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

REPLY OF UKRAINE

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

REGISTRY
The Permanent Court of Arbitration

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Chapter One: Introduction

1. For almost a decade, the Russian Federation has defied the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention") in the Black Sea, the Sea of Azov, and the Kerch Strait. Since 2014, Russia has restricted freedom of navigation and transit passage, jeopardized the environment, and mistreated priceless underwater cultural heritage in these waters. Russia's conduct breaches its obligations to all UNCLOS States Parties, and has seriously injured Ukraine.

2. In its Counter-Memorial, Russia admits, or fails to credibly contest, several of its most serious violations of the Convention. Significantly, Russia admits that it constructed a bridge across the busy Kerch Strait with a clearance of only 33 meters (the "Kerch Strait Bridge" or the "Bridge"), without consulting Ukraine and other user States. Russia also admits that its Bridge prevents the passage of large cargo vessels and specialized vessels that historically transited the Strait. Russia's own data identifies hundreds of regular transits by large cargo vessels in the decade prior to construction of the Kerch Strait Bridge. Not a single such vessel has called on Ukraine's Sea of Azov ports since Russia installed the Bridge's central span.

3. Russia also admits that it has stopped, boarded, and inspected foreign-flagged vessels navigating to and from Ukrainian ports in the Sea of Azov. Russia fails to produce any direct evidence to support its position that its interference with navigation can be explained as routine inspection activity. Rather than making its officials (or official records) available to this Tribunal, Russia relies on the testimony of a London-based marine accident investigator, who has no personal knowledge of Russia's actions in the Black Sea, Sea of Azov, and Kerch Strait. Further, Russia does not deny that it unilaterally reflagged as Russian two Ukrainian vessels — *i.e.*, the jack-up drilling rigs ("JDRs") *Sivash* and *Tavrida* that it seized in Crimea's territorial sea.

4. With respect to the environment, Russia's Counter-Memorial confirms that it failed to undertake adequate assessments of the environmental impacts of any of its construction projects across the Kerch Strait. Russia admits that it never assessed impacts arising from its installation of a submarine fiber optic cable. Its claim to have conducted assessments and carried out mitigation measures with respect to the other projects falls apart under even minimal scrutiny. Any pre-construction environmental analysis that Russia can point to was rushed and seriously deficient when measured against established standards and was not communicated to Ukraine or other interested States. Further, Russia

confirms that only conclusory, "brief results" of monitoring activities have been made publicly available for the Kerch Strait Bridge, and it concedes that no monitoring reports were published or communicated to relevant international organizations with regard to its undersea cable and gas pipelines.

5. The Counter-Memorial seeks to justify the removal of underwater cultural heritage from the seabed, contrary to the generally accepted preference for *in situ* preservation, by claiming that the items in question would have been destroyed by the construction activity. Yet it has produced no evidence that alternatives, such as changes to the Bridge design, were appropriately considered. Meanwhile, Russia disclaims any duty to protect objects of archaeological and historical interest that have been underwater for fewer than 100 years, relying on a definition of underwater cultural heritage found in a different treaty which Russia elsewhere insists has no application in these proceedings.

6. With little defense on the merits, Russia once again relies on its claim of dominion over all 37,600 square kilometers of the Sea of Azov. It asks this Tribunal to issue a ruling that would depart from the plain text of UNCLOS, and recognize the largest area of pluri-State internal waters in the world — by a factor of twenty. Such a ruling would imperil the rights not only of Ukraine, but also of the flag States of the multitude of vessels that have historically transported millions of tons of grain, steel, and other commodities from Mariupol, Berdyansk, and the other ports along the Sea of Azov coast.

7. Russia also redoubles its efforts to enlist this Tribunal in legitimizing its brutal and unlawful war of aggression. Russia demands a ruling that the Tribunal can no longer adjudicate Ukraine's claims concerning the Sea of Azov and Kerch Strait because, according to Russia, Ukraine's territory surrounding the Sea of Azov is disputed as a result of Russia's February 2022 invasion of Ukraine and subsequent annexations of the Donetsk, Luhansk, Zaporizhzhia, and Kherson oblasts. For this Tribunal to accept this new argument, which contradicts a binding order of the International Court of Justice ("ICJ"), would undermine the credibility of the entire UNCLOS dispute resolution system. In any event, the relevant critical date to assess this Tribunal's jurisdiction over Ukraine's claims is the date of Ukraine's Notification and Statement of Claim ("Notification"), 16 September 2016. An alleged issue emerging out of Russia's illegal aggression — more than six years later — cannot retroactively defeat the Tribunal's jurisdiction.

8. Ukraine's Reply is organized as follows: Chapter Two addresses Russia's renewed jurisdictional objections, confirming that there is no obstacle to the Tribunal's

jurisdiction and that the Sea of Azov and Kerch Strait are governed by UNCLOS. Chapter Three rebuts Russia's claim that it has not hampered and interfered with transit passage and free navigation. Chapter Four discusses Russia's failure to protect the marine environment. Chapter Five demonstrates that Russia has violated its obligations to protect underwater cultural heritage. Chapter Six sets out the ways in which Russia has continued to aggravate the dispute before this Tribunal. Chapter Seven describes the relief to which Ukraine is entitled, and Chapter Eight contains Ukraine's submissions.

Chapter Two: The Tribunal Has Jurisdiction Over This Dispute

9. Russia in its Counter-Memorial carries forward its preliminary objection that the Sea of Azov and Kerch Strait are internal waters,[1] an objection that the Tribunal joined to the merits because it lacked an exclusively preliminary character.[2] Russia also offers new jurisdictional objections, namely that: (i) acts connected to Russia's war of aggression in Ukraine have given rise to a new sovereignty dispute over eastern Ukraine, such that the Tribunal no longer has jurisdiction over Ukraine's claims with regard to the Sea of Azov and Kerch Strait;[3] (ii) Ukraine continues to assert claims premised on its sovereignty over Crimea, in violation of the Tribunal's 2020 Award;[4] and (iii) Ukraine has impermissibly submitted new claims in its Revised Memorial.[5]

10. Russia's jurisdictional objections should be rejected. As explained in Section I, the Sea of Azov and Kerch Strait formed a juridical bay prior to 1991, but they lost that status upon the dissolution of the USSR. Russia's attempt to show otherwise relies on contradictory and sporadic sources, and readings of UNCLOS (and the 2003 Sea of Azov Treaty) that ignore customary international law rules of interpretation, relying instead on speculation, conjecture, and the testimony of Russian state academics. Russia's new jurisdictional and procedural objections also have no merit. As explained in Section II, there is no "change of circumstances" regarding sovereignty over eastern Ukraine, nor are Ukraine's revised claims premised on either Party's sovereignty over Crimea. Further, Ukraine has fully complied with the Tribunal's 2020 Award and its procedural directions. Simply put, Russia is out of excuses — there is no jurisdictional obstacle that prevents this Tribunal from holding Russia to account for its violations of the law of the sea.

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[1] *See* Counter-Memorial of the Russian Federation, ¶¶ 31-134.

[2] Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, ¶¶ 286-297 [hereinafter "Award on Preliminary Objections"].

[3] Counter-Memorial of the Russian Federation, ¶¶ 25-29.

[4] *Id.* ¶ 7.

[5] *Id.* ¶ 9.

I. Russia's Renewed Attempt to Exclude the Application of UNCLOS to the Sea of Azov and the Kerch Strait Fails

11. As Ukraine established in its Revised Memorial, under the USSR, the Sea of Azov and Kerch Strait constituted a single-State juridical bay.[6] After Ukraine's independence in 1991, the Sea of Azov and Kerch Strait were no longer surrounded by a single coastal State, but by two independent and equally sovereign States. Accordingly, by operation of law, those waters ceased to be a single-State juridical bay following Ukraine's independence, and the areas seaward of the Ukrainian and Russian coasts became subject to the UNCLOS regimes for the territorial sea, the contiguous zone, and the exclusive economic zone.[7]

12. Russia insists in its Counter-Memorial that the Sea of Azov and Kerch Strait are outside the jurisdiction of this Tribunal because they are part of a "historic bay" subject to rights of "historic title" or because they remained internal waters following the dissolution of the USSR.[8] As described below, Russia's attempt to assert sovereignty over the Sea of Azov and the Kerch Strait in this proceeding — whether through a claim of historic title, or by declaring those waters internal — should be rejected.

A. The Sea of Azov and Kerch Strait Are Not Part of a Historic Bay nor Subject to Historic Title

13. The Russian Federation continues to argue that, because the Sea of Azov and Kerch Strait should be considered a "historic bay" and an area subject to rights of "historic title," its declaration under Article 298(1)(a)(i) of UNCLOS excludes the Tribunal from exercising jurisdiction over Ukraine's claims concerning activities in these waters.[9] Russia is wrong. As set out below, the Sea of Azov and Kerch Strait are not a historic bay or waters subject to rights of historic title; the Parties never agreed to the existence of such a status; and Ukraine's practices concerning the Sea of Azov and Kerch Strait have not aligned with any such status.

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[6] *See* Revised Memorial of Ukraine, ¶¶ 120-126.

[7] *See id.* ¶ 61.

[8] *See* Counter-Memorial of the Russian Federation, ¶¶ 37-53.

[9] *Id.*

1. Russia and the USSR Never Acquired Historic Title Over the Sea of Azov and Kerch Strait

14. Historic title is a form of "acquisitive prescription"[10] that is established only where a State exercises rights or sovereignty over an area of water to which it otherwise would not have title.[11] Here, as Ukraine set out in its Revised Memorial, there is no evidence to support that the Russian Empire and later the Soviet Union exercised such prescriptive rights over these waters, rather than simply exercising rights consistent with their long-standing status as a single-State, juridical bay.[12]

15. Russia cites the ICJ's decision in *Gulf of Fonseca* to argue that "qualification as a juridical bay would not 'call in question or replace [...] historic status.'"[13] However, this is selective quotation. The full sentence reads: "Yet the rules and principles which normally apply to 'bays the coasts of which belong to a single State' (United Nations Convention on the Law of the Sea, Art. 10 (1)) are not necessarily appropriate to a bay which is a pluri-State bay and is also a historic bay (for the fact that the Gulf of Fonseca *would today qualify geographically* as a 'juridical' bay cannot *now* call in question or replace its historic status)."[14]

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[10] *See* Leo J. Bouchez, The Regime of Bays in International Law (1964), p. 281 (defining "historic waters" as "waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States") (**UAL-126-AM**); *see also* Coalter G. Lathrop, *Baselines* in Donald R. Rothwell et al. (eds.), The Oxford Handbook of the Law of the Sea (2015), p. 84 ("Historic bay claims are subject to customary rules of acquisitive prescription. In order for the waters of a coastal indentation to be deemed an historic bay, the coastal State must demonstrate its 'open, effective, long term, and continuous exercise of authority' over the waters of the bay, and 'affirmative evidence of acquiescence' by other States." (citing Ian Brownlie, Principles of Public International Law 157 (2003))) (**UAL-123**); *see also* George Barrie, *Historical Bays*, Comp. & Int'l L.J. of S. Afr., Vol. 6 (1973), p. 56 (explaining that historic waters involve claims "contrary to the generally applicable rules of international law") (**UAL-159**).

[11] *See* Revised Memorial of Ukraine, ¶ 122; *see also Fisheries Case (United Kingdom v. Norway)*, ICJ Judgment of 18 December 1951, p. 130 ("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.") (**UAL-124**); *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, ICJ Judgment of 11 September 1992, p. 588 (citing same) [hereinafter "*Gulf of Fonseca*"] (**UAL-58**).

[12] *See* Revised Memorial of Ukraine, ¶¶ 120-126.

[13] Counter-Memorial of the Russian Federation, ¶ 42.

[14] *Gulf of Fonseca*, ¶ 393 (emphasis added) (**UAL-58**).

16. Rather than supporting Russia's position, this parenthetical observation underscores a critical difference between the Gulf of Fonseca and the Sea of Azov: the Gulf of Fonseca did not qualify as a juridical bay under customary international law, and thus rights in it were originally obtained by prescription. In contrast, the Sea of Azov did qualify as a juridical bay under customary international law, and thus no prescriptive rights accrued. This difference results from the fact that the Gulf of Fonseca is approximately 20 miles across at its opening,[15] whereas the width of the opening of the Sea of Azov (*i.e.*, the Kerch Strait) is between approximately two and ten miles at different points.[16] The customary international law rule on juridical bays applied only to bays with small mouths, up to twelve miles across[17] — meaning that the Sea of Azov would have qualified, but the Gulf of Fonseca did not. The ICJ was commenting on the fact that more recent legal instruments — *i.e.*, the 1958 Convention on the Territorial Sea[18] and, subsequently, UNCLOS[19] — had allowed for single-State bays with wider mouths. The Court was merely observing that this subsequent change in the law did not displace the fact that title over the Gulf of Fonseca had originally been acquired by prescription.

17. The ICJ's observation is inapplicable here, where the Sea of Azov *never* had the status of a historical bay.[20] Given the narrowness of the Kerch Strait, the Sea of Azov qualified as a juridical bay even under the customary regime.[21] In other words, the Russian Empire and the Soviet Union exercised rights over the Sea of Azov that were consistent with the standard rules for bays as they stood long before the 1958 Convention — they did not accrue any form of prescriptive, historic title.[22]

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[15] *Gulf of Fonseca*, ¶¶ 382-383 (**UAL-58**).

[16] *See* Revised Memorial of Ukraine, Map 2.

[17] *See id.* ¶ 124 n.243 (citing *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**)).

[18] Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, 516 U.N.T.S. 205, Art. 7(4) (**UAL-106**).

[19] UNCLOS, Art. 10(4).

[20] Revised Memorial of Ukraine, ¶ 124.

[21] *Id.*

[22] *Id.*

18. Russia contests this point and states that "under the customary international law of the sea applicable in the decades *preceding* the 1958 Convention (and also for some time thereafter) the coastal State's jurisdiction extended to the then narrow limits of the territorial sea."[23] But Russia is wrong. It is well understood that the customary international law of juridical bays pre-dates the 1958 Convention by centuries.[24]

19. Russia next claims that "[t]he USSR had never declared its refusal of the historic title and, indeed, Soviet legal doctrine had been supporting this following the entry into force of the Geneva Convention."[25] This misses the point: because the USSR was exercising juridical title, it never accrued any prescriptive or historical rights that it could have "refused." In all events, the sources Russia relies on are unpersuasive.

20. The first of these sources is a 1958 article published by the State University of Tartu (a state university in then-Soviet-occupied Estonia), which lists the Sea of Azov as a historic bay.[26] This claim is made as part of a long, dubious list of aggressive claims to Soviet internal waters, covering the Gulf of Riga and significant areas within the northern Sea of Japan and the Arctic Ocean. In the same passage, the article dismisses claims to well-established internal waters such as the Gulf of Fonseca as mere figments of "[t]he bourgeois doctrine."[27] More telling than this polemic is the article's recognition that the "[t]he Azov Sea qualifies as an internal sea also because the width of its mouth does not exceed the double width of our territorial waters"[28] — an observation that confirms that Russia could not have acquired title by prescription over the Sea of Azov, because it was a juridical bay.

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[23] Counter-Memorial of the Russian Federation, ¶ 41 (emphasis added).

[24] *See* M. Wesley Clark, Jr., *Historic Bays and Waters: A Regime of Recent Beginnings and Continued Usage* (1994), pp. 16-22 (discussing historical State practice for defining juridical bays, including the 19th century six mile "double cannon-shot rule" — by which a State could claim as internal waters any bay which could be defended by cannon from the points of the bay mouth — to the later 10 to 12 mile standard) (**UAL-160**); *see also* D.P. O'Connell, *The International Law of the Sea*, Vol. I (1984), pp. 349-355 (describing State practice with regard to drawing closing lines for bays, including the 1839 Anglo-French Fisheries Convention in which it was agreed that "the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries should, with respect to *bays the mouth of which did not exceed ten miles in width*, be measured from a straight line *drawn from headland to headland*" (emphasis added)) (**UAL-161**).

[25] Counter-Memorial of the Russian Federation, ¶ 42.

[26] A.T. Uustal, *International Legal Regime of Territorial Waters*, Transactions of the University of Tartu, Issue 66 (1958), pp. 178-179 & nn.1-2 (**RU-305**).

[27] *Id.* n.1.

[28] *Id.* n.2.

21. Russia also cites the 1966 *Manual of International Maritime Law* published by the *Military Publishing House of the Ministry of Defense of the USSR*.[29] But once again, the reference to the Sea of Azov is presented alongside other similarly dubious claims, and is supported by the remarkable assertion that "[f]rom the perspective of international law, it makes no decisive difference whether or not other states recognise any given bay as a historic bay of a coastal state."[30] Such an assertion would hardly be necessary if the listed waters had a genuine, longstanding, and well-accepted historic status of the type recognized in the Gulf of Fonseca.

22. Russia next argues that there have been no objections from third States with regard to the status of the Sea of Azov and the Kerch Strait as historic internal waters.[31] This is untrue. As Ukraine demonstrated in its Revised Memorial, other littoral States on the Black Sea — as well as the European Union, the United States, and many other U.N. member States — have all objected to Russia's interference with third-State navigational rights.[32] These States have specifically criticized Russia's unlawful attempt to transform the Sea of Azov, in the words of the European Parliament, "into an internal lake within the Russian Federation."[33] The numerous examples cited by Ukraine in its Revised Memorial, none of which Russia acknowledges in its Counter-Memorial, demonstrate that third States have not acquiesced in any claim by Russia to an internal waters status for the Sea of Azov and Kerch Strait.

23. At most, Russia's argument in its Counter-Memorial is that third States did not protest Russia's claim of shared internal waters for the Sea of Azov and Kerch Strait until Russia started interfering with third-State navigational rights.[34] But as Ukraine explained previously, this makes sense: States are not obligated to protest abstract harms to their rights before those harms have occurred.[35] This is particularly to be expected where prior

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[29] P. D. Barabolya et al., *Manual of International Maritime Law*, Military Publishing House of the Ministry of Defense of the USSR, Moscow, 1966 (**RU-304**).

[30] *See id.* p. 216.

[31] Counter-Memorial of the Russian Federation, ¶ 43.

[32] Revised Memorial of Ukraine, ¶¶ 88-90.

[33] European Parliament, Resolution of 25 October 2018 on the Situation in the Sea of Azov (2018/2870(RSP), ¶¶ G(4)-(5) (**UA-544**).

[34] *See* Counter-Memorial of the Russian Federation, ¶ 43.

[35] Rejoinder of Ukraine on Jurisdiction (28 March 2019), ¶ 94.

public statements by Russia and Ukraine did not in fact implement an internal waters status over the Sea of Azov and Kerch Strait.[36] Once Russia began interfering with third-State navigational rights, third States promptly protested.

2. The Parties Never Agreed to Historic Title Over the Sea of Azov and Kerch Strait

24. Russia in its Counter-Memorial incorrectly argues that the historic character of the Sea of Azov and Kerch Strait was agreed to by Ukraine and the Russian Federation in the (now terminated) 2003 Sea of Azov Treaty.[37]

25. As Ukraine explained in its Revised Memorial, the 2003 Sea of Azov Treaty — which provides at Article 1, paragraph 1 that "[t]he Sea of Azov and the Kerch Strait historically constitute internal waters of the Russian Federation and Ukraine" — does not indicate that the Parties agreed that these waters are subject to historic title. Instead, Article 1, paragraph 1 records a *historical fact* as to their past status,[38] as recognized before Ukraine's independence. If the Parties had intended to provide that the Sea of Azov and Kerch Strait were at the time of signature a historic bay subject to historic title, they would have included such language in the Treaty.

26. When Russia and Ukraine executed the 2003 Sea of Azov Treaty, the Parties had fundamentally different views on the future status of the Sea of Azov.[39] Russia wanted to treat the sea as undivided, common internal waters. Ukraine was open to seeking to assert an internal waters status, but only if an agreement could be reached as to delimitation and a shared navigation regime. Executed amid a crisis, under threat that Russia would seek to

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[36] The 2003 Sea of Azov Treaty and the Joint Statement do not constitute a claim for a *present* internal waters status for these bodies of water, but rather refer to the past or historical status of the waters. *See* Revised Memorial of Ukraine, ¶¶ 110-111; *see infra* Chapter Two, Section I.A.2. Only the Joint Statement — which stated that "historically the Sea of Azov and the Strait of Kerch are inland waters of Ukraine and Russia" — was circulated officially to all United Nations members. *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, Law of the Sea Bulletin No. 54 (2004), p. 131 (**UA-530**).

[37] *See* Counter-Memorial of the Russian Federation, ¶¶ 44-50. In the face of continued aggression by the Russian Federation, on 24 February 2023 the Verkhovna Rada of Ukraine voted to denounce all treaties with Russia concerning the Sea of Azov, including the 2003 Sea of Azov Treaty. *See* Tetyana Lozovenko, *Rada Terminated All Agreements with Russia on the Sea of Azov*, Ukrainska Pravda (24 February 2023) (**UA-796**).

[38] Revised Memorial of Ukraine, ¶ 110.

[39] *Id.* ¶¶ 109-110.

annex Tuzla Island,[40] the Treaty was intended to preserve each party's respective position for further negotiations. It was never intended to serve as a final, operative agreement for regulating the Parties' activities in the Sea of Azov and Kerch Strait. In this regard, it is notable that the Treaty contains only five brief articles, each of which are framed in general terms, and contemplates "new" agreements and future "consultations and negotiations."[41] Interpreting Article 1, paragraph 1 as simply recording a historical fact regarding those waters is consistent with the Treaty's limited object and purpose.

27. To arrive at a contrary conclusion, Russia offers an abstract, semantic analysis of the Treaty tendered by [redacted] who works for a Russian government university.[42] But Article 31 of the Vienna Convention on the Law of Treaties (the "Vienna Convention") does not call for semantic linguistic analysis — its focus is on "ordinary meaning," read in "context" and "in the light of [the treaty's] object and purpose."[43] Russia cites nothing in the Vienna Convention, its *travaux préparatoires*, or any other source that supports the use of linguistics experts to determine the "ordinary meaning" of the text.[44] Its attempt to prioritize semantic linguistic analysis circumvents the Tribunal's role and attempts to replace the Tribunal's interpretive conclusions with those of a linguistics expert with no background in international law or treaty interpretation.[45]

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

[41] *See* Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait (24 December 2003), Arts. 3, 4 (**UA-19**).

[42] Counter-Memorial of the Russian Federation, ¶ 45 (arguing, among other points, that the placement of, "[t]he adverb 'historically', after the verb 'are', means that the present status (specified by the present tense term 'are') of these waters as 'internal' finds its origin in history").

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

[44] There is no mention of such semantic analysis in Article 27 of the 1966 International Law Commission Draft Articles on the Law of Treaties (the precursor to Article 31 of the Vienna Convention), nor in the 1956 resolution of the Institute of International Law addressing principles of treaty interpretation, nor even in the publications of Sir Gerald Fitzmaurice, the former Special Rapporteur on the law of treaties, whose scholarship informed the Draft Articles. *See Draft Articles on the Law of Treaties with Commentaries*, International Law Commission, Vol. II (1966), pp. 217-218, 220-222 (**UAL-162-AM**); *Annuaire de Institute de droit International*, Vol. 46 (1956), pp. 358-359 (**UAL-163**); Hugh Thirlway, *Treaty Interpretation and Other Treaty Points, Division A: Treaty Interpretation, Fitzmaurice's Principles,* The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence Volume II (2013) (**UAL-215**).

