 hours before being given permission to transit the Kerch Strait.⁶¹⁷ Further, since notification of this dispute, the Russian Federation has stopped and inspected hundreds of vessels heading to Ukrainian ports, doing so at a disproportionate rate as compared to those headed to Russian ports.⁶¹⁸ Most recently in April 2021, Russia escalated its assault on free navigation by announcing a six-month closure of parts of the Black Sea, including the southern entrance to the Kerch Strait, to foreign military and other government vessels.⁶¹⁹ As a result, all foreign military and government vessels, including Ukrainian vessels, will be prevented from transiting the Kerch Strait and cut off from Ukraine's Sea of Azov ports. Russia's violations of free navigation since Ukraine's Notification and Statement of Claim have further aggravated the Parties' dispute, as well as compounded the harm to Ukraine.⁶²⁰

289. In addition, Russia continues to aggravate the Parties' dispute with respect to underwater cultural heritage. It continues to disturb archeological artifacts, and at least some of these artifacts are being retrieved by amateurs without the skills to properly preserve them. For example, in May 2017, a "historical reconstruction group" raised a WWII-era airplane from the seabed of the Kerch Strait, causing significant damage to the 70-year old aircraft in the process.⁶²¹ With the support of the Russian Ministry of Defense, another group then used the same method to execute a similar excavation in September 2020.⁶²² These reckless actions risk the permanent destruction of, or injury to, truly unique artifacts that are of immense value to all humankind. They render Russia's violations more serious and frustrate the effectiveness of any award in this case, as no arbitral order can recover and restore archeological and historical objects once they have been harmed.

290. In sum, Russia's actions since initiation of this arbitration render its violations of the Convention more serious and more difficult to remedy. By erecting twelve thousand metric tons of concrete and steel where previously there was an unobstructed

⁶¹⁷ See *supra* Chapter Six, Section I.A.3.ii.

⁶¹⁸ See *supra* Chapter Six, Section I.A, I.B.

⁶¹⁹ See *supra* Chapter Six, Section I.A.3.iii.

⁶²⁰ See *supra* Chapter Six, Section, I.A, I.B.

⁶²¹ See *supra* Chapter Six, Section III.B (quoting Drone Captures Lifting of U.S.-Made Warplane that Sank Near Russia In WW2, *Russia Today*, 6 May 2017 (UA-237)).

⁶²² *Id.*

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navigable waterway,⁶²³ impeding navigation to and from busy Ukrainian ports, and removing from the sea floor and damaging artifacts of cultural value to all humankind, Russia has sought to create a *fait accompli*. In so doing, Russia has violated its obligation to settle this dispute by peaceful means and in good faith under Articles 279 and 300.

⁶²³ See Six-Thousand Ton Arch of Crimean Bridge Ready for Installation, *Sputnik News*, 28 August 2017 (UA-241); Russia Installs Crimea Bridge Railway Arch in Unique Operation, *Russia Today* (27 August 2017) (noting that the necessity of two arches) (UA-676).

Chapter Eight: Ukraine’s Entitlement to Relief Under the Convention for Russia’s Internationally Wrongful Acts

291. As established in the preceding Chapters of this Revised Memorial, Russia has breached its obligations under UNCLOS, and harmed not only the rights and interests of Ukraine, but also those of other UNCLOS States Parties. Ukraine is entitled to complete relief for the injuries it has suffered, and that it continues to suffer, as a result of Russia’s internationally wrongful acts.

292. In the first instance, Russia must bring itself into compliance with the Convention by ceasing its violations and providing Ukraine with appropriate assurances and guarantees of non-repetition.⁶²⁴ Second, under Articles 293 and 304 of the Convention, Ukraine calls upon this Tribunal to order Russia to make reparation consistent with general principles of international law.⁶²⁵ Specifically, the Tribunal’s Award should, “as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”⁶²⁶ Third, Ukraine is entitled to compensation for all damage caused by the Russian Federation’s unlawful acts.⁶²⁷ While Ukraine has not included specific requests for compensation at this time, Ukraine reserves the right to seek monetary damages at a later stage of these proceedings.

⁶²⁴ Report of the International Law Commission on the Work of Its Fifty-Third Session, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 53rd Session, U.N. Doc. No. A/56/10 (23 April–1 June, 2 July–10 August 2001), Art. 28, Commentary, ¶ 2 (“ILC Articles on Responsibility of States for Internationally Wrongful Acts”) (“The core legal consequences of an internationally wrongful act . . . are the obligations of the responsible State to cease the wrongful conduct” and “to make full reparation for the injury caused by the internationally wrongful act”) (UAL-24); see *LaGrand (Germany v. United States of America)*, ICJ Judgment of 27 June 2001, pp. 513-514 (UAL-23); *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Judgment of 27 June 1986, p. 149 (UAL-25); Report of the ILC on its 52nd Session (2000), ILC Yearbook 2000, Vol. 2, Part 2, p. 26 (UAL-26).

⁶²⁵ UNCLOS Art. 293 (“A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.”); UNCLOS Art. 304 (“The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.”).

⁶²⁶ *Factory at Chorzów (Germany vs. Poland)*, PCIJ Judgment of 13 September 1928, p. 47 (UAL-27).

⁶²⁷ ILC Articles on Responsibility of States for Internationally Wrongful Acts, Art. 36(1) (“The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.”) (UAL-24); *Arctic Sunrise*, Award on the Merits of 14 August 2015, ¶ 393 (“The Tribunal considers that the Netherlands is entitled to compensation for damage to the Arctic Sunrise, including physical damage and costs incurred to prepare it for its return voyage, as well as lost profits.”) (UAL-4).

293. The Russian Federation has engaged in numerous, serious breaches of the Convention. This Tribunal should grant Ukraine all relief necessary to vindicate the rights that Russia has violated and to restore, as far as possible, the situation that would have existed absent Russia's violations of UNCLOS.

I. Ukraine Is Entitled to a Declaration Establishing Russia's Violations of Ukraine's Rights Under the Convention

294. For the reasons provided in Chapter Six, Ukraine is entitled to a declaration of Russia's violations of the Convention. These violations strike at some of the most foundational areas of the law of the sea: the rights of freedom of navigation in the seas and transit passage through international straits; the protection of the marine environment; and the protection and preservation of underwater cultural heritage.

295. In the area of navigation, Russia has committed violations of the Convention that disregard not only the rights of Ukraine, but also the rights of all UNCLOS States Parties in multiple respects. First, Russia has violated the right to transit passage under Articles 38, 43, and 44 by constructing a low-clearance bridge across the Kerch Strait that permanently impedes the ability of large vessels to transit the Strait, by failing to share information as to the potentially significant threats to safe navigation caused by its hasty construction of the bridge, by imposing disproportionate delays on vessels passing through the Strait navigating to and from Ukrainian ports, and by asserting a closure of the Strait to foreign governmental traffic for a period of over six months. Second, Russia has violated the right to free navigation under Articles 58 and 87, and Ukraine's sovereignty over its territorial sea under Article 2, by stopping and inspecting vessels in the Sea of Azov traveling to and from Ukrainian ports. For those stoppages and inspections that involved Ukrainian-flagged vessels, Russia further violated Ukraine's exclusive jurisdiction under Articles 58 and 92. Finally, in seizing two Ukrainian-flagged JDRs and reflagging them to Russia, Russia has violated its obligations under Articles 2(3) and 91.

296. As for the environment, Russia has disregarded its duties to protect the marine environment as well as its duties to cooperate with other States to prevent and mitigate potential and actual harms. Russia has violated its obligations under Articles 123, 192, 194, 204, 205, and 206 to assess, monitor, and protect against potential adverse effects on the fragile, interconnected ecosystem of the Black Sea Basin caused by its construction activities in the Kerch Strait. Russia has further violated its duties under Articles 123, 192, 194, 198, and 199 to protect and preserve the environment by failing to notify potentially

affected States of pollution events and to cooperate with those States to mitigate the harmful effects thereof.

297. With regard to underwater cultural heritage, Russia's unlawful conduct has, in violation of Article 303(1), risked and in some instances caused harm to this valuable resource that is the common heritage of all humankind.