[45] *See Draft Articles on the Law of Treaties with Commentaries*, International Law Commission, Vol. II (1966), p. 218 (noting that "their application [of a certain method of interpretation] is not automatic but depends on the *conviction of the interpreter* that it is appropriate in the particular circumstances of the case" (emphasis added)) (**UAL-162**).

28. In any event, linguistics analysis does not support Russia's position. [redacted], has analyzed Article 1, paragraph 1 of the 2003 Sea of Azov Treaty, and explains that the sentence under consideration records a historical fact as to the *past status* of the Sea of Azov and Kerch Strait.[46] As [redacted] notes, the contention of Russia's expert that the copular verb "*yavlyatsya*" denotes a situation which is "taking place at present" is linguistically unsubstantiated.[47] [redacted] further explains that [redacted] conclusion regarding the meaning of the word "historically" is also wrong[48] — it does not mean "[i]n the course of historical development."[49] Rather, the word "historically" indicates that Article 1, paragraph 1 of the Sea of Azov Treaty makes a claim about the *historical* status of the Sea of Azov and the Kerch Strait, rather than their present status.[50]

29. This is easily demonstrated by reference to a semantically analogous sentence: "The waters of the Black Sea are historically/historically constitute the internal waters of Türkiye."[51] As in Article 1 paragraph 1 of the Sea of Azov Treaty, the use of the adverb "historically" in this sentence does not imply that the waters of the Black Sea are currently considered Türkiye's internal waters, only that historically they have been so considered.[52] [redacted] concludes that determining whether the Sea of Azov and Kerch Strait (or, by analogy, the Black Sea) are currently internal waters of the Russian Federation and Ukraine (or by analogy, of Türkiye) is outside the scope of linguistics analysis.

30. Russia next argues that the reference to the Sea of Azov and Kerch Strait as historically constituting the internal waters of "the Russian Federation and Ukraine" cannot refer to the past, since in the past Ukraine and the Russian Federation were the Russian Soviet Federative Socialist Republic (the "Russian SFSR") and the Ukrainian Soviet Socialist

[46] *See* Expert Report of [redacted] (23 March 2023) ("[redacted] Report"), ¶ 11.

[47] *See* [redacted] Report, ¶¶ 16-21.

[48] *See id.* ¶¶ 22-27.

[49] *See id.* ¶ 31. As [redacted] explains, [redacted] erroneously arrives at this conclusion by analyzing the meaning of the adverb "historically" outside the context of the sentence itself. *See id.* ¶ 23.

[50] *See id.* ¶ 36.

[51] *Id.* ¶ 34.

[52] *See* [redacted] Report, ¶ 35.

Republic (the "Ukrainian SSR")."[53] This argument is pure speculation — and it is incorrect. It is entirely natural for the Parties to have opted to use the present-day titles of their respective States, even when recording a historical fact.[54]

31. Russia also argues that interpreting Article 1, paragraph 1 as stating a historical fact would deny the provision any *effet utile*.[55] But the doctrine of "effet utile" has relevance with respect to normative provisions, while Article 1, paragraph 1, contains nothing suggesting that it creates right or obligations for the Parties. The intended purpose of Article 1, as noted, was simply to record a basis for a potential future internal waters claim, to the extent the question of delimitation was eventually resolved.

32. Russia states that if the Sea of Azov and Kerch Strait were not considered historic internal waters, then the provisions on third-State navigation in the 2003 Sea of Azov Treaty would contravene UNCLOS.[56] Russia's response again ignores the purpose of the Treaty, which was to provide a framework for further discussions between the Parties, including as to the issue of third-State navigation.[57] Consistent with this purpose, Article 2 of the Treaty notably preserves the most essential of third-State navigational rights — *i.e.*, the right of commercial vessels to transit to and from the ports in the Sea of Azov.[58]

33. The intention and effect of the Treaty's provision on third-State warships, in contrast, is ambiguous at best. It does not purport to directly bind or restrict the navigation of third-State warships (nor could it), and at most it establishes that Ukraine and Russia

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[53] Counter-Memorial of the Russian Federation, ¶ 46.

[54] For example, in 2022, as the United Kingdom and the Portuguese Republic approached "the 650th anniversary of the Anglo-Portuguese Treaty signed at Tagilde," the two States signed a joint declaration to "celebrate the deep historical connections that bind our two countries." *See* UK–Portugal Joint Declaration on Bilateral Cooperation, p. 1 (13 June 2022) (**UA-797**). Nowhere in the joint declaration is there text clarifying that the 1373 Anglo-Portuguese Treaty was signed by what was then the "Kingdom of England" and the "Kingdom of Portugal."

[55] Counter-Memorial of the Russian Federation, ¶ 47.

[56] *Id.* ¶¶ 49-50.

[57] Revised Memorial of Ukraine, ¶¶ 110-113.

[58] 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) ("Trade vessels under the flags of third states may enter the Sea of Azov and pass through the Kerch Strait if they are bound for or returning from a Russian or Ukrainian port.") (**UA-19**).

should not facilitate port visits by third-State governmental vessels absent the consent of the other State.[59]

34. Ultimately, under Article 3 of the Treaty, the precise regime "of shipping, including the regulation thereof and navigational-hydrographic support" was left for "the implementation of [other] existing agreements and the entering into of new ones as appropriate."[60]

35. If Russia was seeking a clear declaration that third-State vessels could not enter the Sea of Azov absent consent of the littoral States, that desire is not reflected in the text. That result is all the more notable given that Ukraine was focused on seeking to defuse a crisis that had placed its own territory and security under threat, not on defending the navigational rights of third-State vessels. The rights of third States to navigate in the Sea of Azov were guaranteed by UNCLOS, and did not need to be spelled out in a bilateral agreement between Ukraine and Russia.

3. Ukraine Never Recognized the Sea of Azov as a Historic Bay

36. Separate from its failed attempt to establish the Parties' agreement, Russia argues again that Ukraine implicitly recognized the historic bay character of the Sea of Azov when, in its Article 298(1)(a) declaration, Ukraine excluded from compulsory jurisdiction disputes concerning "historic bays or titles."[61] As Ukraine explained previously, its declaration simply paraphrases Article 298(1)(a)(i), which encompasses both "disputes relating to sea boundary delimitations" and "disputes involving historic bays or titles[.]"[62] Russia in its Counter-Memorial claims that Ukraine's position is a "mere affirmation without

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[59] 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(3) ("Military ships and other government vessels of third states that are used for non-commercial purposes may enter the Sea of Azov and pass through the Kerch Strait if they are making a visit or business call to a port of one of the Parties at its invitation or with its permission, approved by the other Party.") (**UA-19**).

[60] 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. 3 (**UA-19**).

[61] Counter-Memorial of the Russian Federation, ¶ 51.

[62] Written Observations on Jurisdiction, ¶ 96. Article 298(1)(a)-(b) refers to: "disputes concerning the interpretation or application of articles 15, 74 and 83 [i] *relating to sea boundary delimitations*, or those [ii] *involving historic bays or titles* . . . [and] disputes [iii] *concerning military activities*." UNCLOS, Art. 298 (emphasis added). Ukraine's declaration upon ratification tracks this language, referring to: "disputes [i] *relating to sea boundary delimitations*, disputes [ii] *involving historic bays or titles*, and disputes [iii] *concerning military activities*." Declaration of Ukraine Upon Ratification of UNCLOS (26 July 1999) (emphasis added) (**UA-8**).

support,"[63] but it is again Russia that fails to offer any evidence to support the conclusion that Ukraine's declaration applied to the Sea of Azov. Indeed, as Ukraine demonstrated in its Revised Memorial and explains below in Section I.B.3 of this Chapter, Ukraine's practice in the Sea of Azov subsequent to its Article 298(1)(a) declaration was inconsistent with recognizing those waters as subject to a claim of historic title.[64] In the absence of any contrary evidence, Ukraine's decision — along with numerous other States[65] — to make a general declaration paraphrasing the language of Article 298(1)(a)(i) cannot be taken as evidence that Ukraine in July 1999 intended to acknowledge a specific legal status as to the Sea of Azov and Kerch Strait.

B. The Sea of Azov and Kerch Strait Did Not Remain Internal Waters Post-Dissolution of the USSR

37. As Ukraine explained in its Revised Memorial,[66] following the dissolution of the Soviet Union and Ukraine's independence, the Sea of Azov and Kerch Strait were no longer surrounded by a single coastal State, but two. As a result, these waters ceased to be a single-State juridical bay, and the areas seaward of the Ukrainian and Russian baselines became subject to the general rules on jurisdiction of the international law of the sea. Russia argues in its Counter-Memorial that when the USSR dissolved, the Sea of Azov and the Kerch Strait "remained internal waters" "because they had always enjoyed the regime of the internal waters under the sovereignty of their riparian State."[67] According to Russia, "the fact that the riparian State was replaced by two riparian States, while bringing the Sea of Azov out of the scope of the provisions on juridical bays, cannot alter the status of the areas."[68] Russia's arguments fail for two independent reasons. First, Russia's position

[63] Counter-Memorial of the Russian Federation, ¶ 51.

[64] Revised Memorial of Ukraine, Chapter Five, Section IV.C.

[65] Algeria, Angola, Congo, Greece, Malaysia, Mexico, Montenegro, Singapore, Spain, and Trinidad and Tobago all made a declaration pursuant to Article 298(1)(a)(i) excluding from compulsory jurisdiction disputes concerning "historic bays or titles." *See* Declarations and Reservations Upon Ratification, Formal Confirmation, Accession, or Succession of UNCLOS (**UA-08**). None of these States appear to have claimed a historic bay.

[66] Revised Memorial of Ukraine, ¶ 61.

[67] Counter-Memorial of the Russian Federation, ¶ 56.

[68] *Id.*

violates the plain terms of UNCLOS. Second, Russia fails to demonstrate that the three criteria routinely used for recognition of a pluri-State bay are met here.[69]

1. Russia Cannot Claim or Exercise Sovereignty Over the Sea of Azov Without Violating UNCLOS

38. Article 293(1) specifies that the Tribunal is bound to "apply this Convention," and may not consider agreements or rules that are "incompatible with this Convention."[70] As Ukraine demonstrated in its Revised Memorial, UNCLOS prevents Russia from claiming sovereignty over Ukraine's exclusive economic zone in the Sea of Azov.[71]

39. Any such claim would contradict Article 89, which provides that "no State may validly purport to subject any part of the high seas to its sovereignty."[72] Article 89 is applicable in the exclusive economic zone by virtue of Article 58, paragraph 2, which provides that "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."[73] The Virginia Commentary confirms that "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."[74] Instead, per Article 56, coastal States enjoy "sovereign rights" and "jurisdiction" in their exclusive economic zones, to the extent specifically prescribed in the Convention.

40. Russia fails to engage with the actual language of these articles, and its reading again departs from fundamental rules of treaty interpretation under the Vienna Convention. Russia's argument depends on the circular assumption that Articles 56, 58, 86, and 89 are irrelevant to the analysis of the legal status of the Sea of Azov because the dissolution of the USSR could have had no effect on such status. But this is precisely the

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[69] Russia also argues that a dispute over the *existence* of internal waters is a sovereignty dispute that is outside the jurisdiction of this Tribunal. *See* Counter-Memorial of the Russian Federation, ¶ 138. But, as recognized by the Tribunal in *South China Sea*, a dispute over the legal categorization of a geographic feature is not a dispute concerning sovereignty over the feature. *See South China Sea, South China Sea Arbitration (Philippines v. China)*, UNCLOS/PCA Case No. 2013-19, Award on Jurisdiction and Admissibility of 29 October 2015, ¶¶ 398-400 (**UAL-3**).

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

[71] Revised Memorial of Ukraine, ¶¶ 72-79.

[72] UNCLOS, Art. 89.

[73] UNCLOS, Art. 58(2).

[74] Virginia Commentary, Art. 89 (**UAL-121**).

question that the Tribunal is called upon to answer. Russia's preferred result cannot simply be assumed. The same assumption underlies Russia's argument that no third-State rights are prejudiced by treating the Sea of Azov and Kerch Strait as internal waters, as discussed further below.

41. Instead of applying Russia's assumption, the Tribunal is called upon to "apply this Convention"[75] to determine the status of the Sea of Azov and Kerch Strait in light of the dissolution of the USSR. No provision of the Convention categorizes those waters as internal — Russia does not claim that the waters fall within Articles 7, 8, 9, 10, 11, or 50, which collectively define the types of internal waters recognized under the Convention. To the contrary, Russia admits that the Convention does not contemplate the existence of pluri-State internal bays.[76]

42. Russia claims that the conclusion to be drawn from the absence of any recognition of pluri-State internal bays in the Convention is that such waters are not regulated by the Convention because they are internal waters under the sovereignty of the coastal States.[77] However, Russia cites no legal support for this assertion, and its argument — which contravenes the Convention's object and purpose "to settle . . . *all issues* relating to the law of the sea"[78] — ignores that six other categories of internal waters are specifically defined or discussed in UNCLOS.[79] The omission of any reference to pluri-State internal

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[75] 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.").

[76] Counter-Memorial of the Russian Federation, ¶ 66.

[77] *Id.* Russia also maintains that disputes concerning internal waters are not disputes concerning the interpretation or application of UNCLOS, *see* Counter-Memorial of the Russian Federation, ¶¶ 121-134, a proposition that the Tribunal previously characterized as "rather sweeping" and unsupported. *See* Award on Preliminary Objections, ¶ 294. Contrary to Russia's position, there are a number of UNCLOS provisions that contribute to a legal regime governing internal waters. *See, e.g.*, UNCLOS, Arts. 34 and 35 (recognizing 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). Additionally, certain UNCLOS provisions apply to all maritime areas, including internal waters. Even if the Sea of Azov and Kerch Strait were internal waters (which they are not), those waters would still be governed by UNCLOS in important respects. *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**).

[78] UNCLOS, Preamble (emphasis added).

[79] *See* UNCLOS, Arts. 8-11, 15, 50, 298(1)(a)(i) (discussing, *inter alia*, mouths of rivers, bays, and ports).

waters does not suggest that such bays somehow exist apart from and without regard to the Convention; rather, it indicates that no such specific juridical status exists, and that pluri-State bays can only be recognized in cases involving historic title.[80]

43. Finally, as support for its position, Russia cites a statement by Jennings and Watts in the 1992 Edition of *Oppenheim's International Law* that "[i]t would seem anomalous if the coastal states of a pluristatal bay should . . . be supposed jointly to enjoy markedly inferior powers of jurisdiction and control over the waters of their bay than might be enjoyed by the littoral state of a single-state bay."[81] Russia's reliance on Jennings and Watts is misplaced. First, Jennings and Watts did not appear to contemplate that a pluri-State bay would constitute internal waters, since they anticipated that access to such a bay would be governed by UNCLOS Article 45, which applies to passage in straits connecting the high seas and a territorial sea (not an area of internal waters).[82] Second, Jennings and Watts' statement is, as they expressly acknowledge, inconsistent with the position in prior editions of *Oppenheim's*.[83] Third, the statement is sourced to no other text and no example of practice (other than the Gulf of Fonseca which, as the authors acknowledged, is unique because of its historical status).[84]

2. Pluri-State Internal Waters Have Been Recognized Only in Exceptional Circumstances Where Three Criteria Are Met, and Russia Has Not Demonstrated That Those Criteria Are Met Here

44. As Ukraine demonstrated in its Revised Memorial, even prior to UNCLOS it was long recognized that a sea surrounded by more than one coastal State generally cannot be claimed as internal waters. Previously cited statements by Professor Yehuda Blum and Sir Gerald Fitzmaurice support this observation and are reflective of State practice.

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[80] Indeed, the Court in *Gulf of Fonseca* recognized precisely this point, finding that "a pluri-state bay [is] a kind of bay for which there are notoriously no agreed and codified general rules of the kind so well established for single-State bays." *Gulf of Fonseca*, ¶ 384 (**UAL-58**).

[81] Counter-Memorial of the Russian Federation, ¶ 57 (citing R.Y. Jennings and A. Watts (eds.), *Oppenheim's International Law, Volume I Peace* (1992), pp. 632-633 (**RUL-18**)).

[82] R.Y. Jennings and A. Watts (eds.), *Oppenheim's International Law, Volume I Peace* (1992), p. 633 (**RUL-18**).

[83] *Id.*, p. 632 (noting that "[f]ormer editions of the present volume took the view that 'all gulfs and bays enclosed by the land of more than one littoral State, however narrow their entrance may be, are . . . parts of the open sea, the marginal belt inside the gulfs and bays excepted").

[84] *Id.*

45. Russia in its Counter-Memorial acknowledges that Blum and Fitzmaurice are "respected scholars,"[85] but takes issue with Ukraine's reliance on them.[86] Contrary to Russia's assertion however, Fitzmaurice's statement 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 among themselves"[87] is perfectly applicable to the Sea of Azov. Fitzmaurice does not distinguish between the case of two longstanding riparian States drawing a closing line across a bay and two newly independent riparian States doing the same.[88]

46. Russia criticizes Ukraine for quoting a statement from another author that was adopted by Professor Blum.[89] But Professor Blum makes the same point — that pluri-State bays generally cannot be claimed as internal waters — in his own words as well, going so far as to criticize the *Gulf of Fonseca* decision for recognizing an exception to this general position.[90] Moreover, despite Russia's contention otherwise, this conclusion is in no way contradicted by Professor Blum's separate observation that "[t]he change of the character of such water areas from a closed sea into essentially high seas is, however, generally not brought about automatically."[91] Professor Blum was referring to the fact that, prior to UNCLOS, treaties were negotiated among littoral and user states to govern the specific

[85] Counter-Memorial of the Russian Federation, ¶ 69.

[86] *Id.* ¶¶ 70-71.

[87] *See* 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*, Int'l & Comparative L.Q., Vol. 8 (Jan. 1959), p. 82 (**UAL-57**).

[88] *See id.* pp. 82-83 ("In all other cases . . . each State bordering on the bay simply has the belt of territorial sea fronting its portion of the coast of the bay; and the rest of the bay is high seas. It 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." (emphasis added)).

[89] Counter-Memorial of the Russian Federation, ¶ 70.

[90] *See* Yehuda Z. Blum, Historic Titles in International Law (1965), p. 279 ("The decision reached in the *Gulf of Fonseca* case has, however, met with severe criticism and is still regarded as a sort of anomaly in international law, which does not reflect the general rule [regarding formerly single-state bays].") (**UAL-56**).

[91] *See id.*

regime of navigation in formerly internal waters[92] — an arrangement that is no longer necessary now that the Convention is in force.

47. In its Revised Memorial, Ukraine explained that a limited exception to the general rule that a sea surrounded by more than one State cannot be claimed as internal waters has been recognized only in bays that have three characteristics in common: first, they are too small to contain areas of high seas or exclusive economic zones; second, the exercise of sovereignty over them does not prejudice third States; and third, all littoral States have affirmatively agreed to an internal waters status.[93] Russia in its Counter-Memorial argues that these three criteria "are not necessary under international law,"[94] but Russia identifies no State practice, and no other legal basis, for the recognition of pluri-State internal waters where the three conditions are not met.

48. First, with regard to the size of the waters, Russia does not dispute that pluri-State internal waters have been recognized only in bodies of water covering what would otherwise constitute territorial sea, and that the Sea of Azov — which encompasses 36,700 square kilometers of sea — is categorically different from recognized pluri-State bays in this regard.[95] Russia offers no examples of pluri-State internal waters encompassing areas that would otherwise qualify as exclusive economic zones; as described above, such a result would violate the plain text of UNCLOS.[96]

49. Second, with regard to the requirement that pluri-State status may not interfere with the rights of third States, Russia does not dispute that in each recognized case of pluri-State internal waters there was no prejudice to third States. Russia's argument that third States would not be prejudiced if the Sea of Azov was recognized as a pluri-State bay incorrectly draws a parallel with the rights third States had under the juridical bay regime existing *prior to* the dissolution of the USSR. Russia's contention that there would be no interference with the rights of third States thus ignores the navigational and other rights

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[92] *Id.* (discussing the example of the 1774 Treaty of Kuchuk-Kainarji between Russia and Turkey which, after Russia secured a foothold on the Black Sea, recognized Russia as a littoral State and granted Russia rights of navigation in what had previously been "a Turkish lake").

[93] Revised Memorial of Ukraine, ¶ 81.

[94] Counter-Memorial of the Russian Federation ¶¶ 68-85.

[95] For example, the Gulf of Fonseca is 1,800 square kilometers or approximately 20 times smaller than the Sea of Azov, and the Bay of Piran is approximately 19 square kilometers or approximately 2,000 times smaller. *See* Revised Memorial of Ukraine, ¶ 83.

[96] *See supra* Chapter Two, Section I.B.1.

third States have in an international strait, exclusive economic zone, and the territorial sea,[97] which, as described above, are the governing regimes established by UNCLOS in the Sea of Azov and Kerch Strait in light of the dissolution of the USSR.[98] Russia does not contest that, absent a special internal waters regime, the Sea of Azov would contain areas of exclusive economic zone and territorial sea and the Kerch Strait would be an international strait.

50. Third, Russia argues that the requirement that States must affirmatively agree to a pluri-State internal waters status following the dissolution of a State surrounding a single-State bay is "not supported by the cases and element of practice Ukraine relies upon."[99] While Russia concedes that the ICJ in *Gulf of Fonseca* recognized that all States bordering the bay "acted jointly" to claim historic title, Russia argues that "joint action" is different from "affirmative agreement."[100] This is nonsensical, and inconsistent with the ICJ's reasoning.

51. The ICJ's reference to States "act[ing] jointly" in *Gulf of Fonseca* derives from a study prepared by the United Nations Secretariat following the 1958 Conference on the Law of the Sea.[101] In that study, the Secretariat noted that historic claims to a bay bordered by two or more States "might be envisaged in two different circumstances . . . [t]he claim may be *made jointly by all the bordering States* or it may be presented by one or more, but not all of these States."[102] In this regard, the Secretariat noted (as quoted by the ICJ in *Gulf of Fonseca*), "[i]f 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."[103] Notwithstanding Russia's disquisition that "[t]he meeting of minds that is the necessary prerequisite of an agreement (even a tacit

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[97] Counter-Memorial of the Russian Federation, ¶ 78.

[98] *See supra* Chapter Two, Section I.B.

[99] Counter-Memorial of the Russian Federation, ¶ 80.

[100] *Id.* ¶ 82.

[101] *See Gulf of Fonseca*, ¶ 394 (citing 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. 21, ¶ 147 (**UA-591**)) (**UAL-58**).

[102] 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. 21, ¶ 147 (emphasis added) (**UA-591**).

[103] *Id.* (quoted by the ICJ in *Gulf of Fonseca*, ¶ 394) (emphasis added).

agreement) may be evidenced by joint action, but is not a necessary aspect of it,"[104] multiple States cannot act to jointly present a claim of historic title without agreeing to do so.

52. With regard to the Bay of Piran and the 2009 *Croatia/Slovenia* arbitration, as Ukraine explained in its Revised Memorial, the Parties' arbitration agreement — which disallowed the tribunal from considering any unilateral actions by either State post-dating the dissolution of Yugoslavia[105] — in effect constituted an agreement between the two States to continue the pre-dissolution legal regime.[106] Russia emphasizes that the *Croatia/Slovenia* Tribunal did not expressly "rely on" this provision in its decision,[107] but that is beside the point — it could, for example, simply reflect that the meaning of the provision was not in dispute or not a focus of the Parties' briefing. The fundamental fact remains that Russia cannot rely on the Bay of Piran as relevant State practice without accounting for the fact (which Russia does not deny) that both States involved had reached an affirmative agreement that preserved the *status quo ante*, including the internal waters status of the Bay of Piran.

53. Finally, Russia does not dispute that Estonia rejected, and thus effectively vetoed, Latvia's proposal to declare the Gulf of Riga a historic bay after the dissolution of the Soviet Union, and that the Gulf of Riga now has the status of international waters.[108]

54. Combined, these examples demonstrate that States must affirmatively agree to a pluri-State internal waters status following the dissolution of a State surrounding a single-State bay, which Ukraine did not do here. There is not a single example of pluri-State internal waters being established without such agreement, and here, no agreement to establish pluri-State internal waters exists.

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[104] Counter-Memorial of the Russian Federation, ¶ 104.

[105] 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, prejudge the award.") (**UAL-61**).

[106] Revised Memorial of Ukraine, ¶ 95.

[107] Counter-Memorial of the Russian Federation, ¶ 83.

[108] Revised Memorial of Ukraine, ¶ 94.

55. In its search to identify such an agreement, Russia again cites the 2003 Sea of Azov Treaty.[109] But, as shown above in Section I.A of this Chapter, that Treaty does not assist Russia's argument.[110]

56. Russia also turns to another source already dealt with in Ukraine's prior submissions, the 2003 State Border Treaty.[111] Article 5 of the State Border Treaty provides that "[n]othing 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."[112] Russia says that this language is evidence that the internal waters status was "already a shared assumption of the Parties,"[113] but this does not make sense. As Ukraine explained in its Revised Memorial, the Treaty's language reflects that Ukraine and Russia had distinct, disparate *positions* as to how a future internal waters status might work, thus confirming that the two States had yet to reach an agreement.[114]

57. Russia next relies on two new exhibits, which are similarly unhelpful to its case. First, it cites a 2001 letter from former Ukrainian President Leonid Kuchma to Russian President Vladimir Putin.[115] Notably, however, far from confirming any agreement, the letter reinforces that, while Ukraine was open to considering the assertion of an internal waters status for the Sea of Azov and Kerch Strait, its agreement was conditioned on a final settlement that included "delimitation of the territories of the two States in the Sea of Azov and the Kerch Strait."[116] Russia opposed delimitation, because of its concern that delimitation would "lead to acquiring of the status of international waters by the Sea of Azov"[117] — a concern that shows that even Russia recognized that the post-Soviet legal status

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[109] Counter-Memorial of the Russian Federation, ¶¶ 98-102.

[110] *See supra* Chapter Two, Section I.A.2.

[111] Counter-Memorial of the Russian Federation, ¶ 96.

[112] Treaty between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, 28 January 2003, Article 5 (**RU-19**).

[113] Counter-Memorial of the Russian Federation, ¶ 96.

[114] Revised Memorial of Ukraine, ¶ 108.

[115] Counter-Memorial of the Russian Federation, ¶ 92.

[116] Letter from the President of Ukraine Leonid Kuchma to the President of the Russian Federation Vladimir Putin, transmitted by *Note Verbale of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation*, No. 5211/13-011-268-2001 (13 August 2001), p. 2 (**RU-70**).

[117] *Id.*

of the Sea of Azov was not yet fixed. No final resolution was ever reached. Most significantly, the letter expresses the presidents' mutual "concern" regarding the Parties' lack of progress toward such agreement.[118]

58. Second, Russia presents as supposed evidence of an agreement a "draft treaty" from 2004 that defines the term "State Border" as a "line, separating the State territories (waters, seabed, subsoil and airspace) of the Contracting Parties in the Sea of Azov."[119] But Russia itself characterizes this as evidence of a merely "*suggested* State border"[120] — and, in any event, the Parties never agreed to the proposed treaty. Ukraine explained previously that any statements, or even provisional agreements, offered during negotiations cannot be treated as a binding agreement.[121] Russia fails to engage with this point and does not offer any authority or support that suggests otherwise. Thus this draft treaty, like the rest of Russia's evidence, fails to demonstrate the existence of an agreement to treat the Sea of Azov and Kerch Strait as common internal waters.

59. The conclusion to be drawn is clear. Pluri-State internal waters have been recognized only in exceptional circumstances — and in every case, all three of the factors cited by Ukraine have been met. Here, not one has been satisfied. The Sea of Azov and the Kerch Strait are not bodies of internal waters, and are instead subject to the normal rules of UNCLOS, which brings them under the jurisdiction of this Tribunal.

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[118] *Id.* ("I fully share your *concern* about the progress of the negotiation process on the issue." (emphasis added)).

[119] Draft Treaty between Ukraine and the Russian Federation on Ukraine-Russia State Border in the Sea of Azov, transmitted by *Note Verbale of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation*, No. 72/22-410-831 (16 February 2004), p. 1 (**RU-76**).

[120] Counter-Memorial of the Russian Federation, ¶ 103 (emphasis added).

[121] Revised Memorial of Ukraine, ¶ 113 (citing *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**)).

3. Ukraine's Practice in the Sea of Azov Is Not Consistent with an Internal Waters Status

60. As Ukraine demonstrated in its Revised Memorial, its conduct in the Sea of Azov is not consistent with an internal waters status.[122] Shortly after Ukraine's independence in 1991, it took various steps that reflected the changed status of the Sea of Azov as a result of the dissolution of the Soviet Union and the emergence of two coastal States. Ukraine's actions made clear that it considered these waters as encompassing its territorial sea and exclusive economic zone.

61. As a prime example, in the immediate aftermath of the dissolution of the USSR, both Ukraine and Russia invoked UNCLOS in an early post-Soviet fisheries agreement governing the Sea of Azov.[123] Russia contests the relevance of this agreement, but it cannot dispute that in the preamble Ukraine and Russia agreed to "[t]ake into account the UN Convention on the Law of the Sea,"[124] and that the Parties made reference to "the *relevant* articles of the UN Convention on the Law of the Sea" relating to the preservation and management of fish stocks.[125] Russia cannot explain why the Parties would have specifically identified their desire to "take into account" UNCLOS, and invoked "*relevant articles*" of UNCLOS,[126] if they thought that UNCLOS did not apply to one of the two bodies of water to which the agreement applied (*i.e.*, the Sea of Azov).

62. Similarly, the domestic legal regime Ukraine developed following its independence treated the Sea of Azov as containing its territorial sea and exclusive economic zone. In 1991, Ukraine passed the Law of Ukraine on the State Border of Ukraine, which established Ukraine's 12-mile territorial sea.[127] The law included a definition of internal waters that mirrored the UNCLOS regime for internal waters,[128] and did not provide for the possibility of pluri-State internal waters in the Sea of Azov or elsewhere.

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[122] Revised Memorial of Ukraine, ¶ 94.

[123] Counter-Memorial of the Russian Federation, ¶ 117.

[124] Agreement between the Government of Ukraine and the Government of the Russian Federation in the Fisheries Sector (24 September 1992), Preamble (**UA-70**).

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

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

[127] Law of Ukraine On the State Border of 4 November 1991, Art. 5 (**UA-602**).

[128] *Id.* 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

63. Later, in 1995, Ukraine passed the Law of Ukraine on the Exclusive (Marine) Economic Zone, which defined its exclusive economic zone as no greater than "200 nautical miles measured from the same baselines as the territorial sea of Ukraine,"[129] thus establishing an exclusive economic zone in the Sea of Azov.[130]

64. Russia admits that Ukraine's domestic laws "indeed mirror[] the UNCLOS provisions."[131] However, Russia refers to these laws as being "of basic nature and general application"[132] and claims "it is impossible to infer from their mere existence that they specifically cover the Sea of Azov and the Kerch Strait or exclude the possibility of their internal waters status."[133] Russia has it backwards: in adopting an UNCLOS-consistent set of maritime laws, with no specific exclusion for the Sea of Azov, Ukraine demonstrated that it expected UNCLOS to apply to the Sea of Azov as it would to any other sea.

65. Ukraine's actions on the international stage — including its ratification of UNCLOS without any reservation covering the Sea of Azov,[134] and its deposit of baselines for the Sea of Azov in November 1992[135] — were also consistent with its treatment of the Sea of Azov as containing its territorial sea and exclusive economic zone.

66. Russia's Counter-Memorial fails to engage with the absence of a Ukrainian reservation covering the Sea of Azov, and also fails to engage with Ukraine's observation that Russia similarly made no such reservation.[136]

67. With respect to the deposit of baselines, in its Counter-Memorial Russia falls back on its argument that the baselines "were communicated to Russia only in 2002,"[137] but

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lane does not exceed 24 nautical miles," and "waters of gulfs, bays, estuaries and lagoons, seas and straits that historically belong to Ukraine").

[129] Law of Ukraine "On the Exclusive (Maritime) Economic Zone of Ukraine," No. 162/95-VR (16 May 1995), Art. 2 (**UA-6**).

[130] Revised Memorial of Ukraine, ¶ 101.

[131] Counter-Memorial of the Russian Federation, ¶ 111.

[132] *Id.*

[133] *Id.*

[134] Revised Memorial of Ukraine, ¶ 102.

[135] *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**); 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**).

[136] Revised Memorial of Ukraine, ¶ 102.

[137] Counter-Memorial of the Russian Federation, ¶ 88.

even if true, this would not defeat the relevance of the baselines as evidence of Ukrainian practice. In any event, the record shows that Russia had multiple opportunities to respond to Ukraine's baselines: in 1992, when the baselines were deposited at the United Nations; in 1998, when the United Nations published Ukraine's baselines in the Law of the Sea Bulletin; and then, as Russia acknowledges, in 2002, when Ukraine reiterated its baselines during negotiations over the Sea of Azov and Kerch Strait.[138] Not once did Russia object to Ukraine's baselines, which were inconsistent with a supposed shared understanding of an internal waters status for the Sea of Azov and Kerch Strait.

68. Despite these clear examples of Ukraine treating the Sea of Azov as containing its territorial sea and exclusive economic zone following its independence, Russia argues that the Parties' agreement that the Sea of Azov and the Kerch Strait remained internal waters after the dissolution of the USSR is "evident" by Ukraine's practice.[139]

69. Regarding Russia's contention that a 2015 Notice to Air Missions ("NOTAM") issued by the Ukrainian State Aviation Service suggests the absence of an exclusive economic zone in the Sea of Azov,[140] this is not the case. As explained in a letter submitted by Ukraine's State Aviation Service, the relevant NOTAM (No. A2594/15) was grounded in Ukraine's responsibilities for the safe administration of air travel within the Dnipro and Simferopol Flight Information Regions.[141] Specifically, the NOTAM was necessary as a safety measure under Annex 11[142] and Article 12 of the Convention on International Civil Aviation, which applies to the airspace over exclusive economic zones and the high seas.[143] The NOTAM carried no implication as to the status of the waters underneath the relevant

[138] Revised Memorial of Ukraine, ¶ 99.

[139] Counter-Memorial of the Russian Federation, ¶ 87.

[140] *Id.* ¶ 104.

[141] [redacted]

[142] *See* International Civil Aviation Organization, *Annexes to the Convention on International Civil Aviation* (Annex 11 explains that "[t]he world's airspace is divided into a series of contiguous flight information regions (FIRs) within which air traffic services are provided," and "[s]afety is the overriding concern of international civil aviation and air traffic management contributes substantially to safety in aviation. Annex 11 contains an important requirement for States to implement systematic and appropriate air traffic services (ATS) safety management programmes to ensure that safety is maintained in the provision of ATS within airspaces and at aerodromes.") (**UAL-164**).

[143] *See* Convention on International Civil Aviation, Art. 12 ("Over the high seas, the rules in force shall be those established under this Convention.") (**UAL-165**).

airspace.[144] Indeed, Russia has itself issued NOTAMs restricting airspace within flight information regions that cover the exclusive economic zones of not only Russia, but also of third States.[145] The issuance of a NOTAM restricting air travel over an area of the oceans on grounds of safety cannot be equated to an exercise of sovereignty over that area.

70. Russia's reference to the October 2018 decree of the President of Ukraine is equally unavailing.[146] The statement was made after Ukraine had suffered more than four years of aggression at the hands of the Russian Federation, including the illegal invasion and annexation of Crimea, ongoing conflict with Russian-controlled fighters in eastern Ukraine, and Russia's blatant disregard for its international obligations in the Sea of Azov and Kerch Strait. As Ukraine's President notes in the decree, Ukraine's interests at the time were under severe threat, including "threats to national security in the South and East of Ukraine, in the waters of the Black Sea, the Sea of Azov and the Kerch Strait caused by aggressive actions of the Russian Federation."[147] Under the strain of Russia's continued aggression, the National Security and Defense Council of Ukraine decided that "[i]n order to protect national interests" and "deter the armed aggression of the Russian Federation"[148] it was necessary to delimitate a state border line in the Sea of Azov, Kerch Strait, and the Black Sea. In fact, Ukraine never deposited revised baselines with the United Nations, and the National Security and Defense Council's suggestion that a border line should be drawn with Russia in the Sea of Azov and Kerch Strait is simply evidence that Ukraine's security interests — and indeed territorial integrity — were in peril, and that Ukraine was evaluating multiple options to safeguard its essential interests.

71. Finding little to support its position in contemporary Ukrainian practice, Russia turns next to historical Ukrainian acts. Notably, the steps on which Russia relies were taken in the relatively early post-Soviet days, when Ukraine — like many other States — was

[144] [redacted]

[145] *See generally* Åtland, Nilsen, & Pedersen, *Military Muscle-Flexing as Interstate Communication: Russian NOTAM Warnings off the Coast of Norway, 2015–2021*, 5 Scandinavian J. Mil. Stud. 1, pp. 63-78 (14 June 2022) (**UAL-166**).

[146] Counter-Memorial of the Russian Federation, ¶ 105.

[147] President of Ukraine, Decree No. 320/2018 "On National Security and Defense Council of Ukraine Decision dated 12 October 2018 'On Urgent Measures to Protect National Interests in the South and East of Ukraine, in the Black Sea, the Sea of Azov and the Kerch Strait,'" p. 2 (**RU-80**).

[148] *Id.*

in the initial stages of navigating the post-Soviet era and disentangling itself from the Soviet regime. It is not surprising that Ukraine's practice in this area has evolved over time. Nonetheless, Russia profoundly misinterprets the limited set of actions to which it cites.

72. Russia points to the establishment of the Ukrainian-Russian Commission on Fisheries in the Sea of Azov ("URC") — which annually determines the total allowable catch — and an underlying Agreement between the Parties (the "1993 Fishery Inter-Committee Agreement"), which provides that "the right to engage in fishing in the Sea of Azov shall only be enjoyed by vessels under the flags of Ukraine and the Russian Federation."[149] Russia describes these as "steps" consistent with a shared internal waters regime.[150] This is wrong, as the recognition of exclusive fishing rights is entirely consistent with an exclusive economic zone regime under Article 56 and territorial sea.

73. With regard to the supposed exclusive use of the Sea of Azov by Ukrainian and Russian warships, Russia again cites the joint statement by the Presidents of Ukraine and the Russian Federation issued in the aftermath of the 2003 Sea of Azov Treaty, as well as the Treaty itself.[151] However, as explained above, the 2003 Sea of Azov Treaty and corresponding joint declaration were simply meant to preserve the Parties' positions at the time[152] — they did not "confirm" any shared practice.[153] Moreover, for security reasons States do at times declare military restricted zones that are argued to be in tension with UNCLOS,[154] without thereby establishing an area of internal waters and without expecting

[149] Agreement between the State Committee of Ukraine for Fisheries and Commercial Fishing and the Fishery Committee of the Russian Federation on Aspects of Fishing in the Sea of Azov (14 September 1993), Art. 1 (**UA-71**).

[150] Counter-Memorial of the Russian Federation, ¶ 107.

[151] *Id.* ¶ 108.

[152] *See supra* Chapter Two, Section I.A.2. As demonstrated by the negotiating history cited by Russia, negotiations included discussions regarding the "closed nature of water area of the Sea of Azov for navigation of warships of third states." Minutes of the 12th Meeting of the Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Areas in the Black Sea (19 April 2001) (excerpts) (**RU-67**).

[153] Counter-Memorial of the Russian Federation, ¶ 108.

[154] For example, in May 2016 China demanded the United States cease military surveillance flights in its exclusive economic zone because the activities were "seriously endangering Chinese maritime security." *See* Idrees Ali & Megha Rajagopalan, *China Demands End to U.S. Surveillance After Aircraft Intercept*, Reuters (19 May 2016) (**UA-799**).

that such zones will be enforced by an UNCLOS tribunal. Such practice does not call into question the clear rules of UNCLOS.

* * *

74. The Russian Federation asks this Tribunal to create the largest area of pluri-State internal waters ever recognized with effects that, as recent events have made plain,[155] would severely and irreparably prejudice international navigation and commerce. Russia has not met its burden on this issue[156] — and, in fact, it has failed to establish any grounds that would support this remarkable result. The Tribunal should not treat the Sea of Azov and Kerch Strait as exceptional bodies of water that somehow stand outside of and apart from, in the words of Tommy Koh, the "first comprehensive treaty dealing with practically every aspect of the uses and resources of the seas and the oceans."[157]

II. The Tribunal Should Reject Russia's Other Jurisdictional and Procedural Objections

75. In a renewed effort to avoid accountability for its violations of UNCLOS, Russia's Counter-Memorial presents a series of new jurisdictional and procedural objections, all of which are meritless. As explained below, there is no "change of circumstances" regarding sovereignty over eastern Ukraine; nor are Ukraine's revised claims premised on either Party's sovereignty over Crimea. Further, Ukraine has fully complied with the Tribunal's 2020 Award and its procedural directions.

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[155] *See, e.g.*, Sam Mednick, *Concerns Rise as Russia Resumes Grain Blockade of Ukraine*, Associated Press (30 October 2022) ("Russia resumed its blockade of Ukrainian ports on Sunday, cutting off urgently needed grain exports to hungry parts of the world.") (**UA-800**).

[156] *See Military and Paramilitary Activities in and Against Nicaragua (United States of America v. Nicaragua)*, ICJ Judgment of 26 November 1984, ¶ 101 (**UAL-78**); *see also Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Judgment of 6 November 2003, sep. op. of Judge Owada, ¶¶ 42-46 (noting that, where respondents allege a given set of circumstances, "the burden of proof on the factual aspects of the[] alleged activities . . . come[s] to rest with the Respondent. . . . It goes without saying as a basic starting point in this context that a fundamental principle on evidence *actori incumbit onus probandi* should apply in the present case as well. Thus, the onus of proof to establish these relevant facts inevitably lies with the Party which claims the existence of these facts . . . as the basis for the defence[.]") (**UAL-167**).

[157] *See* Tommy T. B. Koh, A Constitution for the Oceans (1982), p. 2 ("The Convention is the first comprehensive treaty dealing with practically every aspect of the uses and resources of the seas and the oceans . . . [T]he provisions of the Convention are closely interrelated and form an integral package. Thus it is not possible for a State to pick what it likes and to disregard what it does not like.") (**UAL-108**).

A. There Is No "Change in Circumstances" Affecting the Tribunal's Jurisdiction

76. Russia's new jurisdictional objections are not just wrong, they reflect a discreditable attempt to capitalize on aggression and atrocity. On 24 February 2022, Russia launched an unprovoked full-scale invasion of Ukrainian territory, causing catastrophic harm to Ukraine and its people. On 16 March 2022, the ICJ ordered Russia to cease its military operations in the territory of Ukraine. Russia ignored this order, proceeding with its invasion and conducting in September 2022 a series of sham referendums to supposedly declare itself exclusive sovereign over the entire Sea of Azov. Russia now invites the Tribunal to validate and compound this gross disregard for international law by excluding Russia's bald violations of UNCLOS in the Sea of Azov from this Tribunal's jurisdiction because of the existence of a so-called "sovereignty dispute." To accept Russia's argument would undermine the credibility of UNCLOS dispute resolution and abet Russia's blatant violations of international law. It would also violate two basic legal principles — *i.e.*, that the Tribunal should assess its jurisdiction as of the critical date of the initiation of the arbitration (the date of Ukraine's Notification), and that the Tribunal should not sustain an argument premised on actions that violate a binding order of the ICJ.

1. Russia's New Sovereignty Objection Ignores the Critical Date to Assess the Tribunal's Jurisdiction

77. For more than five years following the commencement of this arbitration in 2016, Russia did not dispute that the Donetsk, Luhansk, Zaporizhzhia, and Kherson oblasts are part of Ukraine, thus making Ukraine a coastal state of the Sea of Azov. Russia acknowledged this fact in its preliminary objections, asserting that "the Sea of Azov is a bay with more than one coastal State."[158] The Tribunal similarly observed, in its 2020 Award, that the Sea of Azov is bordered by the sovereign territory of both Ukraine and Russia.[159] Russia now unilaterally asserts that, as of 30 September 2022, Ukraine has "ceased to be a coastal State with regard to the Sea of Azov."[160]

78. Russia ignores that the date of Ukraine's Notice (16 September 2016) constitutes a critical date, with actions post-dating that date having no effect on the

[158] Preliminary Objections of the Russian Federation, 19 May 2018, ¶ 84 [hereinafter "Russia's Preliminary Objections"].

[159] *See* Award on Preliminary Objections, ¶¶ 199-297.

[160] Counter-Memorial of the Russian Federation, ¶ 27.

Tribunal's jurisdiction over Ukraine's claims. As the ICJ has held in multiple cases, it is a "general rule"[161] that "the date at which its jurisdiction has to be established is the date on which the application is filed."[162] In this regard, "the removal, after an application has been filed, of an element on which the Court's jurisdiction is dependent does not and cannot have any retroactive effect."[163] This is the case even when the application seeks prospective relief.[164]

79. As the ICJ has noted, "[i]t is easy to see why this rule exists. If at the date of filing of an application all the conditions necessary for the Court to have jurisdiction were fulfilled, it would be unacceptable for that jurisdiction to cease to exist as the result of a subsequent event."[165] If this rule did not exist, "a respondent could deliberately place itself beyond the jurisdiction of the Court by bringing about an event or act, after filing of an application, as a result of which the conditions for the jurisdiction of the Court were no longer satisfied."[166] This is precisely what Russia attempts to do here. It relies on its subsequent acts of aggression to argue that a sovereignty dispute now exists which precludes the Tribunal's jurisdiction.[167] Russia's argument contradicts well-settled jurisdictional rules and should be rejected.

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[161] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, ICJ Judgment of 18 November 2008, ¶ 78 ("In numerous cases, the Court has reiterated the *general rule* which it applies in this regard, namely: 'the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings.'" (emphasis added)) [hereinafter "*Croatia v. Serbia*"] (**UAL-168**).

[162] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, ICJ Judgment of 17 March 2016, ¶ 33 [hereinafter "*Nicaragua v. Colombia*, Judgment of 17 March 2016"] (**UAL-169**); *Croatia v. Serbia*, ¶ 79 ("[T]he jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings") (**UAL-168**); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Judgment of 11 July 1996, ¶ 26 (same) (**UAL-170**).

[163] *Nicaragua v. Colombia*, Judgment of 17 March 2016, ¶ 80 (citing *Croatia v. Serbia*, ¶ 80 (**UAL-168**)) (**UAL-169**); *cf. Nottebohm (Liechtenstein v. Guatemala)*, ICJ Judgment of 18 November 1953, p. 123 ("An extrinsic fact such as the subsequent lapse of the Declaration . . . cannot deprive the Court of the jurisdiction already established.") (**UAL-171**).

[164] *See Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, ICJ Judgment of 21 April 2022, ¶ 261 (**UAL-172**) (ordering prospective relief against Colombia notwithstanding the termination of the Pact that conferred jurisdiction on the Court).