298. Finally, across all of these areas, Russia has violated its duty under Articles 279 and 300 not to aggravate the present dispute. Instead, after Ukraine initiated these proceedings, Russia continued to construct and finish the Kerch Strait bridge, began its harassment of vessels traveling to and from Ukraine's Sea of Azov ports, risked further harm to the marine environment, and continued to disturb and remove underwater cultural heritage.

299. Russia's violations of core areas of the Convention, violations which harm not only Ukraine but also all UNCLOS States Parties, must be recognized and condemned.

II. Russia Must Cease Its Unlawful Conduct, and Provide Appropriate Assurances and Guarantees of Non-Repetition

300. Having established that Russia is in breach of the Convention, Ukraine is entitled to a cessation of all aspects of Russia's wrongful conduct,⁶²⁸ as well as appropriate assurances and guarantees of non-repetition.⁶²⁹ Such assurances and guarantees must include "specific measures . . . to avoid repetition" of Russia's unlawful actions.⁶³⁰ Here, assurances and guarantees of non-repetition are necessary across all three substantive areas of the Convention implicated by this case.

301. First, Russia must immediately cease efforts to stop, delay, and otherwise impede free navigation and transit passage of Ukrainian and third-State vessels in and through the Kerch Strait and Sea of Azov. Russia's actions have harmed Ukrainian and foreign shipping to and from Ukraine's Sea of Azov ports. For commercial vessels to serve these ports reliably and efficiently, they must be assured a stable operating environment. The Russian Federation should, accordingly, provide appropriate assurances and guarantees of non-repetition of its conduct. Such assurances and guarantees should include specific

⁶²⁸ ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Art. 30 (**UAL-24**).

⁶²⁹ See *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, pp. 513-514 (**UAL-23**); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Judgment of 19 December 2005, p. 256 (**UAL-32**).

⁶³⁰ ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Art. 30, cmt. ¶ 13 (**UAL-24**).

commitments that Russia will not hamper or impede transit passage in the Kerch Strait, including for foreign government vessels, nor interfere with free navigation of vessels traveling to or from Ukraine's Sea of Azov ports.

302. Second, the Russian Federation must provide assurances and guarantees of non-repetition with regard to protection of the marine environment. This includes assurances that Russia will take all appropriate steps to protect the marine environment, such as by conducting all appropriate environmental assessments and monitoring in accordance with accepted, internationally recognized scientific standards. Russia must also provide appropriate assurances and guarantees of non-repetition with regard to its failure to communicate to Ukraine, other potentially affected States, and competent international organizations, appropriate assessments of the potential effects on the marine environment of its construction activities in the Kerch Strait, as well as its failure to report on the results of any subsequent environmental monitoring.

303. Finally, Russia must cease excavating UCH sites until it can guarantee that any further excavation will comply with internationally-accepted archaeological standards. The Russian Federation must also provide appropriate assurances and guarantees of non-repetition in this regard.

304. In addition to the foregoing, several of the specific measures necessary to effect reparation, as detailed in the next section, also are necessary to ensure cessation of Russia's violations of the Convention.

III. Russia Must Make Full Reparation

305. Russia is required to make reparation to undo the effects of its violations of the Convention.⁶³¹ In its Judgment in *M/V Saiga (No. 2)*, ITLOS emphasized that “reparation must, as far as possible, wipe out all the consequences of the illegal act.”⁶³² In

⁶³¹ See, e.g., *M/V "SAIGA" (No. 2)*, (*Saint Vincent and the Grenadines v. Guinea*), Judgment, ITLOS Reports 1999, ¶ 170 (“It is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act . . .”) (UAL-28); *Factory at Chorzów (Germany v. Poland)*, PCIJ Judgment of 26 July 1927, p. 21 (“Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.”) (UAL-140); ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Art. 31 (UAL-24).

⁶³² *M/V "SAIGA" (No. 2)*, (*Saint Vincent and the Grenadines v. Guinea*), Judgment, ITLOS Reports 1999, ¶ 170 (quoting *Factory at Chorzów*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47 (UAL-27)) (UAL-28).

M/V Virginia G, quoting the ILC Articles on State Responsibility, ITLOS reiterated that “[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”⁶³³

306. Russia must make full reparation “in an adequate form.”⁶³⁴ As the ICJ has found, “what constitutes ‘reparation in an adequate form’ clearly varies depending upon the concrete circumstances surrounding each case.”⁶³⁵ In light of the circumstances surrounding this case, adequate reparation must include specific actions necessary to wipe out the consequences of Russia’s wrongful acts and, where that is not possible, compensation.⁶³⁶

307. With regard to violations of its obligations related to freedom of navigation and transit passage, Russia must modify the central span of the Kerch Strait bridge to provide for a height clearance that is sufficient to restore passage for merchant and other vessels that historically transited the strait, and that foreseeably may seek to transit the strait in the future. In addition, Russia must undertake the steps, as set out below, necessary to mitigate the risk of hydrodynamic changes, ice formation, and bridge collapse, all of which would jeopardize the safety and continuity of navigation through the Kerch Strait.

308. With respect to its violations of Ukraine’s rights as a flag State, Russia must release to Ukraine the two Ukrainian-flagged JDRs it unlawfully seized and re-flagged so as to re-establish Ukraine’s exclusive jurisdiction over those vessels. It must also withdraw its claim to have re-flagged those vessels under the Russian flag.

309. With regard to the marine environment, Russia must conduct such further monitoring and studies as are necessary to determine the measures most capable of identifying and repairing any remaining environmental harm from the construction phase of the Kerch Strait construction projects, and mitigating the anticipated continuing impacts

⁶³³ *The M/V “Virginia G” Case (Panama/Guinea-Bissau)*, ITLOS Case No. 19, Judgment, 14 April 2014, ¶¶ 428-430 (quoting ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Art. 31 (UAL-24)) (UAL-9); see also *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, ITLOS Case No. 17, Advisory Opinion, 1 February 2011, ¶¶ 178-180, 194-198, 210 (UAL-156).

⁶³⁴ ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Art. 31, cmt. (1) (UAL-24); *Factory at Chorzów (Jurisdiction)*, PCIJ Judgment of 26 July 1927, p. 21 (“It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.”) (UAL-140).

⁶³⁵ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, ¶ 119 (UAL-143).

⁶³⁶ See, e.g., ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Arts. 34, 36 (UAL-24).

associated with operation of those projects. At a minimum, Russia must undertake the environmental monitoring and analysis outlined by Ukraine and its environmental assessment expert, [REDACTED], and implement suitable mitigation measures based on the results of that monitoring and analysis, as described above in Chapter Six, Sections II.A.2 and II.A.3.⁶³⁷ Further, Russia must invite international participation in such monitoring and studies, including by representatives of other littoral states of the Black Sea Basin and relevant regional organizations, such as the Commission on the Protection of the Black Sea Against Pollution, and make the results thereof available to the general public.

310. Taking account of the outcome of the aforementioned monitoring and studies, Russia must implement reparatory and mitigation measures designed to restore the marine environment of the Black Sea Basin as nearly as possible to its condition prior to the construction projects, and to manage as comprehensively as possible the continuing risks of environmental harm associated with operation of the projects.

311. Given the urgency of the threat to the sensitive environment of the Black Sea Basin, Russia must be required to act expeditiously, including by publishing a comprehensive report on the reparatory and mitigation measures it will undertake within 15 months of the issuance of the Award in this proceeding, and by commencing implementation of the measures in question no later than three months thereafter. To accommodate this time frame, Ukraine respectfully requests that Article 22 of the Rules of Procedure be amended to increase from six months to 24 months the period in which the Parties may submit requests for interpretation of the final award or concerning a manner of its implementation. This would effectively give the Parties six months to seek guidance from the Tribunal if needed after Russia commences implementation of the reparatory and mitigation measures identified in the aforementioned report. Under the circumstances, any shorter timeframe would fail to give effect to the Tribunal's power to hear interpretation and implementation disputes, as provided under UNCLOS Annex VII, Article 12(1).