[165] *Croatia v. Serbia*, ¶ 80 (**UAL-168**).

[166] *Id.*

[167] Russia cannot argue (as it did earlier in this proceeding with regard to Crimea) that the "actual objective" of Ukraine's claims was to settle a sovereignty dispute over the Donetsk, Luhansk, Zaporizhzhia, and Kherson oblasts. *See* Russia's Jurisdictional Objections, ¶ 25. By Russia's own

2. Russia's Claim of Sovereignty Over the Donetsk, Luhansk, Zaporizhzhia, and Kherson Oblasts Contradicts a Legally Binding Order of the International Court of Justice and Does Not Give Rise to a Sovereignty Dispute

80. In addition to its obvious deficiency in timing, Russia's argument suffers from another fatal flaw: it relies entirely on acts carried out in violation of a legally binding order of the ICJ.

81. On 16 March 2022, the ICJ issued a Provisional Measures Order, directing Russia to "immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine," and to "ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations."[168] The Court also required both parties to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."[169]

82. Russia's flagrant disregard of the ICJ's Order is not disputable. The day after the ICJ indicated provisional measures, Kremlin spokesperson Dmitry Peskov announced that Russia would "not be able to take this decision into account."[170] Russia continued its invasion in direct violation of the Court's Order and, as a result, occupied as of late September portions of the relevant regions of Ukraine.[171]

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admission, the supposed dispute as to sovereignty over these oblasts arose "since the date of the filing of Ukraine's Revised Memorial." Counter-Memorial of the Russian Federation, ¶ 25. Any claimed sovereignty dispute related to these oblasts therefore cannot be the real issue in the case. *See Chagos Marine Protected Area Arbitration*, Award of 18 March 2015, ¶ 208 (quoting *Nuclear Tests (New Zealand v. France)*, ICJ Judgment of 20 December 1974, p. 466, ¶ 30) ("Ultimately, it is for the Tribunal . . . 'to isolate the real issue in the case and to identify the object of the claim'")) (**UAL-18**).

[168] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, ICJ Provisional Measures Order of 16 March 2022, ¶ 86 (**UAL-173**).

[169] *Id.*

[170] Sofia Stuart Leeson, *Russia Rejects International Court Ruling to Stop Invasion of Ukraine*, EURACTIV (17 March 2022) (**UA-801**); *see also Russia Can't Accept Int'l Court of Justice Order to Halt Operation in Ukraine – Peskov*, Interfax (17 March 2022) (**UA-802**).

[171] *See, e.g.*, Elena Becatoros, Oleksandr Stashevskyi, & Ciaran McQuillan, *Russia Claims to Have Taken Full Control of Mariupol*, Associated Press (20 May 2022) (indicating that Russia did not purport to control Mariupol until after the ICJ order, in late May 2022) (**UA-803**).

83. Russia argues in its Counter-Memorial that the "referendums" conducted on 30 September 2022 in the Donetsk, Luhansk, Zaporizhzhia, and Kherson oblasts resulted in those areas acceding to Russia, thus creating a sovereignty dispute that divests this Tribunal of jurisdiction.[172] But those "referendums" — and the resulting annexations — were only possible because of Russia's continued military campaign in violation of the Order. For example, Mariupol, the largest Ukrainian port on the Sea of Azov, was not taken by the Russian Federation until May 2022,[173] two months after the ICJ issued its Order. No "referendum" could have occurred in Mariupol without continuing violations of the Order. Similarly, the Russian military participated directly in the conduct of the "referendums" throughout the purportedly annexed oblasts, with armed soldiers in some cases being deployed door-to-door to collect votes,[174] and at times making residents vote at gunpoint.[175] This Tribunal cannot reward or legitimize such acts of naked illegality.

84. In *Mauritius/Maldives*, an International Tribunal on the Law of the Sea ("ITLOS") Special Chamber determined that a sovereignty claim that contradicts an ICJ ruling "cannot be considered anything more than 'a mere assertion,'" "does not prove the existence of a dispute," and thus cannot interfere with the jurisdiction of an UNCLOS tribunal.[176] Similarly, here, Russia's claims can have no effect on the Tribunal's jurisdiction, given that they contradict a decision of the ICJ that is legally effective and binding pursuant to Article 41 of the Statute of the International Court of Justice.

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[172] Counter-Memorial of the Russian Federation, ¶ 26 ("[O]n 30 September 2022, following the referendums held in the DPR, the LPR, the Zaporozhye Region and the Kherson Region, these areas, as a result of their accession to the Russian Federation, became part of the sovereign territory of the Russian Federation[.]").

[173] Mariupol, for example, did not fall to Russian forces until May 2022. *See* Elena Becatoros, Oleksandr Stashevskyi, & Ciaran McQuillan, *Russia Claims to Have Taken Full Control of Mariupol*, Associated Press (20 May 2022) (**UA-803**).

[174] *See* James Waterhouse, Paul Adams, & Merlyn Thomas, *Ukraine 'Referendums': Soldiers Go Door-to-Door for Votes in Polls*, BBC (23 September 2022) (**UA-804**).

[175] *See* Yulia Gorbunova, *Fictitious Annexation Follows 'Voting' at Gunpoint*, Human Rights Watch (30 September 2022) (**UA-805**); *see also* David Stern, *Russia Rounds up Ukraine Voters at Gunpoint for Staged Referendums*, Washington Post (24 September 2022) (**UA-806**).

[176] *See Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, ITLOS Case No. 28, Judgment of 28 January 2021, ¶¶ 243, 249-251 (**UAL-174**).

B. Ukraine's Claims Do Not Depend on Sovereignty Over Crimea

85. Russia in its Counter-Memorial argues that Ukraine continues to assert claims premised on its sovereignty over Crimea.[177] This is false.

86. Russia first makes this argument with respect to Ukraine's claims concerning vessel inspections in the Kerch Strait and restrictions on passage for non-Russian governmental ships through the Strait.[178] These claims, however, turn on the Kerch Strait's status as an international strait,[179] where Russia has an obligation under Articles 38 and 44 not to impede transit passage. Russia would have these obligations even if it were the only coastal State in the Strait.

87. Further, Russia asserts that Ukraine's claims regarding the seizure and reflagging of the JDRs *Tavrida* and *Sivash* would require the Tribunal "to turn to the issue of sovereignty over Crimea"[180] because Ukraine's arguments depend on an "assessment of lawfulness of legal acts that the Republic of Crimea adopted."[181] However, as Ukraine explained in its Revised Memorial, its claims regarding the seizure and reflagging of the JDRs *Tavrida* and *Sivash* depend on Russia's obligations under Articles 2(3) and 91 of the Convention.[182] Under the Convention, the removal of a vessel's flag must be conducted in accordance with procedures stipulated by the flag State's domestic law.[183] This is true even when a vessel is in the territorial sea of a foreign State, where a coastal State's exercise of sovereignty must accord with the "Convention and . . . other rules of international law."[184]

88. Thus, regardless of whose territorial seas the *Tavrida* and *Sivash* were in when they were seized, under Article 91 Ukraine has exclusive authority over the process of de-registration of its vessels.[185] Further, to the extent Russia refers to alleged Crimean legal acts relating to *title* over the vessels (rather than the re-flagging of the vessels), such acts are

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[177] Counter-Memorial of the Russian Federation, ¶ 7.

[178] *Id.* ¶¶ 252, 279.

[179] Revised Memorial of Ukraine, ¶ 132.

[180] Counter-Memorial of the Russian Federation, ¶ 311.

[181] *Id.* ¶ 313.

[182] *See* Revised Memorial of Ukraine, ¶¶ 176-180.

[183] *See id.* ¶ 177.

[184] UNCLOS, Art. 2(3).

[185] Revised Memorial of Ukraine, ¶ 178.

not the subject of Ukraine's claims.[186] As further explained in Chapter Three, Section III below, Ukraine's claims before this Tribunal concern flag State jurisdiction over the vessels, not their ownership.

89. Despite Russia's contention otherwise, none of Ukraine's claims in its Revised Memorial require the Tribunal to address the issue of sovereignty over Crimea.

C. Ukraine Has Fully Complied with the Tribunal's Directions Regarding the Procedural Schedule and Has Not Impermissibly Raised New Claims

90. Finally, Russia argues that Ukraine has used its Revised Memorial to raise new claims it did not raise in the Original Memorial.[187] To the contrary, Ukraine has simply updated its claims to account for the Tribunal's 2020 Award. In that Award, Ukraine was instructed "to revise its Memorial so as to take full account of the scope of, and limits to, the Arbitral Tribunal's jurisdiction as determined in the present Award."[188] That is precisely what Ukraine has done — it has re-stated a limited number of claims to avoid relying on theories that implicate the sovereignty of either Party over Crimea. In following the Tribunal's directives, nothing prevents Ukraine from pleading new legal bases for its claims, so long as the new arguments do not, in the words of the ICJ, "transform the subject-matter of this dispute."[189]

91. In its Original Memorial, Ukraine claimed that Russia's seizure of the JDRs *Tavrida* and *Sivash* prevented Ukraine from exercising its Article 2, 56, and 77 coastal State rights to explore, exploit, and license the exploration and exploitation of hydrocarbon resources in its territorial sea, exclusive economic zone, and continental shelf.[190] To account for the Tribunal's 2020 Award, Ukraine revised the legal basis of its claims in its Revised Memorial such that they are now based on Russia's obligations under Articles 2(3) and 91 of the Convention.[191] These claims, based on the same underlying conduct by Russia, relate to

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[186] *See infra* Chapter Three, Section III.

[187] Counter-Memorial of the Russian Federation, ¶ 9.

[188] Award on Preliminary Objections, ¶ 198.

[189] *Case Concerning the Territorial and Maritime Dispute (Nicaragua v. Colombia)*, ICJ Judgment of 19 November 2012, ¶¶ 105, 111 (admitting a new legal claim raised in a reply, where the claim was raised to account for the ICJ's preliminary objection ruling and "cannot be said to transform the subject-matter of [the] dispute") (**UAL-175**).

[190] Original Memorial of Ukraine, ¶¶ 117-127.

[191] Revised Memorial of Ukraine, ¶ 178.

the same "subject-matter of the dispute between the parties"[192] that existed when Ukraine filed its Application.

92. As to Ukraine's claims regarding the electric-power and fiber optic-communication cables Russia laid across the bottom of the Kerch Strait, in Ukraine's Original Memorial those claims were based on Russia's unauthorized construction on the subsoil of Ukraine's territorial sea, in violation of Ukraine's sovereignty under UNCLOS Article 2.[193] In its Revised Memorial, Ukraine updated the legal basis for these claims — which again are based on the same underlying conduct by Russia and relate to the same "subject-matter of the dispute between the parties"[194] — to address provisions of UNCLOS that are not dependent on the status of sovereignty over Crimea, namely, the likely lasting damage to the marine environment in violation of Russia's obligations under UNCLOS Articles 123, 192, 194, 204, 205, and 206.[195]

93. Ukraine's revision of its claims is fully consistent with the Tribunal's instruction in its 2020 Award.

[192] *See, e.g.*, *Nicaragua v. Colombia, Judgment of 17 March 2016*, ¶ 51 (**UAL-169**).

[193] Original Memorial of Ukraine, ¶ 182.

[194] *See, e.g.*, *Nicaragua v. Colombia, Judgment of 17 March 2016*, ¶ 51 (**UAL-169**).

[195] Revised Memorial of Ukraine, ¶ 184.

Chapter Three: Russia Impermissibly Interfered with Navigation Rights in Violation of UNCLOS

94. Ukraine demonstrated in its Revised Memorial that Russia has undermined freedom of navigation and transit passage throughout the Sea of Azov and Kerch Strait by unilaterally building a low-clearance bridge that prevents the passage of vessels that used or foreseeably would have used the Strait, failing to cooperate with Ukraine as to threats to navigation posed by the construction of the Bridge, subjecting vessels heading to Ukraine's Sea of Azov ports to disproportionate and discriminatory delays and inspections, suspending passage of foreign warships and government vessels through the Kerch Strait, and stopping and inspecting vessels in the Sea of Azov in transit to and from Ukrainian ports. In addition to interfering with navigation, Ukraine's Revised Memorial demonstrated that Russia has violated Ukraine's rights as a flag State by stopping and inspecting Ukrainian vessels and seizing and re-flagging two Ukrainian JDRs.

95. In its Counter-Memorial, Russia does not and cannot dispute the critical facts underlying Ukraine's claims. Rather, as Ukraine demonstrates in this Reply, Russia seeks to evade accountability for its unlawful interference with navigation and transit passage by distorting the legal standard applicable to the construction of a bridge under an international strait (Section I.A); attempting to reduce to minimal obligations the duties of cooperation and publicity in Articles 43 and 44 of UNCLOS (Section I.B); explaining away delays and inspections of vessels navigating the Strait as the "normal" and "legitimate" exercise of "sovereign powers," while artificially heightening the evidentiary standard that Ukraine has to meet to establish a violation of Articles 38 and 44 (Section I.C); attempting to justify the suspension of transit passage of foreign warships and government vessels through the Strait under the (inapplicable) regime of innocent passage (Section I.D); and relying on its purported "sovereign prerogative" to inspect vessels in the Sea of Azov (Section II). Russia also flouts the principle of exclusive flag State jurisdiction by mischaracterizing Ukraine's claim as an attempt to seek a declaration of title over the JDRs (Section III).

96. In this Chapter, Ukraine responds to Russia's interpretations of UNCLOS that contradict both the text and the object and purpose of the Convention, and explains how the factual record before this Tribunal demonstrates Russia's persistent and blatant defiance of its obligations to respect freedom of navigation, unimpeded transit passage, and Ukraine's rights as a flag State.

I. The Construction of the Kerch Bridge Violates UNCLOS Articles 38, 43, and 44, and Their Guarantee of Unimpeded Transit Passage Through International Straits

97. Ukraine demonstrated in its Revised Memorial that the Russian Federation has unlawfully abrogated transit passage of Ukrainian and international vessels in the Kerch Strait through the construction of the low-clearance Kerch Strait Bridge.[196] In doing so, Russia has acted (and continues to act) in brazen violation of the right to unimpeded transit passage through international straits guaranteed by Articles 38, 43, and 44 of UNCLOS, undermining Ukraine's access to the oceans and the access of international shipping to Ukraine.

98. In its Counter-Memorial, the Russian Federation concedes that it built a bridge at a height of 35 meters; and that the Bridge prevents passage of large ocean-going vessels of over 40,000t DWT, which regularly transited the Strait prior to the construction of the Bridge.[197] Russia also concedes that the Bridge impacts traffic to Ukraine's Sea of Azov ports at Mariupol and Berdyansk, while leaving unaffected the smaller vessels that call at Russian ports.[198] According to Russia, a Russian government institute unilaterally determined "that the handling of large-tonnage ocean-going ships at the relevant [Ukrainian] ports and their passage through the [Kerch-Yenikale Channel ("KYC")] appears to be unreasonable," and thus recommended the construction of a bridge with a 35-meter height that blocked such vessels.[199] These concessions alone establish Russia's violations of Articles 38, 43, and 44 of UNCLOS.

99. Despite the clear text of these articles, which provide the correct legal framework to assess Russia's obligations under UNCLOS, Russia invents a self-judging balancing test and then assesses its conduct against the wrong legal framework. But Russia's construction of a low-clearance bridge that hinders navigation to and from Ukraine's Sea of Azov ports cannot be justified even under Russia's flawed "balancing of competing interests" framework. Russia's Counter-Memorial also confirms that Russia failed to share information with Ukraine about potentially significant threats to safe navigation posed by

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[196] Revised Memorial of Ukraine, Chapter Six, Section I.A.1.

[197] Counter-Memorial of the Russian Federation, ¶ 175; Expert Report of [redacted] Report"), ¶ 105.

[198] Counter-Memorial of the Russian Federation, ¶ 175 (quoting a Russian government report as indicating that "the clearance of the navigable span should be 35.0 metres for more than 95% of ships calling at the Ukrainian ports and for 100% of ships calling at the Russian ports").

[199] *Id.* ¶ 174.

the construction of the Bridge, and Russia cannot escape liability by reducing Articles 43 and 44 to minimal obligations.

A. UNCLOS Prevents Russia from Constructing a Low-Clearance Bridge Over an International Strait

100. The text of UNCLOS contains the relevant legal standards by which the Russian Federation's conduct must be assessed. 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."[200] Article 44 further provides that "States bordering straits shall not hamper transit passage," and that "[t]here shall be no suspension of transit passage."[201] As established in Ukraine's Revised Memorial, these articles require that a bridge over an international strait be built at a height that accommodates *all* ships that use the international strait, as well as *all* ships that "may reasonably be foreseen to use" the relevant strait in the future.[202]

101. This principle is reflected in State practice.[203] As Ukraine noted in its Revised Memorial, when Denmark proposed to construct a bridge across the Great Belt — a strait used for international navigation — Finland filed an application instituting proceedings before the ICJ, arguing that the proposed bridge, a fixed span with 65 meters of clearance, would prevent Finnish drilling rigs from being towed in their vertical position across the Great Belt.[204] Notably, both Finland and Denmark agreed that international law requires a bridge over an international strait to be built at a height that allows "the highest existing ships to pass" the relevant strait.[205] The parties' main disagreement centered on whether the

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[200] UNCLOS, Art. 38(1) (emphasis added).

[201] UNCLOS, Art. 44.

[202] Revised Memorial of Ukraine, ¶ 134.

[203] *See, e.g.*, 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**).

[204] *Passage through the Great Belt (Finland v. Denmark)*, ICJ, Memorial of the Government of the Republic of Finland (December 1991), ¶ 4 (**UAL-13**)

[205] *Id.* ¶ 422; *Passage through the Great Belt (Finland v. Denmark)*, ICJ, Counter-Memorial of the Government of the Kingdom of Denmark (May 1992), ¶¶ 20, 37 ("clearance for a bridge across the Great Belt allowing the highest existing ships to pass would conform to international law") (**UAL-14**).

right of free passage through the Great Belt extended to drill ships and oil rigs.[206] The parties reached a settlement and the ICJ thus never decided the merits of the case.

102. Consistent with Finland and Denmark's practice, when Italy proposed to build a bridge over the Strait of Messina (between Sicily and continental Italy), it notified the International Maritime Organization ("IMO") of the project, seeking "advice on the navigational aspects of the bridge with special reference to its minimum clearance above sea level."[207] The IMO Sub-Committee on Safety of Navigation endorsed the Italian proposal because the height of the proposed bridge, which would be no less than 64 meters in the central span, "should be more than adequate for ships likely to use the Strait of Messina, so far as can be foreseen."[208] The project has yet to come to fruition.[209]

103. Other States have adopted a similar view. In addressing the question of "how much vertical clearance must exist under a fixed span," the United States considered whether such a span should "be high enough to accommodate all existing ships, all ships currently planned for construction, or even future ship designs which have not yet been contemplated."[210] The United States adopted the position that "[a]n 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."[211]

1. Russia's Invented Balancing Test Is Unsupported

104. Unable to dispute that the Kerch Strait Bridge deprives some of the vessels that previously transited the Strait from the possibility of using it, the Russian Federation mounts no defense under the governing legal standard. Instead, Russia fabricates a self-judging balancing test that is not found in UNCLOS or international law, suggesting that there must be some trade-off between transit passage and a State's "sovereign right" to

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[206] *Passage through the Great Belt (Finland v. Denmark)*, ICJ, Counter-Memorial of the Government of the Kingdom of Denmark (May 1992), ¶ 234 (**UAL-14**).

[207] 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**).

[208] *See* Hugo Caminos & Vincent P. Cogliati-Bantz, *The Legal Regime of Straits: Contemporary Challenges and Solutions* (Cambridge, 2014), p. 341 (**UAL-127**).

[209] Danilo Masoni & Michael Roddy, *Sicily Bridge Project Sinks in Italy Budget Mire*, GlobalPost (26 February 2013) (**UA-807**).

[210] William L. Schachte, Jr. & J. Peter A. Bernhard, *International Straits and Navigational Freedoms*, Va. J. Int'l L., Vol. 33, p. 529 (1993) (**UAL-128**).

[211] *Id.*

oversee its territory.[212] Russia's invented balancing test contradicts the plain language, and frustrates the purpose, of Articles 38 and 44 of UNCLOS.[213]

i. Properly Interpreted in Accordance with Article 31 of the Vienna Convention, Articles 38 and 44 Broadly Prohibit Interference with Transit Passage

105. A proper interpretation of UNCLOS Articles 38 and 44 requires recourse to the customary international law principles of treaty interpretation set forth in Article 31 of the Vienna Convention.[214] Article 31 provides: "A treaty shall 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."[215]

106. The text of Article 38(1) provides that "all ships and aircraft enjoy the right of transit passage" in international straits, and that such passage "shall not be impeded."[216] The French version reads "tous les navires et aéronefs jouissent du droit de passage en transit sans entrave." The Russian version reads, «все суда и летательные аппараты пользуются правом транзитного прохода, которому не должно чиниться препятствий, за исключением того.» The ordinary meaning of these phrases is that the right of "all ships" ("tous les navires") ("все суда"), not only a limited category of ships, to navigate (or "pass") through straits used for international navigation cannot be impaired or obstructed in any way ("sans entrave" in French, "не должно чиниться препятствий" in Russian). The Oxford English dictionary defines "impede" as "[t]o retard in progress or action by putting obstacles in the way."[217] "Entrave," in French, also means any sort of constraint: "obstacle,

[212] Counter-Memorial of the Russian Federation, ¶¶ 147-150.

[213] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Art. 31(1) (**UAL-43**).

[214] It is well understood that Article 31 of the Vienna Convention reflects principles of treaty interpretation under customary international law. *See Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Preliminary Objection Judgment of 12 December 1996, ¶ 23 (**UAL-176**); Jean-Marc Sorel & Valérie Boré Eveno, *Art. 31 1969 Vienna Convention*, in Olivier Corten & Pierre Klein (eds.), The Vienna Conventions on the Law of Treaties (7 April 2011), pp. 804, 818-819 (**UAL-177**).

[215] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Art. 31(1) (**UAL-43**).

[216] UNCLOS, Art. 38(1) (emphasis added).

[217] Oxford English Dictionary, "impede, v." (online ed.) (**UAL-135**).

gêne, contrainte."[218] The Russian explanatory dictionary defines "препятствовий" in relevant part as a "hindrance that delays any action."[219]

107. Article 44 further specifies that "States bordering straits shall not hamper transit passage" (and that "[t]here shall be no suspension of transit passage").[220] The Oxford English dictionary defines "hamper" as including any step that "impede[s] or obstruct[s] in action."[221] The French text is as straightforward. Article 44 provides that "Les Etats riverains de détroits ne doivent pas entraver le passage en transit," which means that the States bordering straits are obliged not to create any "obstacle, gêne, contrainte."[222] The Russian text, "Государства, граничащие с проливами, не должны препятствовать транзитному проходу" uses the verb form of the noun used in Article 38, and thus carries a similar meaning.

108. By their terms, therefore, Articles 38 and 44 prohibit coastal States from impeding or hampering transit passage through straits used for international navigation, such as the Kerch Strait. The use of the imperative "shall" in both articles indicates the mandatory nature of this obligation. On its face, this is a straightforward legal obligation, and Articles 38 and 44 of UNCLOS recognize no qualifications or exceptions.

109. The context of Articles 33 and 44 confirms this interpretation. For example, Article 25(3) of the Convention expressly establishes the right of the coastal State to suspend innocent passage in the territorial sea where such suspension is non-discriminatory and essential for the protection of its security.[223] But no similar exception is prescribed for the regime of transit passage, confirming that transit passage must be respected without regard to the asserted interests of the coastal State. Further, Article 42(1) of UNCLOS sets out a limited and exhaustive list of matters for which the coastal State is allowed to legislate in relation to transit passage, none of which are relevant here.[224] Article 42(2) of UNCLOS

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[218] Dictionnaire de l'Académie française, "entrave, n." (online ed.) (**UAL-178**)

[219] Explanatory Dictionary of the Russian Language, "obstacle" (online ed.) (**UAL-179**).

[220] UNCLOS, Art. 44.

[221] Oxford English Dictionary, "hamper, v." (online ed.) (**UAL-136**).

[222] Dictionnaire de l'Académie française, "entrave, n." (online ed.) (**UAL-178**).

[223] UNCLOS, Art. 25(3).

[224] UNCLOS, Art. 42(1) (the relevant matters are "(a) the safety of navigation and the regulation of maritime traffic, as provided in article 41; (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait; (c) with respect to fishing vessels, the prevention of fishing,

further provides that laws and regulations relating to transit passage through straits cannot have "the practical effect of denying, hampering or impairing the right of transit passage."[225] And Article 233 permits coastal States to directly enforce the laws and regulations referred to in Article 42, paragraphs 1(a) and (b), only where "a foreign ship other than those referred to in section 10 ['Sovereign Immunity'] has committed a violation . . . causing or threatening major damage to the marine environment of the straits."[226] These provisions confirm that transit passage cannot be made to yield to the interests of the coastal State, which may only legislate in limited areas, and may only act against ships in transit passage when such ships are not entitled to sovereign immunity and pose a "major" risk to the marine environment of the strait as a whole.

110. That transit passage may not be impeded, hampered, or suspended by littoral States for any reason also accords with one of the principal purposes of UNCLOS, namely to "facilitate international communication" through the oceans and to "promote the peaceful uses of the seas and oceans."[227] Allowing coastal States to trump their obligations by applying a self-judging balancing test undermines the very international cooperation and communication UNCLOS seeks to foster.

111. In sum, Russia's attempt to subject the guarantees of free navigation and transit passage under Articles 38 and 44 of UNCLOS to a self-judging balancing test between "competing rights" cannot be reconciled with the ordinary meaning of these articles, read in context, and in the light of the Convention's object and purpose.

ii. Supplementary Means of Interpretation Do Not Support Russia's Invented Balancing Test

112. While there is no need to resort to supplementary means of interpretation as set forth in Article 32 of the Vienna Convention, it should be noted that Russia's attempt to subject the regime of transit passage to a self-judging balancing test of "competing interests" is at odds with the *travaux préparatoires* of UNCLOS.[228]

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including the stowage of fishing gear; (d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits"). *See also* Virginia Commentary, Art. 42, p. 369, ¶ 42.1 (**UAL-180**).

[225] UNCLOS, Art. 42(2).

[226] UNCLOS, Art. 233 (emphasis added).

[227] UNCLOS, preamble.

[228] *See* Virginia Commentary, Art. 44 (**UAL-181**).

113. Acknowledging the critical importance of international straits as the lifeline between the world's seas, the basic rule of noninterference with the freedom of transit passage was expressed at an early stage of the negotiations by Russia itself. At the 1972 session of the Sea-Bed Committee, the Soviet Union submitted a proposal providing that: "No State shall be entitled to interrupt or stop the transit of ships through the straits, or engage therein in any acts which interfere with the transit of ships."[229] At the 1973 session of the Sea-Bed Committee, a proposal by six East European Socialist States — Bulgaria, Czechoslovakia, German Democratic Republic, Poland, the Ukrainian SSR and the USSR — repeated the earlier Soviet proposal and added a requirement that, with regard to the transit of ships, "[t]he coastal State shall not place in the straits any installations which could interfere with or hinder the transit of ships."[230] Malta submitted a competing proposal that directed coastal States to "not hamper" passage through straits, but provided that measures could be taken to prevent or suspend passage through straits less than 24 miles wide "only in case of reasonable fear of grave and imminent threat to [the coastal State's] security."[231] This proposal for even a limited right to suspend passage was not carried forward to the second session of the Conference.

114. Instead, at the second session, the United Kingdom consolidated various proposals in a single article providing that: "A straits State shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which it has knowledge. There shall be no suspension of transit passage."[232] The U.K. representative indicated that this proposal was intended to provide "for a secure right of

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[229] U.N. Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, Draft Articles on Straits Used for International Navigation submitted by the Union of Soviet Socialist Republics, originally issued as U.N. Doc. A/AC.138/SC.II/L.7 (reproduced in U.N. Doc. A/8721) (1972)), pp. 162, 163 (**UA-808**).

[230] Third United Nations Conference on the Law of the Sea, Bulgaria, Czechoslovakia, German Democratic Republic, Poland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics: Draft Articles on Straits Used for International Navigation, U.N. Doc. A/CONF.62/C.2/L.11 (17 July 1974), Art. 1 (**UA-809**).

[231] United Nations Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, Malta: Preliminary Draft Articles on the Delimitation of Costal State Jurisdiction in Ocean Space and on the Rights and Obligations of Costal States in the Area Under Their Jurisdiction, originally issued as U.N. Doc. A/AC.138/SC.II/L.28 (1973) (reproduced in U.N. Doc. A/9021 (Vol.III)), Art. 38 (**UA-810**).

[232] Third United Nations Conference on the Law of the Sea, United Kingdom: Draft Articles on the Territorial Sea and Straits, U.N. Doc. A/CONF.62/C.2/L.3 (3 July 1974), Ch. III, Art. 6 (**UA-811**).

navigation and overflight for ships or aircraft proceeding from one part of the high seas to another through or over waters connecting those two seas."[233]

115. A competing proposal by four straits States (Malaysia, Morocco, Oman, and Yemen) sought to provide that the passage of foreign ships through straits was to be governed by the rules of innocent passage in the territorial sea. The proposal read in part: "The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea in straits and shall make every effort to ensure speedy and expeditious passage."[234] Subsequently, at the third session of the Conference, Oman submitted a proposal that similarly sought to apply the regime of innocent passage to the passage of foreign ships in straits.[235] However, these proposals were rejected, and the U.K. text was included as Article 43 — without exception or qualification.

116. At the fourth session, a proposal by Yemen repeated the earlier proposal by Oman seeking to apply the regime of innocent passage to straits.[236] At the sixth session, and again at the seventh session, Morocco proposed adding several new articles specifying certain "duties of States making use of Straits."[237] Again, none of these proposals were accepted, and the only change in the article as proposed by the United Kingdom was its renumbering as Article 44.[238]

117. In sum, the *travaux préparatoires* of Article 44 reflect that the drafters of UNCLOS considered and rejected the possibility of subjecting transit passage through international straits to the regime of innocent passage (or to other limitations or exceptions).[239] Instead, UNCLOS established a regime that would ensure unimpeded transit through and over international straits. As the United States representative said in

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[233] Third United Nations Conference on the Law of the Sea, Summary Records of Meetings of the Second Committee 3rd meeting, U.N. Doc. A/CONF.62/C.2/SR.3 (11 July 1974), ¶ 31 (**UA-812**).

[234] Third United Nations Conference on the Law of the Sea, Malaysia, Morocco, Oman and Yemen: Draft Articles on Navigation through the Territorial Sea, Including Straits Used for International Navigation, U.N. Doc. A/CONF.62/C.2/L.16 (22 July 1974), Art. 22(3) (**UA-813**).

[235] Virginia Commentary, Art. 44, p. 387, ¶ 44.5 (**UAL-181**).

[236] *Id.* Art. 44, p. 388, ¶ 44.6.

[237] *Id.* Art. 44, p. 388, ¶ 44.7.

[238] Third United Nations Conference on the Law of the Sea, Informal Composite Negotiating Text, U.N. Doc. A/CONF.62/WP.10 (15 July 1977), Art. 44 (**UA-814**).

[239] UNCLOS, Art. 19 (Meaning of Innocent Passage).

Sub-Committee II of the General Assembly-established Committee on the Uses of the Seabed on 2 April 1973:

> A principal goal of the Law of the Sea Conference must be to agree on a regime which will minimize the possibilities of conflict among nations, conflicts which may arise because of uncertainties as to legal rights and responsibilities. In view of the importance of straits used for international navigation, any regime for such straits which depended upon a set of criteria that could be subjectively interpreted by straits states would sow the seeds of future conflict and undercut a major goal of the Conference.[240]

118. Reviewing the *travaux préparatoires* of Article 44, leading commentators have emphasized that the right of transit passage is not subject to exceptions. For example, Judge Hugo Caminos and Vincent P. Cogliati-Bant have affirmed that the "duty involved [in Article 44] 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."[241]

119. In fact, the delegates to the Third U.N. Conference on the Law of the Sea, which resulted in the adoption of UNCLOS, specifically acknowledged that a bridge could constitute one such material obstacle and hamper transit passage by its very nature.[242] Two delegates to the Conference subsequently wrote an article recording the formulation of Part III of UNCLOS.[243] They noted that Article 44 contains three elements, the first of which is not to hamper transit passage.[244] The authors explained this "means that movement has not to be obstructed by material obstacles or retarded, hindered or 'impeded.'"[245] They further noted that the Private Group on Straits (an informal negotiation group formed by States which favored transit passage or a similar regime led by the joint chairmanship of Fiji

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[240] Statement by John Norton Moore, U.S. representative to the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, April 2, 1973, USUN Press Release No. 32(73) (3 April 1973), p. 2 (**UA-815**).

[241] Hugo Caminos & Vincent P. Cogliati-Bantz, *The Legal Regime of Straits: Contemporary Challenges and Solutions* (Cambridge, 2014), p. 233 (emphasis added) (**UAL-127**).

[242] S.N. Nandan and D.H. Anderson, Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982 (1990), p. 195 (**UAL-182**).

[243] *Id.*

[244] *Id.*

[245] *Id.*

and the United Kingdom) inquired "whether building a high bridge would amount to hampering, even if navigation was not affected. In reply, it was pointed out that the article was designed to forbid activities which could have the incidental effect of inhibiting passage. It was decided to retain the word 'hamper' in the Group's draft articles on that basis."[246]

120. Therefore, as evidenced by the *travaux préparatoires*, when the drafters established that States bordering a strait cannot "allow the construction of works or installations which would impede ships or aircraft in transit," bridges were clearly considered "works or installations" of potential concern.[247] The Kerch Strait Bridge is not only a material obstacle to navigation and the regime of transit passage, it is a permanent one.

121. The negotiating history of Article 38 also does not support Russia's balancing test. In their initial proposals in the Sea-Bed Committee, the United States and the Soviet Union provided that "[i]n straits used for international navigation . . . all ships and aircraft in transit shall enjoy the same freedom of navigation . . . as they have on the high seas."[248] At the second session of the Conference, the United Kingdom's proposal confirmed the drafters "had endeavoured to find a middle way . . . between the interests of the international community as a whole and the legitimate concerns of the straits States."[249] To this end, the U.K. proposal stated that "all ships and aircraft enjoy the right of transit passage, which shall not be impeded," defined the concept of "transit passage" for the first time, and outlined situations to which transit passage would not apply, including where an equally suitable high seas route was available.[250]

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[246] *Id.*

[247] *Id.*

[248] U.N. Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, U.N. Doc. A/8421 (1971), p. 241 (**UA-816**); U.N. Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, Draft Articles on Straits Used for International Navigation submitted by the Union of Soviet Socialist Republics, originally issued as U.N. Doc. A/AC.138/SC.II/L.7 (reproduced in U.N. Doc. A/8721) (1972)), p. 162 (**UA-808**).

[249] Third United Nations Conference on the Law of the Sea, Summary records of meetings of the Second Committee 11th meeting, U.N. Doc. A/CONF.62/C.2/SR.11 (22 July 1974), ¶ 26 (**UA-817**).

[250] Third United Nations Conference on the Law of the Sea, United Kingdom: Draft Articles on the Territorial Sea and Straits, U.N. Doc. A/CONF.62/C.2/L.3 (3 July 1974), Ch. III, Art. 1 (**UA-811**).

122. A proposal by six East European Socialist States — Bulgaria, Czechoslovakia, German Democratic Republic, Poland, Ukrainian SSR, and USSR — similarly confirmed that "all ships in transit shall enjoy equally the freedom of navigation for the purposes of passage through such straits" and that "[n]o State shall be entitled to interrupt or suspend the transit of ships through the straits."[251] The proposal included specific provisions for certain types of channels, including "narrow straits." Referring to the proposal, the USSR representative noted that "the adoption of the principle of innocent passage with regard to those straits would entail the risk of hampering international trade, to the serious detriment of certain countries and the international community as a whole."[252] The USSR "recognized the need to protect the security of coastal States bordering on straits used for international navigation . . . but it also believed that the security and other interests of countries that used those straits, which compromised the majority, should be taken into account."[253] Thus, the USSR delegation noted that it "could not agree that matters relating to navigation through straits used for international navigation admitted unilateral solutions. Attempts to modify the traditional regime or to limit transit through those straits were against the interests of the international community."[254]

123. At the third session, the Private Group on Straits used the U.K.'s proposal as a base and largely retained the proposal's text, including the language that the article applies to all ships, the definition of transit passage, and that transit passage "shall not be impeded." As noted by the Virginia Commentary, the Article 38 rule that transit passage "shall not be impeded" is complemented by the direction in Article 44 that "States bordering straits shall not hamper transit passage."[255] While Article 38 underwent further reorganization and various proposals regarding references to aircraft and passage, nothing in the *travaux préparatoires* suggests the drafters intended Article 38 to give rise to the balancing test advanced by Russia.[256]

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[251] Third United Nations Conference on the Law of the Sea, Bulgaria, Czechoslovakia, German Democratic Republic, Poland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics: Draft Articles on Straits Used for International Navigation, U.N. Doc. A/CONF.62/C.2/L.11 (17 July 1974), Art. 1 (**UA-809**).

[252] Third United Nations Conference on the Law of the Sea, Summary records of meetings of the Second Committee 12th meeting, U.N. Doc. A/CONF.62/C.2/SR.12 (22 July 1974), ¶ 1 (**UA-818**).

[253] *Id.* ¶ 2.

[254] *Id.* ¶ 2.

[255] Virginia Commentary, Art. 38, p. 329, ¶ 38.8(c) (**UAL-183**).

[256] *See* Virginia Commentary, Art. 38, pp. 325-28 (**UAL-183**).

124. In short, nothing in the *travaux préparatoires* support Russia's claim that a balancing test is appropriate in this situation, and in fact, the *travaux préparatoires* show that the Soviet Union (and other States) successfully advocated for proposals that precluded unilateral limitations on transit through international straits.

iii. Russia Relies on Inapposite Authorities to Support Its Invented Balancing Test

125. Finding no support in the text of UNCLOS, the *travaux préparatoires*, or scholarship, the Russian Federation turns to inapposite authorities and provisions of UNCLOS in support of its fabricated, self-judging balancing test.

126. First, Russia relies on the jurisdiction and merits award in the *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, which found that UNCLOS Article 194(4) requires a "balancing act between competing rights" in the context of environmental protection.[257] In so finding, the *Chagos* tribunal followed the plain text of Article 194(4), which requires that States "[i]n taking measures to prevent, reduce or control pollution of the marine environment, refrain from *unjustifiable* interference with activities carried out by other States . . . ."[258] Articles 38 and 44 contain no similar language. On the contrary, the obligation not to impede or hamper transit passage is unqualified, making no allowance for *justifiable* interference.

127. Second, Russia points to the language of Article 78(2) of UNCLOS, which expressly establishes a balancing test between competing rights in the continental shelf, stating that "[t]he exercise of the rights of the coastal State over the continental shelf must not infringe or result in any *unjustifiable* interference with navigation and other rights and freedoms of other States as provided for in this Convention."[259] In the same vein, Russia cites Article 87,[260] which provides that "freedom of navigation" on the high seas "shall be exercised by all States with *due regard* for the interests of other States in their exercise of the freedom of the high seas."[261] Article 87 expressly requires States to have "due regard" for —

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[257] Counter-Memorial of the Russian Federation, ¶ 150 (citing *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom),* PCA Award of 18 March 2015, ¶ 540 (**RUL-85**)).

[258] UNCLOS, Art. 194(4) (emphasis added).

[259] UNCLOS, Art. 78(2) (emphasis added).

[260] Counter-Memorial of the Russian Federation, ¶ 149.

[261] UNCLOS, Art. 87 (emphasis added).

that is, to balance — the interests of other States when exercising their own rights, duties, and freedoms. There is no similar requirement in Articles 38 and 44.

128. The fact that UNCLOS incorporates express balancing tests in other Chapters, but not in the provisions relating to transit passage, strongly undermines Russia's position. These provisions of UNCLOS underscore that, unlike other areas where balancing may be appropriate, the regime of transit passage is not subject to exceptions or limitations. If the States Parties to UNCLOS had intended to submit the regime of transit passage to a balancing test, they would have done so. Instead, as the *travaux préparatoires* reveal, the drafters of UNCLOS considered proposals to qualify or limit the regime of transit passage, and rejected such proposals in favor of a clear prohibition on any form of impediment to navigation.

2. Russia Does Not Attempt to Defend Its Conduct Under the Governing Legal Standard — and It Cannot Defend Its Construction of a Low-Clearance Bridge Even Under Its Fabricated Balancing Test

129. Russia is unable to mount a defense under the governing legal standard, and fails even to attempt to do so. Thus, the Tribunal need not reach Russia's factual arguments related to the Bridge, and should sustain Ukraine's claims that the Bridge constitutes an impediment to transit passage.

130. Instead of addressing the requirements of the transit passage regime, Russia raises three arguments under its invented balancing test — *i.e.*, that (i) the Bridge, as constructed, was justified because of the "economic and humanitarian necessity" to connect the Crimean peninsula to Russia; (ii) the Bridge was the "only viable option . . . as regards location and design"; and (iii) the resulting "interference with navigation was minimal."[262] But even under Russia's invented balancing test, the facts do not support Russia's position.

i. Russia's "Economic and Humanitarian Necessity" Argument Is Irrelevant

131. The Russian Federation seeks to justify the construction of a low-clearance Bridge that admittedly interferes with navigation through the Strait by invoking an alleged "economic and humanitarian necessity" of connecting the Crimean peninsula to Russia.[263] But whether the Bridge was a "necessity" is not the relevant question before this Tribunal.

[262] Counter-Memorial of the Russian Federation, Chapter Three, Sections I(A), I(B), I(C).

[263] Counter-Memorial of the Russian Federation, ¶ 151.

The question presented is whether Russia violated UNCLOS by constructing a low-clearance structure that hampers or impedes transit passage through an international strait.

132. Even if relevant, the alleged "economic and humanitarian necessity" Russia invokes does not justify the construction of a low-clearance bridge that prevents passage of vessels that historically transited the Kerch Strait. Any economic or humanitarian interest in connecting the Crimean peninsula to Russia could have been satisfied by constructing a bridge with a higher clearance — as States have done over other waterways, including those cited by Ukraine's navigation expert, [redacted], in his first expert report.[264]

133. Russia's reliance on Ukraine's prior support for the construction of a bridge over the Kerch Strait as an indication of the economic need for the Bridge is similarly misplaced.[265] As Ukraine explained in its Revised Memorial, until 2014, Ukraine and Russia jointly facilitated navigation through the Kerch Strait and had discussed the possibility of a bridge over the Strait as part of the regime of cooperation in place since the late 1990s.[266] These discussions stemmed from the shared understanding that any bridge would be a joint effort, developed according to environmental studies and in line with navigational safety.[267] Ukraine's previous support for a potential bridge — constructed in an environmentally sound manner that would not impede navigation through the Strait — cannot be extended to the Kerch Strait Bridge, which was hastily developed and unilaterally built by the Russian Federation, at a low height that impedes navigation to Ukraine's Sea of Azov ports and falls short of international standards.

134. In any event, Ukraine's requested relief before this Tribunal is for the Russian Federation to raise the clearance of the Kerch Strait Bridge so that it no longer hampers navigation and impedes the right of transit passage.[268] Merely raising the Bridge would have no effect on the claimed situation of "economic and humanitarian necessity."

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[264] *See* Expert Report of [redacted] (18 May 2021) ("First [redacted] Report"), Section 4.

[265] Counter-Memorial of the Russian Federation, ¶¶ 152-154.

[266] Revised Memorial of Ukraine, ¶ 32.

[267] *Id.* ¶ 33.

[268] *Id.* ¶ 316(a).

ii. Russia's Argument That the Kerch Strait Bridge Was the Only Viable Option "as Regards Location and Design" Is Untenable

135. The Russian Federation also seeks to justify building a bridge with a clearance of 33 meters by applying a "'cost vs. benefit' analysis."[269] As explained, Russia cannot invoke a subjective and self-judging "cost vs. benefit" analysis to decide whether to comply or not with its (unqualified) obligation under UNCLOS not to hamper or impede transit passage. But even assuming that such analysis were permissible under UNCLOS, Russia's conclusion that [redacted][270] is contradicted by Russia's own evidence.

136. First, Russia alleges that it conducted a "feasibility study," undertaken by the Institute for Survey and Design of Bridge Crossings and reviewed by multiple Russian agencies and an expert council,[271] which, according to Russia, included an "[a]nalysis of previous practice of navigation through the Strait to establish the clearance of the Bridge."[272] Russia, however, only submitted with its Counter-Memorial 14 pages of what appears to be a 40-page document, and there is no record in the excerpts provided that Russia analyzed navigation practice through the Strait to establish the clearance of the Bridge.[273] Instead, the redacted study includes conclusory statements without support or underlying calculations,[274] which should not be given any weight by this Tribunal. Tellingly, moreover, Russia's "feasibility study" notes in its introduction that the USSR's 1947 proposal for a bridge across the Kerch Strait included a bridge clearance of 40 meters (*i.e.*, 7 meters higher than the clearance of the Bridge, as built).[275]

137. Second, Russia claims that the Bridge's dimensions were developed based on "all-encompassing research and development works" conducted by the Design, Survey, and Research Institute of Sea Transport "Soyuzmorniiproekt" ("Soyuzmorniiproekt").[276] Again,

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[269] Counter-Memorial of the Russian Federation, ¶ 161.

[270] *Id.* ¶ 183.

[271] *Id.* ¶ 162.

[272] *Id.*

[273] [redacted]

[274] *Id.* pp. 4-6.

[275] *Id.* p. 16. Ukraine submits a translation of relevant pages not translated by the Russian Federation as [redacted].

[276] Counter-Memorial of the Russian Federation, ¶ 169.

Russia submitted into evidence only 22 out of 122 pages of this study; redacted the names of the authors of the report; and left out multiple potentially relevant sections, including Section 5, titled "[redacted]," and Section 7, titled "[redacted]."[277] Once again, Russia's argument should be disregarded, as Russia has not put forward the evidence necessary to support it.

138. In any event, Russia's heavily redacted Soyuzmorniiproekt study on bridge clearance determined — based on an inadequate analysis of Ukrainian bound traffic using only two vessels[278] — that "[t]o ensure that ships can call at the Ukrainian ports, the top level of the span should be *at least* 39.5–42.5 metres"[279] (*i.e.*, at least 6.5 meters higher than the clearance of the Kerch Strait Bridge).[280]

139. While a height clearance of 39.5–42.5 meters would still be too low, if the Bridge had been built to allow a 42.5 meter vertical clearance, it would have been possible for vessels with a keel-to-mast height ("KtM") of 50.5 meters to access the Sea of Azov, as [redacted] explains in his second report.[281] Russia's "feasibility study" and Soyuzmorniiproekt study thus demonstrate that Russia has failed to meet even the bridge clearance specifications recommended by its own studies and its historical proposal.