312. At this stage in the proceeding — and in light of the Russian Federation's lack of transparency, as well as Ukraine's present inability to reliably access the areas of sea in which Russia's violations have occurred — Ukraine is unable to determine whether additional reparation may be required. A number of the measures requested above are intended to assist the Tribunal in determining whether and how Russia can undo the consequences of its illegal acts, particularly as to the marine environment. Similarly, it is currently not possible for Ukraine to determine the amount of compensation it is owed by

⁶³⁷ See *supra* Chapter Six, Sections II.A.2, II.A.3; [REDACTED] Report, Parts V.B, VI.B, VI.C.

the Russian Federation, and Ukraine reserves the right to seek adequate compensation at a later stage. Finally, certain of the actions set out above involve Russia remediating harm in areas subject to Ukrainian sovereignty but presently under Russian jurisdiction and control. In the event Ukrainian jurisdiction and control is restored before these actions are completed, Russia should be ordered to cooperate with Ukraine to ensure completion of its reparation, and to bear all associated costs.

* * *

313. Russia has comprehensively violated the Convention by impeding navigation, imperiling the ecosystem of the Black Sea Basin, and recklessly interfering with the rich underwater cultural heritage found in these waters. The injury to Ukraine and the broader community of UNCLOS States Parties must be redressed. To vindicate these core rights under the Convention, the Tribunal should award Ukraine the relief requested herein, to which it is entitled under international law.

Chapter Nine: Submissions of Ukraine

314. For the reasons set out in this Memorial, Ukraine respectfully requests the Tribunal to adjudge and declare that:

- a. The Russian Federation has violated Articles 38, 43, and 44 of the Convention by: constructing a bridge across the Kerch Strait that permanently impedes the ability of vessels that previously transited the Strait or foreseeably may have transited the Strait from doing so; failing to share information as to threats to safe navigation caused by the bridge; delaying passage through the Strait for vessels that are navigating to and from Ukrainian ports and inspecting such vessels; and restricting the navigation of all foreign governmental vessels through the Strait for a period of over six months.
- b. The Russian Federation has violated Articles 2, 58, and 87 of the Convention by stopping and inspecting Ukrainian and third-State vessels in the Sea of Azov traveling to and from Ukrainian ports.
- c. The Russian Federation has violated Articles 58 and 92 of the Convention by stopping and inspecting Ukrainian-flagged vessels in the Sea of Azov travelling to and from Ukrainian ports.
- d. The Russian Federation has violated Articles 2(3) and 91 of the Convention by unlawfully seizing and re-flagging two Ukrainian-flagged JDRs.
- e. The Russian Federation has violated Articles 123, 192, 194, 198, 199, 204, 205, and 206 of the Convention by failing to assess, monitor, and protect against potential adverse effects on the marine environment caused by its construction activities in the Kerch Strait.
- f. The Russian Federation has violated Articles 123, 192, 194, 204, 205, and 206 of the Convention by failing to cooperate and share information with Ukraine and other potentially-affected States concerning the environmental impact of its construction activities in the Kerch Strait.
- g. The Russian Federation has violated Articles 123, 192, 194, 198, 199, 204, and 205 of the Convention by failing to communicate or cooperate with Ukraine concerning the May 2016 oil spill off the coast of Sevastopol.
- h. The Russian Federation has violated Article 303 of the Convention by failing to protect unique archaeological and historical objects found at sea.

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- i. The Russian Federation has violated Articles 279 and 300 of the Convention by aggravating and extending the dispute between the parties since the commencement of this arbitration in September 2016.

315. To bring the Russian Federation's conduct into line with its obligations under the Convention and to provide assurance that the violations will not be repeated, Ukraine further requests the Tribunal to order the Russian Federation to:

- a. Cease immediately all efforts to stop, delay, or otherwise impede free navigation and transit passage of Ukrainian and third-State vessels through the Kerch Strait and in the Sea of Azov.
- b. Provide appropriate assurances and guarantees of non-repetition with regard to its violations of the rights to transit passage, free navigation, and exclusive flag State jurisdiction, including specific commitments that Russia will not hamper or impede transit passage in the Kerch Strait or interfere with the navigation of vessels traveling to or from Ukraine's Sea of Azov ports.
- c. Provide appropriate assurances and guarantees of non-repetition with regard to its violations of the duty to protect and preserve the marine environment and to cooperate with other States to that end, including specific commitments to assess the environmental impact of activities within its jurisdiction that may reasonably be expected to harm the marine environment of the Black Sea, Sea of Azov or Kerch Strait, and to monitor the environmental effects of any such activities in accordance with accepted scientific standards.
- d. Provide appropriate assurances and guarantees of non-repetition with regard to its failure to communicate to Ukraine, other potentially-affected States, and competent international organizations, an appropriate assessment of the potential effects on the marine environment of its construction activities in the Kerch Strait, as well as its failure to report the results of any subsequent environmental monitoring.
- e. Cease excavating underwater cultural heritage sites until it can guarantee that any further excavation will comply with internationally accepted archaeological standards.
- f. Provide appropriate assurances and guarantees of non-repetition with regard to its failure to protect archaeological and cultural objects found at sea.

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316. The Russian Federation is required to make reparation in order to, as far as possible, wipe out the consequences of its illegal acts. Accordingly, Ukraine requests that the Tribunal order Russia to:

- a. Modify the central span of the Kerch Strait bridge to provide for a height clearance sufficient to restore passage for merchant and other vessels that previously transited the Strait, as well as those that may foreseeably transit the Strait in the future.
- b. Release to Ukraine the two Ukrainian-flagged JDRs it unlawfully seized and re-flagged so as to re-establish Ukraine's exclusive jurisdiction over the vessels.
- c. Withdraw all claims to have re-flagged under the Russian flag the two Ukrainian-flagged JDRs it unlawfully seized.
- d. Conduct immediately further monitoring and studies of the construction projects undertaken in the Kerch Strait, and their impact on the marine environment of the Black Sea Basin, as are necessary to determine the measures most capable of identifying and repairing any environmental harm resulting from the construction phase of the Kerch Strait construction projects and mitigating any anticipated, continuing impacts associated with operation of the projects. Such monitoring and studies must include, but are not limited to, those identified by [REDACTED] and described in Chapter Six, Sections II.A.2 and II.A.3 of Ukraine's Revised Memorial.
- e. Invite international participation in its environmental monitoring and studies, including by representatives of other littoral states of the Black Sea Basin and relevant regional organizations, and make the results thereof available to the general public.
- f. Take account of the monitoring and studies conducted pursuant to paragraphs (d) and (e), above, and implement as soon as practicable reparatory and mitigation measures designed to restore the marine environment of the Black Sea Basin as nearly as possible to its condition prior to the construction projects, and to manage as comprehensively as possible the continuing risks of environmental harm associated with operation of the projects. Such reparatory and mitigation measures must include, but are not limited to, those identified by [REDACTED] and described in Chapter Six, Sections II.A.2 and II.A.3, of Ukraine's Revised Memorial, to the extent that further monitoring and studies indicate such measures are necessary.

- g. Within 15 months of the issuance of the Award in this proceeding, publish and communicate to Ukraine, as well as all other interested States and relevant international organizations, a comprehensive report on the reparatory and mitigation measures it has undertaken since the issuance of the Award and will undertake going forward, pursuant to paragraphs (d), (e), and (f), above.
- h. Commence implementation of all reparatory and mitigation measures identified in the report referenced in paragraph (g), above, no later than 18 months after the issuance of the Award in this proceeding.
- i. Pay Ukraine financial compensation in an amount to be determined at a later phase of the proceedings.

317. Ukraine requests that the Tribunal take into account that several of the specific measures necessary to effect reparation also are necessary to ensure cessation of Russia's violations of the Convention.

318. Ukraine further requests that the Tribunal amend Article 22 of the Rules of Procedure to increase from six months to 24 months the period in which the Parties may submit requests for interpretation of the final award or concerning a manner of its implementation.

319. Ukraine reserves the right to modify and extend its Submissions, including in response to the submissions of the Russian Federation and any facts or events that may transpire or come to light during the pendency of this arbitration.

Kyiv, Ukraine, 20 May 2021



Yevhenii Yenin
Agent for Ukraine