140. Third, Russia relies on "an alternative independent analysis" by [redacted] which, according to Russia, confirms that [redacted][282] As a preliminary point, [redacted] testimony on the alleged lack of "economic rationale" for erecting a high-clearance bridge should be deemed

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[277] [redacted]

[278] *See* Expert Report of [redacted] (24 March 2023) ("Second [redacted] Report"), ¶¶ 6.3-6.8.

[279] [redacted]

[280] Counter-Memorial of the Russian Federation, ¶ 175 (citing [redacted]).

[281] *See* Second [redacted] Report, ¶ 6.11.

[282] Counter-Memorial of the Russian Federation, ¶ 183.

inadmissible. As [redacted] admits, he has no relevant expertise as an economist.[283] [redacted] also emphasizes [redacted] lack of qualification as an economist, rendering his opinions on the economics of vessel transit "misplaced" and "entirely speculative."[284] As [redacted] also points out, [redacted] fails to provide *any* evidence or calculations to support his purported economics analysis.[285]

141. Even if [redacted] testimony were admissible, his conclusion that the transit of large-sized vessels through the Strait is "economically unviable" and "could not reasonably justify these classes of vessels to be taken into account during the feasibility study of the Bridge clearance,"[286] is contradicted by the evidence. [redacted] bases his conclusion primarily on the observation that Panamax-sized vessels are not fully loaded when transiting the Strait because of the maximum permissible draft in the Strait of up to 8 meters.[287] But [redacted] disregards, as [redacted] has explained, that "the industry practice of partial loading and discharge is well established"[288] and that "[b]ecause large ocean-going vessels are designed to carry more sizeable loads than smaller short sea vessels, even a small number of such larger vessels can account for a meaningful share of cargo uplift from a given port."[289] Moreover, while [redacted] opines on matters related to vessel efficiencies, he does not engage in any analysis of the economics of the maritime business, which must take into account, as [redacted] explains, not only the ship's carrying capacity, but also "physical freight trades, freight derivative trades, benchmarking physical contracts, freight markets' performance, chartering, chartering negotiations or vessel financing."[290]

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[283] [redacted] CV and statement of expertise reveal that he largely practices as a marine accident investigator and has prior experience as a mariner. He, however, is not an economist, and has no experience in supply chain management.

[284] *See* Second [redacted] Report, ¶ 9.19.

[285] *See id.*

[286] [redacted] Report, ¶¶ 50, 64.

[287] *Id.* ¶ 57.

[288] Second [redacted] Report, ¶ 6.15.

[289] *Id.* ¶ 3.5.

[290] *See id.* ¶ 9.15.

142. [redacted]

143. While Russia seeks to assign significance to the fact that the Ukrainian ports of Mariupol and Berdyansk have a depth of around 8 meters, it is undisputed that large ocean-going vessels, including vessels in the Panamax class, were able to and did call at these ports before the Bridge construction.[293] Russia's argument that "the size of the two main ports in the Sea of Azov — Berdyanks and Mariupol"[294] prevented large-sized ships from calling at those ports is, therefore, contradicted by the evidence.

144. In sum, Russia's self-judging "cost vs. benefit" analysis of the design and clearance of the Bridge should be discounted as it lacks support and fails to engage with the reality that larger vessels regularly employed in international shipping used to transit the Kerch Strait to and from Ukraine's Sea of Azov ports, and now cannot due to the low clearance of the Bridge.

iii. Russia's "Comparable Bridges" Are Nothing of the Sort

145. Russia relies on [redacted] report to dismiss the comparator bridges selected and presented in [redacted] first report as "neither relevant nor representative."[295] According to Russia, the bridges selected by [redacted] are not "similarly situated" because they span deep and busy commercial waterways that are not comparable to the Kerch Strait.[296] This criticism is misguided. In conducting his bridge study, [redacted] selected bridges "spanning either international waterways or waterways

[291] *See* First [redacted] Report, ¶ 4.48.

[292] *See* Second [redacted] Report, ¶ 2.31.

[293] [redacted]; Counter-Memorial of the Russian Federation, ¶ 180.

[294] Counter-Memorial of the Russian Federation, ¶ 173.

[295] *Id.* ¶ 184.

[296] *Id.*

linking international waters along which ocean-going vessels transit."[297] In light of the limited number of bridges that meet this criteria — a reflection of the fact that it is unusual for a State to even attempt to build a bridge over an international strait — he selected a secondary sample of bridges spanning waterways that provide access to working ports for ocean-going vessels.[298] His selection of comparable bridges confirms that the clearance under a bridge spanning a busy waterway such as the Kerch Strait should be in a range of approximately 60 to 70 meters — a height that permits the transit of large ocean-going cargo vessels that previously transited the Strait.[299]

146. [redacted] analysis of allegedly "comparable bridges," on the other hand, is not actually based on comparables. He analyzes no bridges located in international straits connecting two areas of exclusive economic zones or territorial sea.[300] Further, as [redacted] demonstrates in his second report, three of the twelve bridges [redacted] selected — the Grűnental High Bridge and Hohenhörn High Bridge located in the Kiel Canal (Germany) and the St Georges East Bridge, located in the Chesapeake and Delaware Canal (United States) — are not only located in artificial canals but can be avoided entirely via a short, alternative route in the relevant waters, weakening any comparison to the Kerch Strait, which is the sole thoroughfare between Sea of Azov ports and the Black Sea.[301]

147. Five other bridges selected by [redacted] sit fully within a single State (for example, the Crescent City Connection Bridge spanning the Mississippi River in New Orleans (United States)), or a small island (the Suramadu Bridge, linking the island of Madura to the island of Java (Indonesia)).[302] Four other bridges are on the St. Lawrence River and Seaway, within Canada or in the artificial canal connecting the navigable portions of the St. Lawrence to Lake Ontario.[303] Aside from being a river that is not naturally navigable for much of its length, rather than a strait, the maximum vessel height of ships transiting the St. Lawrence Seaway is limited by the Seaway's Practice and Procedure, which

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[297] *See* First [redacted] Report, ¶ 4.5.

[298] *See id.* ¶ 4.6.

[299] *See id.* ¶ 4.7.

[300] [redacted] Report, p. 31, Table 5.

[301] *See* Second [redacted] Report, ¶¶ 7.7-7.8.

[302] *See id.* ¶¶ 7.9-7.10.

[303] *See id.* ¶ 7.11

provide that "[n]o ship shall transit if any part of the ship or anything on the ship extends more than 35.5 m above water level."[304]

148. Notably, two of the bridges selected by [redacted], the Sidney Sherman Bridge and the Benjamin Franklin Bridge, are located upriver and far inland, and pose no barrier for ocean-going vessels to navigate to their destination ports.[305] In particular, accessing the main port of Houston does not require passing under the Sidney Sherman Bridge, which spans the Houston Ship Channel; ocean-going vessels are able to access this port by passing under two earlier bridges with higher clearance.[306] Similarly, ocean-going vessels are able to access the Port of Philadelphia without passing under the Benjamin Franklin Bridge, as there are two other bridges further seaward with higher clearance that control access to the main port.[307] These bridges, therefore, do not restrict access to ports capable of handling ocean-going vessels, as the Kerch Strait Bridge does.

149. In any event, with the single exception of the Humber Bridge, which allows access only by small short-sea vessel sizes due to restrictions in the inland river ports, all the bridges chosen by [redacted] have a higher clearance height than the Kerch Strait Bridge.[308]

150. To justify discounting the most directly applicable examples, [redacted] inaccurately represents that the main factor to be taken into consideration in determining bridge height to ensure vessel passage is water depth.[309] As [redacted] explains, "[w]hile water depth is, of course, a factor in maximum vessel size, it is only one of several factors. The immediate cessation of vessel calls at Mariupol and Berdyansk of larger vessels that had historically used the Strait coincides with the installation of the Bridge's main span in August 2017."[310] If water depth limited the vessels which can transit the Strait, and bridge height merely reflected that limitation, the number of vessels in excess of 40,000 DWT would not have dropped to zero after construction of the Bridge, despite their continual use in the

[304] *See id.* ¶ 7.12.

[305] *See id.* ¶ 7.13.

[306] *See id.* ¶ 7.14.

[307] *See* Second [redacted] Report, ¶ 7.15.

[308] *See* Second [redacted] Report, ¶ 7.16.

[309] [redacted] Report, ¶¶ 11, 69-70.

[310] *See* Second [redacted] Report, ¶ 7.4.

decade prior.[311] [redacted] assertion regarding water depth is clearly contradicted by the Øresund Bridge which, as [redacted] notes, has both a shallower water depth (7.2 meters) and a considerably larger height clearance (55 meters) than the Kerch Strait Bridge.[312]

iv. Russia's Argument That Interference with Navigation Was "Minimal"[313] Is Contradicted by the Facts

151. [redacted]

[311] *See id.*

[312] *See id.* ¶ 7.20.

[313] Counter-Memorial of the Russian Federation, ¶ 193.

[314] *Id.* ¶ 187.

[315] *Id.* ¶ 188.

[316] *Id.* ¶ 187.

[317] *Id.* ¶ 188.

[318] *Id.* ¶ 188.

[319] Counter-Memorial of the Russian Federation, ¶ 188 (emphasis added).

[320] *See* Second [redacted] Report, ¶¶ 9.5, 9.10, 9.12-13.

[redacted] As [redacted] explains, because large ocean-going vessels carry much more sizeable loads than other vessels, even a small number of such vessels can account for a meaningful share of cargo shipping in a given area.[323]

153. With respect to the transit of specialized classes of vessels, Russia does not dispute that the right to transit passage attaches to JDRs, instead arguing that "the Kerch Bridge does not impede navigation of specialised vessel types, including jack-up drilling rigs (JDRs)" because "removal and replacement of jack-up legs is a possibility to allow for [JDRs'] transit under bridges."[324] This argument is similarly unavailing. As Russia's feasibility study reveals, the Russian energy company Rosneft Oil Company OJSC requested changes to the proposed dimensions and design of the Bridge, which would permit "jack-up drilling rigs to pass through the Kerch Strait into the Sea of Azov."[325] Russia was thus on notice that the proposed clearance of the Bridge would hinder the passage of JDRs needed to access, explore, and develop reserves in the Sea of Azov, but nevertheless proceeded with the Bridge's construction. Moreover, Russia fails to address Ukraine's observation that "[a]

[321] Counter-Memorial of the Russian Federation, ¶ 188.

[322] *See, e.g.*, Counter-Memorial of the Russian Federation, ¶ 188 [redacted]); *id.* ¶ 193 (The "proportion of large ocean-going vessels previously able to pass through the KYC, which are unable to do so after the construction of the Bridge is negligible. . . ").

[323] *See* Second [redacted] Report, ¶¶ 3.3-3.5, 9.22.

[324] Counter-Memorial of the Russian Federation, ¶ 192.

[325] [redacted] The Annex provided by the Russian Federation was not fully translated; thus, Ukraine submits a more complete translation as [redacted]. The study acknowledged that [redacted] would require erecting additional pylons to support [redacted] *Id.* The study further noted with concern that such a development would result in [redacted] in construction and operations costs, failing to reach a conclusion on whether to accommodate JDR passage through the Kerch Strait. *Id.* The study did advise that, [redacted] and conspicuously did not mention the removal and replacement of jack-up legs as a potential alternative to a heightened clearance. *Id.* Russia has provided no evidence that it heeded this warning or gave additional consideration to the free navigation of JDRs in the Kerch Strait and the Sea of Azov.

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."[326]

154. In sum, Russia's argument that interference with navigation was "minimal" cannot be reconciled with reality: Russia built a low-clearance bridge that closes off the Sea of Azov to large ocean-going vessels commonly used in international shipping, as well as to hydrocarbon services vessels essential to the development of oil and gas reserves in these waters.

B. Russia Has Violated UNCLOS Articles 43 and 44 by Failing to Cooperate with Ukraine as to Threats to Safe Navigation Posed by the Construction of the Bridge

155. UNCLOS Articles 43 and 44 require that Russia "by agreement cooperate" with user States,[327] including Ukraine, concerning navigational safety in the Kerch Strait, such as through the sharing of information relating to dangers to navigation.[328] As Ukraine demonstrated in its Revised Memorial, Russia violated these obligations in failing to provide Ukraine *any* information related to the construction of the Kerch Strait Bridge, despite the serious risks to safe navigation posed by its construction and despite the fact that Ukraine requested such information in a diplomatic note dated 12 July 2017.[329] Even now, Russia has failed to produce the full study it claims it had prepared before construction of the Bridge (and, in particular, it has failed to produce Section 7, titled "Potential risks associated with

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[326] Revised Memorial of Ukraine, ¶ 148 (explaining that the Bridge's low clearance would force JDRs to "compromise the integrity of the leg structure" just to transit the Kerch Strait. This threat to the safety and durability of the JDRs imposed by the Bridge impedes the vessels' ability to freely navigate the Sea of Azov).

[327] UNCLOS, Art. 43.

[328] Revised Memorial of Ukraine, ¶ 150.

[329] *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-663-1651 (12 July 2017) ("The Ministry further requests that the Russian Federation promptly provide to Ukraine all available information relating to the construction of the Kerch Strait Bridge, any associated threats to the marine environment, and any associated interference with navigation through the Kerch Strait . . . . The Russian Federation should also alert Ukraine to, and provide, any information that calls into question the short- or long-term structural integrity of the Kerch Strait Bridge.") (**UA-211**). Ukraine mistakenly dated this communication as 2016 in its Revised Memorial, when the correct date of the Note Verbale is 2017. *See Note Verbale of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation*, No. 72/22-663-1651 (12 July 2017) (**RU-352**). This typographical error does not detract from the fact that Russia simply ignored this request, and also failed to cooperate with Ukraine to address the dangers posed by the Bridge.

the construction of the transport crossing").[330] This confirms Russia's violations of its Article 43 and 44 obligations to cooperate with and inform Ukraine of "*any* danger to navigation."[331]

156. In its Counter-Memorial, Russia concedes that "Articles 43 and 44 . . . fall within Part III of UNCLOS, which imposes obligations to cooperate and share information about threats to safe navigation on States bordering international straits."[332] Russia also does not dispute that Ukraine qualifies as a user State of the Strait within the ordinary meaning of that term.[333] Russia nonetheless attacks Ukraine's reliance on Articles 43 and 44, arguing that these articles do not represent a "general and all-encompassing obligation to cooperate, with the exception of an actual and imminent danger that needs to be brought to the attention of the public."[334] Russia is wrong to interpret Articles 43 and 44 as minimal obligations, seeking to excuse its unlawful failure to cooperate with Ukraine.

1. Russia's Interpretation of Articles 43 and 44 as Minimal Obligations Is Contradicted by Their Ordinary Meaning, Read in Context, and in Light of the Object and Purpose of UNCLOS

157. Russia's attempt to reduce Articles 43 and 44 to minimal obligations is inconsistent with the ordinary meaning of these Articles, read in context, and in light of the object and purpose of UNCLOS, as required by Article 31 of the Vienna Convention.[335]

158. First, by its terms, Article 43 imposes a duty on 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."[336] In turn, Article 44 requires States bordering a strait to give "appropriate publicity" ("publicité adéquate," in French; "должны соответствующим образом

[330] [redacted]

[331] UNCLOS, Art. 44.

[332] Counter-Memorial of the Russian Federation, ¶ 196.

[333] *Id.* ¶ 210.

[334] *Id.* ¶ 195.

[335] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Art. 31(1) (**UAL-43**).

[336] UNCLOS, Art. 43.

оповещать," in Russian) of "any danger to navigation or overflight within or over the strait of which they have knowledge" (or "tout danger" in the French version; "о любой известной им опасности" in the Russian version.)[337] The Oxford English Dictionary defines "appropriate" as "[s]pecially fitted or suitable, proper,"[338] "any" as "even a single; the slightest,"[339] and "danger" as "[l]iability or exposure to harm or injury; the condition of being exposed to the chance of evil; risk, peril."[340] The Dictionnaire de l'Académie française defines "adéquat" as "Qui est exactement adapté,"[341] "tout" as "Qui comprend l'intégrité, la totalité d'une chose considérée par rapport au nombre, à l'étendue ou à l'intensité de l'énergie,"[342] and "danger," in the context of navigation, as "Barre, écueil, épave ou tout autre obstacle qui constitue une menace pour la navigation."[343] The Explanatory Dictionary of the Russian Language defines « соответствующий [appropriate] » as « suitable for this case, proper, such as required. Act appropriately, »[344] and « любой [any] » as « whatsoever, every possible, all, every, »[345] and « опасность [danger], » in the context of navigation, as « capable to cause, or cause any kind of harm. »[346]

159. The ordinary meaning of Articles 43 and 44 thus requires 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 by giving "appropriate"

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[337] UNCLOS, Art. 44 (emphasis added).

[338] Oxford English Dictionary, "appropriate, *adj.*, *and n.*" (online ed.) (**UAL-184**). With regard to "appropriate publicity," the IMO Secretariat has pointed out that: "the objective of publicity required will be effectively achieved only if the information in question reaches the States, authorities, entities and persons who are expected to be guided by the information. IMO maintains the most direct and continuing contact with the authorities of States concerned with safety of navigation and the prevention of vessel-source pollution." *See* Implications of the United Nations Convention on the Law of the Sea, 1982, for the International Maritime Organization (IMO), Study by the Secretariat of IMO, Doc. LEGIMISC/I (27 July 1987), Reproduced in 3 Int'l Org. & L. Sea: Documentary Y.B. 317 (1987), ¶ 130, p. 340, 390 (**UA-820**).

[339] Oxford English Dictionary, "any, adj.,pron., n., and adv." (online ed.) (**UAL-185**).

[340] Oxford English Dictionary, "danger, n., and adj." (online ed.) (**UAL-186**).

[341] Dictionnaire de l'Académie française, "adéquat, -ate, adj." (online ed.) (**UAL-187**).

[342] Dictionnaire de l'Académie française, "tout, toute, adj." (online ed.) (**UAL-188**).

[343] Dictionnaire de l'Académie française, "danger, n." (online ed.) (**UAL-189**).

[344] Explanatory Dictionary of the Russian Language, "appropriate" (online ed.) (**UAL-190**).

[345] Explanatory Dictionary of the Russian Language, "any" (online ed.) (**UAL-191**).

[346] Explanatory Dictionary of the Russian Language, "dangerous" (online ed.) (**UAL-192**).

(*i.e.*, "suitable, proper") publicity to "any" (*i.e.*, "even a single, the slightest") danger (*i.e.*, "exposure to harm") to navigation.[347]

160. Second, this interpretation of Articles 43 and 44 is confirmed by their context. Whereas the term "danger" in Articles 98(1) and Article 192 is qualified — referring, respectively, to "*serious* danger"[348] and to "grave and imminent danger"[349] — Article 44 contains no such qualification, expressly requiring publicity for "*any* danger to navigation,"[350] provided that such danger is known by the State bordering the strait.

161. Last, a broad obligation to "cooperate" and give "appropriate" publicity to "any" danger to navigation aligns with the object and purpose of UNCLOS of "facilitat[ing] international communication."[351] The aim of fostering international cooperation and communication cannot be realized when States bordering straits take unilateral action, refusing to consult or appropriately warn interested States.

2. Leading Commentators Support a Robust Reading of the Duties of Cooperation and Publicity Under Articles 43 and 44

162. Leading commentators support the view that the obligation to cooperate set out in Article 43 is a mechanism for ensuring that user States' interests are acknowledged and reflected in navigation measures taken by States bordering straits. For example, Professor Bernard H. Oxman notes, "[t]he legal significance of Article 43 is that it mandates co-operation and agreement."[352] Indeed, as Professor Oxman explains, Article 43 requires cooperation amongst States as it "expressly recognises that such practical measures are

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[347] *See* Revised Memorial of Ukraine, ¶ 150.

[348] UNCLOS, Art. 98(1) (emphasis added).

[349] UNCLOS, Art. 142 (emphasis added).

[350] UNCLOS, Art. 44 (emphasis added).

[351] UNCLOS, Preamble.

[352] 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. 409 (**UAL-134**). Oxman also addresses the use of the word should instead of shall in Article 43, explaining, "[i]f the term 'should co-operate' is not the same as 'shall co-operate', it is also not the same as 'may co-operate'. Where co-operation and agreement are being mandated, it is not clear how much difference (if any) it makes whether one says 'shall' or 'should'. The Convention reflects this fact and often uses formulations such as 'should', 'shall seek to', 'shall endeavour to', 'shall promote' or 'shall as appropriate' in this connection in other places. This is especially true where the object of the co-operation is a matter that, under the Convention, engages the rights of a coastal state." *Id.* p. 410.

matters of concern both to straits states and to user states. In this regard, there are two primary reasons for co-operative arrangements with user states: *to ensure that the views and interests of the users are taken into account in dealing with aids to navigation and other practical matters*; and to provide a mechanism for users to assist with expertise and other resources."[353]

163. Scholars also disagree with Russia's narrow reading of Article 44. As Judge Hugo Caminos explains, Article 44 refers to "the duty of the coastal State to give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. The notion should arguably receive a broad interpretation and not be restricted to natural dangers. A bridge could certainly constitute a danger to navigation or overflight."[354] This interpretation is supported by the robust nature of the duty in the *Corfu Channel* case, which is illustrated by its subsequent codification in Article 15(2) of the Convention on the Territorial Sea. Using similarly broad terms to UNCLOS, this convention states: "[t]he coastal State is required to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea."[355] Russia points out that Corfu Channel dealt with failure to give publicity to a minefield,[356] but the duty to notify articulated in the case is not limited to its particular facts.

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[353] 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. 416 (emphasis added) (**UAL-134**). *See also* 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 Aldo Chircop, et al. (eds.), The Future of Ocean Regime Building (2009), pp. 238, 240 ("Article 43 is intended to promote and foster cooperation between States bordering straits and user States to enhance navigational safety and environmental protection in straits used for international navigation.") (**UAL-133**).

[354] *See* Hugo Caminos and Vincent P. Cogliati-Bantz, *The Legal Regime of Straits: Contemporary Challenges and Solutions* (Cambridge, 2014), p. 233 (**UAL-127**).

[355] Convention on the Territorial Sea and the Contiguous Zone (1958), Art. 15(2) (**UAL-106**); *see also* Moore, Nordquist, et al., United Nations Convention on the Law of the Sea: A Commentary (2014) ("The second duty imposed by article 44 on States bordering straits is to give 'appropriate publicity' of dangers to navigation and overflight of which the States have knowledge. The modern articulation of this duty follows from the Corfu Channel case. It was adopted in article 15, paragraph 2 (dangers to navigation), of the 1958 Convention on the Territorial Sea and the Contiguous Zone, based on the work of the International Law Commission, and is carried over into article 44 of the Convention (and in article 24, paragraph 2, which addresses dangers to navigation).") (**UAL-181**).

[356] Counter-Memorial of the Russian Federation, ¶ 200.

3. Russia Cannot Excuse Its Failure to Cooperate and Inform Ukraine of "Any Danger to Navigation"

164. In an effort to evade its duty to cooperate and give "appropriate publicity" of "*any* danger to navigation," Russia raises a number of implausible excuses.

165. First, Russia attempts to dismiss the dangers to navigation raised by Ukraine,[357] even though they are amply supported. In particular, Russia asserts that "a bridge is not a navigational danger *per se*"[358] and relies on a communication that it solicited from the IMO indicating that there is no requirement under the Convention for the Safety of Life at Sea ("SOLAS") to notify the IMO of the "intention" to undertake the construction of a bridge across navigational channels used for international navigation.[359] Russia fails to note, however, that in the same letter, the IMO indicates that SOLAS is not the governing instrument in this area. Instead, the IMO observed that the "international legal framework addressing straits used for international shipping is contained in [UNCLOS]" and encouraged Russia to "contact the UN Division for Ocean Affairs and the Law of the Sea" for "detailed advice on the application and interpretation of the provisions of UNCLOS."[360] There is no indication that Russia sought such advice (and even if it had, moreover, such advice could not preempt this Tribunal's analysis). As referenced above, under UNCLOS Article 44, "[a] bridge could certainly constitute a danger to navigation or overflight"[361] — as is the case with the Kerch Strait Bridge.

166. Second, Russia seeks to dismiss the effects on navigation identified by [redacted] that could potentially result from two environmental issues associated with the construction of the Bridge, namely, a change in the hydrodynamic processes in the Strait, which may create increased sedimentation in the Kerch-Yenicale Channel, and ice build-up due to the Kerch Strait Bridge.[362] As discussed in Chapter Four below, Russia has failed to

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[357] *Id.* ¶ 201.

[358] *Id.* ¶ 213.

[359] *Id.* ¶ 214; Letter of the Director of Maritime Safety Division to the International Maritime Organization [redacted] to the Permanent Representative of the Mission of the Russian Federation to the International Maritime Organization [redacted] (29 July 2015) (**RU-359**).

[360] Letter of the Director of Maritime Safety Division to the International Maritime Organization [redacted] to the Permanent Representative of the Mission of the Russian Federation to the International Maritime Organization [redacted] (29 July 2015) (**RU-359**).

[361] Hugo Caminos & Vincent P. Cogliati-Bantz, *The Legal Regime of Straits: Contemporary Challenges and Solutions* (Cambridge, 2014), p. 233 (**UAL-127**).

[362] *See* First [redacted] Report, ¶ 4.3.

properly assess and monitor those (and other) potential impacts of the Bridge construction and has no basis to rule out such impacts.[363] In fact, Russia does speculate, albeit without a scientific ground, that certain hydrodynamic changes would have occurred and that during the 2016-2017 winter season "ice appeared in the Strait and such kind of surveillance was needed."[364] In any case, whether the environmental impacts of the Bridge, and the associated dangers to navigation, have materialized or not is *ex post facto* information that has no bearing on whether a State has a duty to publicize such dangers.

167. Third, Russia cannot rely on "legitimate security concerns" for not sharing information concerning the construction of the Bridge.[365] As demonstrated in Section I.A.1 of this Chapter, there is no security exception to Articles 43 and 44. In any event, as a simple matter of logic, Russia cannot rely on its *current* security concerns to excuse its *past* failure to provide information to Ukraine on threats to safe navigation posed by the Bridge's construction.

168. Last, Russia cannot simply assume that any efforts to cooperate with Ukraine would have been futile.[366] While Russia notes that Ukraine did not consent to the construction of the Bridge,[367] that fact hardly establishes that Ukraine would not have cooperated in ensuring safe navigation. Further, Russia does not deny that Ukraine requested "all available information relating to the construction of the Kerch Strait Bridge [and] any associated threats to the marine environment,"[368] and that Russia failed to provide any such information, depriving Ukraine of the possibility of understanding and mitigating risks posed by the Bridge construction. Russia emphasizes that Ukraine's request post-dated the commencement of these proceedings, but that fact does not relieve Russia of its duty to cooperate.[369]

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[363] *See* Chapter Four, Sections I.B, III.A.

[364] [redacted] Report, ¶ 128 n.116; *see infra* Chapter Four, Part I.B.

[365] Counter-Memorial of the Russian Federation, ¶¶ 206, 262-263.

[366] *Id.* ¶ 209.

[367] *Id.* (citing *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 610/22-110-1132 (29 July 2015) (**UA-233**)).

[368] Revised Memorial of Ukraine, ¶ 154; *Note Verbale of the Ministry of Foreign Affairs of Ukraine*, No. 72/22-663-1651 (12 July 2017) (**UA-211**).

[369] Counter-Memorial of the Russian Federation, ¶ 205.

C. Russia Has Violated Articles 38 and 44 by Inspecting and/or Delaying Vessels Navigating the Kerch Strait to or From Ukraine's Ports

169. The Russian Federation has interfered with international navigation, including Ukrainian-flagged vessels, in the Kerch Strait and Sea of Azov by targeting vessels travelling to or from Ukraine's Sea of Azov ports for delays and, in many cases, subjecting them to discriminatory inspections before they are permitted to transit the Strait.[370] In its Counter-Memorial, the Russian Federation does not dispute that imposing discriminatory delays on vessels seeking to transit an international strait based on the country to which they are traveling would violate Articles 38 and 44 of UNCLOS.[371] Instead, Russia attempts to question the probative value of the evidence submitted by Ukraine, advances a heightened standard of proof, and seeks to portray its actions as reasonable safety-related control measures.[372] None of these arguments absolves Russia's violations of UNCLOS.

1. Ukraine Has More Than Met the Applicable Evidentiary Standard

170. Ukraine has provided ample documentary evidence and witness testimony in support of Russia's discriminatory delays and inspections of merchant vessels traveling through the Kerch Strait to and from Ukraine's Sea of Azov ports, thus meeting the applicable standard of proof, *i.e.*, "preponderance of evidence" or the balance of probabilities.[373]

171. First, through the testimony of [redacted], Ukraine explained that Automatic Identification System (AIS) data tracking the location of vessels transiting the Strait between July 2018 and March 2021 shows "the average amount of time that vessels traveling to or from Ukrainian ports in the Sea of Azov were forced to wait before being given permission to transit the Kerch Strait was 40 hours,"[374] whereas a sample analysis of vessels traveling to or

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[370] Revised Memorial of Ukraine, ¶ 157.

[371] Counter-Memorial of the Russian Federation, ¶ 256.

[372] *Id.* ¶¶ 295-300.

[373] *See* Rüdiger Wolfrum, *Taking and Assessing Evidence in International Adjudication* in TM Ndiaye and R Wolfrum (eds.), Law of the Sea, Environmental Law and Settlement of Disputes (2007), p. 354 (**UAL-193**); *see also* ITLOS in *M/V Norstar Case (Panama v. Italy),* ITLOS Case No. 25, Judgment of 10 April 2019, ¶¶ 88-98 (**UAL-138**);.

[374] Witness Statement of [redacted] ("[redacted] Statement"), ¶ 12.

from Russian ports in the Sea of Azov resulted in estimated average wait times of approximately three hours.[375] Additionally, [redacted] explained that Russia discriminatorily enforced its pilotage requirement, as well as the use of one-way traffic, to further target Ukrainian vessels for delays, while largely exempting Russian vessels from the same requirements.[376] [redacted] supported his testimony through references to regulations issued by the Russian Ministry of Transport, as well as through reports received from merchant vessel masters who had experienced these delaying tactics.[377]

172. Second, [redacted], [redacted], similarly testified that interviews of vessel captains conducted by the Ukrainian [redacted] at Mariupol and Berdyansk between April 2018 and April 2021 document over 1,600 cases of inspections by the Russian Border Guard, affecting both Ukrainian and foreign commercial vessels.[378] In support, Ukraine submitted a selection of vessel logs showing that Russia has boarded and inspected vessels seeking to transit the Kerch Strait *en route* to Ukrainian ports.[379]

173. Third, Russia's own data supports Ukraine's case. As Ukraine explained in its Revised Memorial, data publicly cited by the Federal Security Service ("FSB") of the Russian Federation confirms that vessels traveling to or from Ukrainian ports have been disproportionately impacted by inspections.[380] In particular, official statements by the First Deputy of the Head of Department of the Coast Guard of the FSB indicate that, between April and December 2018, at least two-thirds of the vessels traveling to or from Ukrainian ports were subjected to Russian inspections.[381] In comparison, Russia inspected a far smaller proportion of vessels traveling to or from Russian ports — approximately 10 percent.[382] Russia's argument that the majority of inspections concerned Russia-bound

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[375] [redacted] Statement, ¶ 13.

[376] *Id.* ¶ 11.

[377] *Id.*

[378] Witness Statement of [redacted] ("[redacted] Statement"), ¶ 4.

[379] *See* Revised Memorial of Ukraine, ¶ 160.

[380] [redacted] Statement, ¶ 14.

[381] *Id.*

[382] *Id.*

vessels is misleading, as there are many more vessels traveling to Russian than to Ukrainian ports.[383]

174. In sum, Ukraine's evidence, combined with Russia's own data, shows that Russia has imposed significant delays on vessels bound to or returning from Ukraine's Sea of Azov ports, while not subjecting vessels traveling to or from Russia's Sea of Azov ports to similar measures.[384] The testimonies of Ukraine's witnesses were informative, credible, and well supported by documents. Russia cannot escape liability for its violations of Articles 38 and 44 simply by claiming insufficient proof while declining to submit any direct countervailing evidence, when any such additional evidence is clearly within Russian control.

2. Russia Seeks to Impose a Heightened Evidentiary Hurdle on Ukraine

175. In an attempt to erect a heightened evidentiary hurdle, Russia misstates the applicable standard of proof. In particular, Russia seeks to evade responsibility for its violations of Articles 38 and 44 by arguing that Ukraine must "unambiguously show a direct connection between the alleged delays of vessels and their inspections" by the Russian Border Guard Service's security inspections.[385]

176. The standard of proof applicable in this proceeding, however, is the standard of "preponderance of evidence" or the balance of probabilities.[386] Under this standard, Ukraine prevails if its evidence, "on the basis of reasonable probability weighs heavier than the evidence produced by" the Russian Federation.[387] Russia provides no basis, under UNCLOS or otherwise, to hold Ukraine to a heightened standard. As the ICJ recently reiterated, "a State that is not in a position to provide direct proof of certain facts 'should be

[383] *Id.*

[384] Revised Memorial of Ukraine, ¶ 159.

[385] Counter-Memorial of the Russian Federation, ¶ 295.

[386] *See* Rüdiger Wolfrum, *Taking and Assessing Evidence in International Adjudication* in TM Ndiaye and R Wolfrum (eds.), Law of the Sea, Environmental Law and Settlement of Disputes (2007), p. 354 (**UAL-193**); *see also* ITLOS in *M/V Norstar Case (Panama v. Italy),* ITLOS Case No. 25, Judgment of 10 April 2019, ¶¶ 88-98 (**UAL-138**).

[387] Rüdiger Wolfrum, *Taking and Assessing Evidence in International Adjudication* in TM Ndiaye and R Wolfrum (eds.), Law of the Sea, Environmental Law and Settlement of Disputes (2007), p. 354 (**UAL-193**).

allowed a more liberal recourse to inferences of fact and circumstantial evidence.'"[388] One circumstance where the Court has permitted this more liberal recourse to inferences is where relevant evidence is outside the applicant State's "exclusive territorial control."[389] Such is the case here where the Russian Federation is the party that carried out these inspections.

3. Russia Fails to Excuse Its Actions as Reasonable Safety-Related Control Measures

177. Rather than grappling with Ukraine's evidence or providing countervailing evidence, Russia attacks a strawman by arguing that Ukraine is attempting to challenge the establishment of routine safety measures in the Kerch Strait.[390] In this regard, Russia insists that various vessel traffic management systems, including traffic separation schemes, have been adopted to minimize navigational risk, both from collisions and groundings.[391] In support of this claim, Russia references [redacted] first report, which states that "[a]s a result of the busy and confined navigational conditions, a compulsory pilotage regime applies in the Kerch Strait, subject only to defined exceptions."[392] But these statements are beside the point. Ukraine's claim is not that these measures are *per se* violations of UNCLOS, but rather, that Russia has used its control over the Kerch Strait to disproportionately delay and, in many instances, inspect vessels traveling to or from Ukraine's Sea of Azov ports.

178. For instance, the mere existence of a compulsory pilotage system is not the source of Ukraine's complaint. It is Russia's adoption of a pilotage regime that permits only qualifying *Russian* vessels to be exempt from this pilotage requirement that is discriminatory.[393] To defend this discriminatory issuance of pilotage exemptions, [redacted] refers to three different pilotage regimes.[394] But none of the coastal pilotage requirements invoked by [redacted] permits exemptions *only* for domestic pilots/vessels;

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[388] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, ICJ Judgment of 9 February 2022, ¶ 120 (citing *The Corfu Channel Case (UK v. Albania)*, ICJ Judgment of 9 April 1949, p. 18 (**UAL-15**)) (**UAL-194**).

[389] *The Corfu Channel Case (UK v. Albania)*, ICJ Judgment of 9 April 1949, p. 18 [hereinafter "*Corfu Channel Case*"] (**UAL-15**).

[390] Counter-Memorial of the Russian Federation, ¶ 228.

[391] *Id.* ¶ 237 (quoting First [redacted] Report, ¶ 3.5).

[392] First [redacted] Report, ¶ 3.8.

[393] *Id.* ¶ 3.10.2.

[394] [redacted] Report, ¶¶ 36-37.

rather, all three treat equally applicants of any nationality that can meet the specified requirements.[395] Russia does not even attempt to articulate a principled justification for excluding Ukrainian vessels from qualifying for the pilotage exemption. [redacted] explains, "that a competently managed pilotage exemption system provides effective mitigation against navigational risks, regardless of the vessel's flag state to which the exemption applies,"[396] emphasizing that, "[i]n accordance with international practice, the decision to grant pilotage exemptions should be based on an objective assessment of the vessel's ability to safely navigate the area without a pilot . . . rather than the nationality of the particular vessel."[397] The Russian pilotage requirement, therefore, impermissibly discriminates against Ukrainian vessels (and those of other user States).

179. Similarly, while the adoption of vessel traffic management systems may not *per se* be objectionable, Russia's implementation of one-way traffic in certain areas of the Kerch Strait was made necessary by the low clearance of the Kerch Strait Bridge.[398] As Russia itself admits, "[o]ne way traffic . . . in the area of the underbridge crossing for vessels with length dimensions exceeding 20m . . . was introduced to safeguard navigation under the central arch of the newly constructed Kerch Bridge."[399] And as [redacted] explained in his witness statement, "the construction of the Kerch Bridge and Russia's resulting implementation of one-way traffic for many vessels in the channel . . . is itself a source of delay."[400] The adoption of one-way traffic in this instance compounds Russia's hindrance of transit passage as a result of the construction of the Kerch Strait Bridge.

180. For the same reasons, Russia's argument that "the practice of security inspections of vessels transiting the straits . . . is not unusual for other water areas around the world"[401] is not relevant to Ukraine's discrimination claims. Russia cites as support the

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[395] Port of London Authority, Pilotage Directions 2017 as amended (1 August 2019) (**RU-219**); Australian Maritime Safety Authority –official website, Coastal Pilotage Exemptions (**RU-220**); Standard Club, Pilotage Bulletin (May 2016), p. 14 (**RU-221**). [redacted], in his second report, explains the difference between coastal and harbor pilotage requirements. *See* Second [redacted] Report, ¶ 4.8.

[396] Second [redacted] Report, ¶ 4.4.

[397] *Id.* ¶ 4.5.

[398] *See id.* ¶ 4.14.

[399] Counter-Memorial of the Russian Federation, ¶ 245.

[400] [redacted] Statement, ¶ 11.

[401] Counter-Memorial of the Russian Federation, ¶ 300.

case of Egypt right after it experienced a coup d'état in 2013.[402] But Egypt's Suez Canal is not a strait — let alone a strait subject to the transit passage regime. Even putting this to one side, the documents Russia cites refer to non-discriminatory inspections conducted at anchorage, or inspections of vessels which fail to provide 96-hour pre-arrival notice to the port,[403] which are clearly distinguishable from Russia's targeted and discriminatory inspections of Ukrainian vessels or vessels traveling to or from Ukrainian ports.

181. Russia also insists that vessel delays due to lengthy inspections are "not unusual"[404] and relies on [redacted] statement that "it is not unusual for 18-24 hours delays for vessels that do not have priority as practiced in the Suez, Panama and Kiel Canals."[405] Once again, these are canals, which are artificial waterways, not straits. As [redacted] explains, "canals often require more extensive regulation (including requirements for pilotage, mooring rope handling, speed limits, and vessel size restrictions) and can be subject to more hazards, such as locks. The strict regulations and procedures that ships generally need to follow to transit through canals, such as the Panama, Suez, or Kiel canals, are not comparable to the Kerch Strait."[406] Moreover, as [redacted] points out, the only evidence provided by [redacted] refers to vessels that are unexpected by the canal authority; as these vessels do not have a booked inspection slot, they must wait for an available opening.[407] These are not typical wait times, as [redacted] misleadingly suggests.

D. Russia's Closure of the Kerch Strait to Navigation by Foreign Military and Other Government Vessels Violates Articles 38 and 44

182. Ukraine proved in its Revised Memorial, and Russia does not dispute, that Russia suspended passage of foreign warships and government vessels in areas of the Black Sea, blocking access to the Kerch Strait, as depicted in **Map 1** below (illustrating the areas covered by Notice No. 1833 of the Ministry of Defense of the Russian Federation). As a result of this closure, Ukrainian and other foreign government vessels were blocked from

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[402] *Id.*

[403] The London P&I Club, "Suez Canal: Random Inspections" (24 July 2022) (**RU-396**); Panama Canal Authority official website, OP NOTICE TO SHIPPING No. N-1-2022 (1 August 2022), pp. 20, 97 (**RU-397**).

[404] *See* Counter-Memorial of the Russian Federation, ¶¶ 295, 300.

[405] [redacted] Report, ¶ 41.

[406] *See* Second [redacted] Report, ¶ 5.3.

[407] *See id.* ¶ 5.4.

accessing the Kerch Strait for over six months from April 2021 through the end of October 2021, and unable to travel to and from Ukraine's critical Sea of Azov ports.[408]

[408] Revised Memorial of Ukraine, ¶ 164.

Map 1


NOTICE TO MARINERS 1883 (T)
BLACK SEA. RF. ANNOUNCEMENT
AREA "C"
Mercator Projection, Datum: WGS-84
(Scale accurate at 45°N)
0 2 4 6 8
Nautical Miles
0 4 8 12 16
Kilometers
Prepared by International Mapping
36°40'E
36°50'E
45°30'N
Sea of Azov
Borzovka Cape
RUSSIA
Fonar Cape
Dinska Gulf
Chushka Beak
Kerch
A-290
Kerchenska Bay
Yeni-Kale Cape
45°20'N
Krupinina Island
RUSSIA
Archway Span
Crimean Peninsula
Komysh-Burunska Bay
Tuzla Island
UKRAINE
UKRAINE
Kerch Strait
Markitantska Beak
Taman
Tuzla Cape
Taman Peninsula
RUSSIA
45°10'N
Malyi Cape
Panagiia Cape
Zhelieznyi Roh Cape
Takyl Cape
Kyz-Aul Cape
NtM 1883 (T) Area "C"
45°00'N
Black Sea
36°20'E
36°30'E
36°40'E
36°50'E

183. Rather than addressing Ukraine's argument that such closure of the Kerch Strait interferes with the regime of *transit* passage guaranteed by UNCLOS Articles 38 and 44, Russia addresses whether its actions would meet the standard for temporary suspensions of *innocent* passage under Article 25(3).[409] But it has no defense for its suspension of the regime of *transit* passage in the Kerch Strait. Nor is any defense possible; as Article 44 states, "[t]here shall be no suspension of transit passage."[410]

184. Persisting in its mischaracterization of Ukraine's case, Russia states that Ukraine's claims based on the navigation of foreign warships and other government ships require an impermissible determination as to whether the sea areas adjacent to Crimea can be regarded as Russia's territorial sea where it may suspend the innocent passage of foreign ships for security purposes.[411] But once again, Ukraine's claims relate to *transit* passage which, as explained in Section I.A.1 of this Chapter, Russia would have no right to suspend or impede even if it were the coastal State in Crimea.

185. Accordingly, Russia's argument that it "lawfully suspended innocent passage for the protection of its security"[412] is legally irrelevant. In any event, Russia has failed to demonstrate that any purported suspension of innocent passage would be in accordance with UNCLOS. Under Article 25 of the Convention, any suspension of innocent passage must be temporary, cannot discriminate in form or fact among foreign ships, and must be essential for the security of the coastal State.[413] Russia failed to meet these requirements: First, Russia's closure of portions of the Black Sea near the Kerch Strait for 24 hours a day, 7 days a week, for six months cannot qualify as "temporary." Second, Russia's declaration applies only to warships and other State vessels and therefore discriminates in fact among types of foreign ships. Third, Russia did not publicly indicate why it was closing off portions of the Black Sea.

186. Similarly irrelevant is Russia's assertion that "Ukraine itself has exercised on repeated occasions its right to suspend innocent passage in different territorial sea areas of the Black Sea."[414] As explained, at issue in the Kerch Strait is the right of transit passage;

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[409] Counter-Memorial of the Russian Federation, ¶¶ 256-268.

[410] UNCLOS, Art. 44.

[411] Counter-Memorial of the Russian Federation, ¶¶ 252-254.

[412] *Id.* ¶ 272.

[413] UNCLOS, Art. 25.

[414] Counter-Memorial of the Russian Federation, ¶ 269.

thus, Ukraine's suspension of innocent passage is inapposite. Ukraine's purported conduct is not a valid defense to Russia's own lengthy and unlawful closure of the Kerch Strait to navigation by foreign military and government vessels.

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

187. Beyond the Kerch Strait, 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 the seas.[415] In its Counter-Memorial, Russia seeks to escape liability for its violations of Articles 2, 58, 87, and 92 of the Convention by insisting that the Sea of Azov constitutes internal waters and that issues of navigation in these waters are governed by the 2003 Sea of Azov Treaty; by shifting focus to pre-2014 practice by Russia and Ukraine; and by questioning the sufficiency and reliability of Ukraine's evidence. Russia's arguments are a distraction and are not a defense to its systematic non-compliance with UNCLOS Articles 2, 58, 87, and 92.

A. Russia Is Bound by Articles 2, 58, 87, and 92 of the Convention

188. As Ukraine demonstrated in its Revised Memorial, Russia violated Articles 2, 58, 87, and 92 of the Convention by impeding navigation in the Sea of Azov to and from Ukraine's Sea of Azov ports. In connection with the stoppages and inspections that occurred in the exclusive economic zone, Russia violated the freedom of navigation guaranteed in Articles 58 and 87 of the Convention.[416] 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.[417] As for Russia's stoppages and inspections of merchant vessels within 12 nautical miles of mainland Ukraine's Sea of Azov baselines, those actions violated Ukraine's sovereignty over its territorial sea under Article 2.[418]

189. In its Counter-Memorial, Russia does not dispute the content of the rights guaranteed in Articles 58, 87, 92, and 2 of the Convention. Instead, Russia argues that these provisions are "irrelevant" because "there was no territorial sea and exclusive economic zone

[415] Revised Memorial of Ukraine, ¶ 175.

[416] *Id.*

[417] *Id.*

[418] *Id.*

in the water area with the status of shared internal waters, which the Sea of Azov enjoyed."[419] Russia continues that "[t]he issues of navigation in these waters were regulated by . . . the Azov/Kerch Cooperation Treaty."[420]

190. Ukraine has already rebutted these arguments in its Revised Memorial and in Chapter Two of this Reply. First, under UNCLOS, the Sea of Azov is comprised of territorial seas and exclusive economic zones.[421] Second, the (two-page) 2003 Sea of Azov Treaty does not govern the regime of navigation in the Sea of Azov and the Kerch Strait, nor do its provisions supersede the obligations and protections guaranteed by UNCLOS.[422] Further, none of Ukraine's claims in this proceeding invoke the 2003 Sea of Azov Treaty or allege violations of it.[423] The 2003 Sea of Azov Treaty is thus inapplicable to the resolution of Ukraine's claims of breaches of its navigation rights under UNCLOS, which is the instrument this Tribunal is tasked with applying.

B. Alleged Pre-2014 Practice by Russia and Ukraine Has No Bearing on Whether Russia's Inspections Comply with UNCLOS — and Provides No Parallel to Russia's Current Pattern of Stoppages

191. Russia attempts to draw a parallel between the recent inspections conducted by the Russian Border Guard Service in the Sea of Azov and inspections conducted by "the border authorities of both States" before 2014.[424] Once again, Russia cannot excuse its UNCLOS violations by shifting focus to alleged prior practice. Russia's assertions regarding past conduct do not provide a valid defense to Russia's post-2014 inspections practice in violation of UNCLOS.

192. Russia's argument is also based on the false claim that its current practice mirrors prior practice. But any prior joint inspection practice reflected coordinated efforts between both States, was non-discriminatory, and thus attracted "no record of protests from

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[419] Counter-Memorial of the Russian Federation, ¶ 281.

[420] *Id.* ¶ 282.

[421] Revised Memorial of Ukraine, Chapter Five.

[422] Counter-Memorial of the Russian Federation, ¶¶ 282-285; *see* 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**).

[423] Revised Memorial of Ukraine, ¶¶ 314-317.

[424] Counter-Memorial of the Russian Federation, ¶ 292.

third States," as Russia notes.[425] In contrast, the international community has vociferously protested the Russian Federation's discriminatory inspections in the Sea of Azov post-2014. As explained in Ukraine's Revised Memorial, several States, as well as regional and international governance bodies, have condemned Russia's excessive stopping and inspections of commercial vessels, including both Ukrainian ships and those with flags of third States.[426] Independent press and academics have also reported on the lengthy and unreasonable delays caused by Russia's inspections, which have hampered commercial transit in the Sea of Azov.[427]

193. Russia tries to evade the stark distinctions between the pre- and post-2014 practice of inspections by claiming that the post-2014 inspections "serve the same security and crime-prevention purposes, as prior practice of Russia and Ukraine."[428] In support, Russia cites news articles by two Russian state-owned news agencies and another Russian media organization,[429] which in turn cite statements by the Russian Border Guard Service on alleged "real threats to security in the Sea of Azov and the Kerch Strait."[430] This vague and self-serving triple-hearsay does not rebut Ukraine's witness testimony and documentary

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[425] *Id.*

[426] Revised Memorial of Ukraine, ¶ 162; see also, *e.g.*, 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 (14 December 2020), p. 4 (**UA-596**); U.N. General Assembly Resolution 76/70, U.N. Doc. No. A/RES/76/70, 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 (16 December 2021), pp. 3-5 (**UA-821**); European Parliament Recommendation 2022/C 117/18, Recommendation of 16 September 2021 to the Council, the Commission and the Vice-President of the Commission / High Representative of the Union for Foreign Affairs and Security Policy on the Direction of EU-Russia Political Relations (2021/2042(INI)) (16 September 2021) (**UA-822**); European Parliament Resolution P9_TA(2021)0050, Resolution of 11 February 2021 on the Implementation of the EU Association Agreement with Ukraine (11 February 2021) (**UA-823**); European Parliament Resolution P9_TA(2021)0515, Resolution of 16 December 2021 on the Situation at the Ukrainian Border and in Russian-Occupied Territories of Ukraine (16 December 2021) (**UA-824**); NATO, Brussels Summit Communiqué (14 June 2021) (**UA-825**).

[427] Christopher Miller, *Sea of Troubles: Azov Emerging As 'Tinderbox' In Russia-Ukraine Conflict*, Radio Free Europe/Radio Liberty (7 August 2018) (**UA-826**); Andrew Wilson, *Strait to War? Russia and Ukraine Clash in the Sea of Azov*, European Council On Foreign Relations (2 October 2018) (**UA-827**); Dr. Maryna Vorotnyuk, *False De-escalation: The Continuing Russian Threat to Ukraine and the Black Sea Region*, RUSI (24 June 2021) (**UA-828**).

[428] Counter-Memorial of the Russian Federation, ¶ 293.

[429] *Id.* ¶¶ 293, 294 nn.393, 395, 396.

[430] *Id.* ¶ 294.

evidence showing that Russia's alleged "security inspections" discriminatorily target vessels bound to or from Ukrainian ports, which are subjected to intrusive inspections, notwithstanding that they are not approaching, and pose no threat to, Russian port facilities. It is also telling that Russia, as the party best placed to explain its own Sea of Azov inspection regime, does not provide any witness testimony or documentary evidence on the alleged similarity of the inspection regime pre- and post-2014.

194. Russia also insists that inspections are "conducted while vessels were waiting for the [Vessel Traffic Services ("VTS")] permission to proceed through the Kerch Strait"[431] and that, "to minimise the delays, the Russian Border Guard Service conducts security inspections specifically in the anchorage zones to make use of the waiting time while vessels await for pilots to arrive."[432] Even if true, this would not excuse Russia's boarding and inspection of foreign flagged vessels. Instead, it would simply underscore the hindrance to navigation caused by the discriminatory application of Russia's VTS and pilotage schemes. In any event, Russia's assertion should not be credited: the only source Russia offers in support of this claim regarding its own inspection regime is another news article.[433] Russia's failure to provide any direct evidence of its own inspection practice is, once again, telling.

C. Russia's Attempt to Dismiss the Reliability of Ukraine's Documentary and Witness Evidence Is Unavailing

195. Somewhat remarkably, given the nature of Russia's evidence on these issues, Russia avers that the Tribunal should discount the testimony of Ukraine's witnesses as "nothing more than a record of a hearsay evidence."[434] Russia relies on *Corfu Channel* to support its argument. In that case, the United Kingdom relied on testimony from a single witness who alleged he saw mines loaded onto two Yugoslav vessels that departed from and returned to Sibenik after the relevant explosions.[435] The Court found that this information relayed by the witness, for which there was "no personal and direct confirmation," was not enough to establish the "charge of such exceptional gravity" that Yugoslavia had colluded

[431] *Id.* ¶ 297.

[432] *Id.*

[433] *Id.* ¶ 297 n.402.

[434] Counter-Memorial of the Russian Federation, ¶ 299.

[435] *Corfu Channel Case*, p. 16 (**UAL-15**).

with Albania.[436] However, in that same case, the Court noted that in situations where relevant evidence is outside the applicant State's "exclusive territorial control," "the State that is not in a position to provide direct proof of certain facts 'should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.'"[437]

196. The testimony of Ukraine's witnesses as regards Russia's discriminatory stoppages and inspections, as explained above, is corroborated by Automatic Identification System ("AIS") data observed in the regular course of their official duties, as well as by reports received from vessel masters who had experienced these stops and inspections. As [redacted] explained in his witness statement, 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 over a period of at least six months from April through October 2018.[438] These inspections lasted, on average, approximately two to four hours, and took place in several areas of the Sea of Azov.[439]

197. [redacted] similarly explained in his witness statement that in 2018, a large number of vessels were inspected in the Sea of Azov, with some vessels being inspected more than once during their journey to Mariupol or Berdyansk.[440] [redacted] testimony is based on interviews conducted by the [redacted] at the time Ukrainian and foreign commercial vessels entered Ukraine's Sea of Azov ports of Mariupol and Berdyansk.[441] These interviews documented over 1,600 cases of inspections by the Russian Border Guard between April 2018 and April 2021.[442]

198. Russia — again — fails to provide any evidence to counter Ukraine's credible witness testimony and accompanying documentary evidence. This is particularly notable because the evidence is in Russia's hands: Russia knows what inspections its authorities

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[436] *Id.* p. 17.

[437] *Id.* p. 18.

[438] [redacted] Statement, ¶¶ 7-8.

[439] *Id.* ¶ 7.

[440] [redacted] Statement, ¶ 3.

[441] *Id.* ¶ 2.

[442] *See, e.g.*, [redacted] (Ukrainian-flagged vessel inspected by six Russian officers at anchorage stop at entrance to the Kerch Strait on 20 December 2019) [redacted].

have undertaken, and yet it has offered no official record or other evidence to rebut Ukraine's showing that Russia's stoppages have been discriminatory. While Russia offers no countervailing evidence, Ukraine's evidence shows that Russia's discriminatory inspections have only continued. Russia thus fails to refute that the Russian Border Guard conducted over 1,600 inspections of Ukrainian and foreign commercial vessels between April 2018 and April 2021, with an average wait time of 40 hours for vessels to transit the Strait.[443]

D. Russia's Alleged Security Concerns Do Not Excuse Its Discriminatory Stoppages and Inspections

199. Last, Russia tries to show that security inspections respond to "real threats to security in the Sea of Azov and the Kerch Strait, which intensified after 2014,"[444] including efforts to destroy the Kerch Strait Bridge.[445] This does not constitute a legal justification for stopping and inspecting vessels in violation of the freedom of navigation in the exclusive economic zone and of Ukraine's sovereignty in its territorial sea.[446] In any case, any such threat arose well after Russia commenced its pattern of stoppages. Moreover, while Russia defends its vessel inspections by likening them to Ukraine's and Russia's prior practices, it again fails to provide any official record to rebut Ukraine's showing that the inspections are discriminatory.

III. Russia Has Improperly Seized Two Ukrainian-Flagged JDRs and Re-Flagged Them

200. As Ukraine established in its Revised Memorial, 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.[447] Article 91 of UNCLOS (which applies in the territorial sea by virtue of Article 2(3)) sets out the general rule that each State is entitled to set the conditions for the grant of its nationality to vessels.[448] It provides: "Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the

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[443] Revised Memorial of Ukraine, ¶¶ 159-160.

[444] Counter-Memorial of the Russian Federation, ¶ 294.

[445] *Id.* ¶¶ 275, 286-288, 290-294.

[446] Anne Bardin, *Coastal State's Jurisdiction over Foreign Vessels*, 14 Pace Int'l L. Rev. 27 (2022), pp. 41, 43, 46-48 (**UAL-195**); Robert Beckman and Tara Davenport, *The EEZ Regime: Reflections after 30 Years*, LOSI Conference Papers (2012), pp. 20-21 (**UAL-196**).

[447] Revised Memorial of Ukraine, ¶ 180.

[448] UNCLOS, Arts. 91, 2(3).

right to fly its flag."[449] It also declares that "[s]hips have the nationality of the State whose flag they are entitled to fly" and that "[t]here must exist a genuine link between the State and the ship."[450]

201. In its Counter-Memorial, Russia does not dispute that the *Tavrida* and the *Sivash* were registered with the IMO and flew the Ukrainian flag at the time they were seized.[451] Russia further acknowledges that in June 2014, the Russian Registry of Vessels registered the JDRs *Sivash* and *Tavrida*, and that they had not been de-listed from Ukraine's registry.[452]

202. Russia argues that Ukraine's claims require the Tribunal to assess the legality of the transfer of the JDRs' ownership title, which is a matter beyond the scope of the Convention.[453] But the premise of Russia's argument — that Ukraine is challenging title to the JDRs in this proceeding — is mistaken. Ukraine is asking the Tribunal to determine whether Russia unlawfully re-flagged two Ukrainian JDRs,[454] a question that falls squarely within this Tribunal's competence under UNCLOS Article 91. In other words, this Tribunal is being asked to decide which sovereign State exercises jurisdiction over the vessels, not which oil and gas company owns the vessels.

203. Russia also observes, as it did earlier in this proceeding, that a Ukrainian oil and gas company is seeking compensation for Russia's expropriation of the JDRs in a parallel investment arbitration.[455] There is no overlap between Ukraine's request for relief in this proceeding (*i.e.*, the release of the JDRs, as well as the withdrawal of Russia's claim to have re-flagged the JDRs under the Russian flag), and the compensation sought by the Ukrainian oil and gas company for the unlawful seizure of the JDRs.

204. Russia also argues that Ukraine's claims related to JDRs depend on the "lawfulness of legal acts" adopted by the Republic of Crimea,[456] and thus presuppose a

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[449] UNCLOS, Art. 91.

[450] UNCLOS, Art. 142.

[451] *See* Revised Memorial of Ukraine, ¶ 179.

[452] Counter-Memorial of the Russian Federation, ¶¶ 315-316.

[453] *Id.* ¶¶ 309-310.

[454] *See* Revised Memorial of Ukraine, ¶¶ 314, 316.

[455] Counter-Memorial of the Russian Federation, ¶ 310.

[456] *Id.* ¶ 313.

decision on the rightful sovereignty of Crimea.[457] Again, this is false: a finding that Russia re-flagged the JDRs in violation of the Convention does not depend on a determination of the sovereign status of Crimea. Ukraine is asking the Tribunal to decide the limited question of the nationality of the JDRs, which depends on an assessment of whether Ukraine's procedures for de-registration and re-flagging of Ukrainian vessels were followed.[458] Once again, this matter concerns the rightful exercise of jurisdiction over the vessel, which is well within the Tribunal's competence.

205. Last, Russia argues that its "right to authorise the use of its flag is independent from Ukraine's deflagging."[459] Russia is mistaken. Ukraine explained in its Revised Memorial that the Russian Federation's re-registration of the JDRs without following Ukraine's de-registration procedures 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 of UNCLOS.[460]

206. As the tribunal noted in *M/V Saiga (No 2) (Saint Vincent and the Grenadines v Guinea),* Article 91 codifies the well-established rule of general international law that "[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."[461] Further, a State may not grant a vessel the right to sail its flag if the vessel already has a flag. This requirement follows from Article 92(1) of UNCLOS, which obliges ships to sail under the flag of one State only.[462] Consistent with this principle, UNCLOS Article 104 recognizes that, even with respect to pirate ships, "[t]he retention or loss of nationality is determined by the law of the State from which such nationality was derived."[463]

207. Russia nonetheless claims that the improper re-registration of the JDRs is excused because Ukraine did not respond to the so-called Republic of Crimea State Unitary Enterprise Chornomornaftogas' ("CNG-RU") request to de-register the JDRs in

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[457] *Id.* ¶¶ 311-313.

[458] *See* Revised Memorial of Ukraine, ¶¶ 314, 316.

[459] Counter-Memorial of the Russian Federation, ¶ 317.

[460] *See* Revised Memorial of Ukraine, ¶¶ 177-178.

[461] *The M/V Saiga (No. 2) (St. Vincent and the Grenadines v. Guinea)*, ITLOS Case No. 2, Judgment of 1 July 1999, ¶¶ 63-65 (emphasis added) (**UAL-28**).

[462] UNCLOS, Art. 92(1).

[463] UNCLOS, Art. 104.

June 2014.[464] This argument is not adequately supported by evidence. The de-registration application submitted by the Russian Federation is facially incomplete.[465] The Russian Federation also fails to provide any evidence that the State Service of Ukraine for the Safety of Maritime and River Transport received the letter drafted by CNG.[466]

208. In any event, Russia proceeding to re-register the JDRs without following Ukraine's de-registration procedures is inconsistent with the rules on nationality of vessels in the Convention and in general international law and cannot be excused by Ukraine's alleged failure to respond to CNG's request. If CNG believed that Ukraine's ship registry was not responding appropriately to a de-registration request, then, consistent with UNCLOS Article 91, its recourse lay in the Ukrainian courts. It was not for Russia to issue a second flag to the JDRs before they were de-registered by Ukraine, and Russia's decision to do so violated Articles 2(3) and 91 of the Convention.

[464] Counter-Memorial of the Russian Federation, ¶¶ 314-317.

[465] Under Ukrainian law, a deregistration application must include "[t]he ship's registration documents indicated in Clauses 25 and 42 of this Procedure, proof of existence or absence of a lien, and proof of payment of official duties." *See* Cabinet of Ministers of Ukraine, Resolution No. 1069 "On the Approval of the Procedure for Maintaining the State Register of Vessels of Ukraine and the Vessel Register of Ukraine" (26 September 1997), Section IV, Art. 49 (**UA-570**). The required registration documents, registration certificates, and other ownership documents are absent from the Russian Federation's application as submitted to this Tribunal.

[466] Counter-Memorial of the Russian Federation, ¶¶ 315-316.

Chapter Four: Russia Failed to Protect the Marine Environment

209. Ukraine has demonstrated that Russia violated its obligations under UNCLOS Articles 123, 192, 194, 204, 205, and 206 by undertaking significant construction activities in the Kerch Strait without due regard for their impacts on the marine ecosystem within the Black Sea, Sea of Azov, and Kerch Strait (the "Black Sea Basin"). The Revised Memorial — supported by the expert report of [redacted], an environmental expert with extensive experience in the assessment and mitigation of the environmental impacts of major construction projects — highlighted specific ways in which Russia had failed adequately to assess, monitor, communicate, or mitigate the impacts of those construction activities on the marine environment.

210. Russia's own contemporaneous documents, submitted with its Counter-Memorial, show that it was well-aware of the potentially profound environmental impacts associated with the construction projects. Yet, instead of carefully assessing those impacts and communicating its conclusions to neighboring affected States, as UNCLOS requires, Russia showed contempt for its UNCLOS obligations. Russia imposed a politically motivated, accelerated approval process designed to allow building to begin without delay, whatever the environmental costs. Challenged in these proceedings to explain its blatant disregard for its environmental obligations under the Convention, Russia seeks to mislead this Tribunal by minimizing the scope of those obligations and mischaracterizing the case against it.

211. In its Counter-Memorial, Russia admits that it failed to undertake an environmental impact assessment before laying a fiber optic submarine cable across the Kerch Strait. While Russia claims to have assessed the environmental impact of its other projects in advance, the information belatedly presented with its Counter-Memorial amounts to nothing more than a motley assortment of data, much of it historical or geographically removed from the construction zones, which is collectively incapable of providing a reliable baseline against which to measure the inevitable impacts of the projects or to guide meaningful mitigation measures. Russia has similarly failed to put in place monitoring programs capable of reliably identifying the actual environmental impacts once construction was complete.

212. The Counter-Memorial also confirms Russia's failure to publish or communicate either its purported environmental assessments or its monitoring reports, even when specifically requested by Ukraine. In an attempt to avoid accountability for its non-

compliance with UNCLOS, Russia seeks both to reduce the Convention's protections against marine pollution to the level of aspirational, discretionary rules, and to exaggerate its own minimal efforts in a bid to pass them off as compliance with UNCLOS's requirements. As this Chapter demonstrates, Russia's woefully inadequate response only confirms the violations of the Convention set forth in the Revised Memorial.

213. Finally, for the reasons explained in Chapter Two, Russia's jurisdictional objections fail.[467] Importantly, the Tribunal has jurisdiction to hold Russia accountable for its violation of Articles 123, 192, 194, 204, 205, and 206, regardless of its findings on the legal status of the Sea of Azov and Kerch Strait. Russia's obligation under Part XII of the Convention to protect and preserve the marine environment apply to all maritime zones or areas,[468] as recently affirmed by the *South China Sea* tribunal.[469]

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[467] *See* Counter-Memorial of the Russian Federation, ¶ 321 (arguing that the Tribunal lacks jurisdiction to hear Ukraine's claim related to the protection and preservation of the marine environment because "the Sea of Azov and the Kerch Strait – the location of the Construction Projects – are internal waters").

[468] Alexander Proelss (ed.), United Nations Convention on the Law of the Sea - A Commentary (2017), p. 1280, ¶ 5 in relation to Art. 192 ("The spatial application of Art. 192 comprises all maritime zones or areas. The obligation covers areas within national jurisdiction as well as areas beyond national jurisdiction. Coastal States, by virtue of their sovereignty, have the duty to protect the marine environment in their territorial sea and their internal waters, in terms of Art. 192."), p. 1357, ¶ 3 in relation to Art. 204 ("In line with Arts. 192 and 194, the monitoring obligations established through Art. 204 apply in all maritime zones."), p. 1375, ¶ 12 in relation to Art. 206 (referring to the scope of application of Art. 206, the author notes that "[i]n addition to a State's land and marine territory and its continental shelf, it most notably encompasses its exclusive zone. Apart from that, the term arguably encompasses flag State jurisdiction . . . and thus provides the provision with the potential for world wide application.") (**UAL-197**); *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, ITLOS Case No. 21, ¶ 120 ("As article 192 applies to all maritime areas, including those encompassed by exclusive economic zones, the flag State is under an obligation to ensure compliance by vessels flying its flag with the relevant conservation measures concerning living resources enacted by the coastal State for its exclusive economic zone because, as concluded by the Tribunal, they constitute an integral element in the protection and preservation of the marine environment.") (**UAL-198**).

[469] *South China Sea Arbitration (Philippines v. China)*, UNCLOS/PCA Case No. 2013-19, Award of 12 July 2016, ¶ 940 ("[T]he obligations in Part XII apply to all States with respect to the marine environment in all maritime areas, both inside the national jurisdiction of States and beyond it. Accordingly, questions of sovereignty are irrelevant to the application of Part XII of the Convention. The Tribunal's findings in this Chapter have no bearing upon, and are not in any way dependent upon, which State is sovereign over features in the South China Sea.") (internal citations omitted) [hereinafter "*South China Sea*"] (**UAL-11**).

I. Russia Violated Article 206 by Not Conducting Adequate Environmental Impact Assessments for Construction Projects in the Kerch Strait or Communicating Their Results

214. Under Article 206, Russia had the obligation to (i) determine whether there were "reasonable grounds for believing" that its 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,[470] namely by publication or provision "to competent international organizations, which should make them available to all States."[471] Russia did none of these, paying only lip service to its Convention obligations.

215. Russia's Counter-Memorial confirms that Russia violated Article 206 by not adequately assessing the planned projects or communicating reports of the results of any assessments, notwithstanding the fact that each one of the planned construction projects gave rise to reasonable grounds to anticipate substantial pollution of, or significant and harmful changes to, the fragile marine ecosystem of the Black Sea Basin.

A. Russia Had an Obligation Under Article 206 to Conduct an Environmental Impact Assessment for Each of the Kerch Strait Construction Projects at Issue

216. Ukraine showed in the Revised Memorial that Russia had engaged in significant construction activities in the Kerch Strait, involving the construction of the 20-kilometer Kerch Strait Bridge, the installation of a 16-kilometer undersea liquid-natural-gas pipeline, and the laying of multiple undersea electric-power and fiber optic communication cables (collectively, the "Construction Projects").[472] The installation of the support pilings for the Kerch Strait Bridge — more than 7,000 of them — alone involved numerous active construction sites, at which heavy equipment drove large steel tubing up to 91 meters (300 feet) deep into the seabed to support each of the main foundation stanchions for the highway and rail bridge corridor.[473] Large cement and asphalt plants were built on both

[470] UNCLOS, Art. 206.

[471] UNCLOS, Art. 205.

[472] Revised Memorial of Ukraine, ¶ 183.

[473] Expert Report of [redacted] (17 May 2021) ("First [redacted] Report"), ¶ 25.

sides of the Kerch Strait Bridge.[474] More than 6,000 workers from 20 different companies were reported to have been involved,[475] and Russia's document confirms they lived in on-site temporary camps "a few steps from the construction site."[476]

217. For each of the Construction Projects, the Article 206 threshold triggering the requirement to conduct an environmental impact assessment ("EIA" or "assessment")[477] was met: Russia had "reasonable grounds for believing" that the Construction Projects might cause "substantial pollution of or significant and harmful changes to the marine environment" of the Kerch Strait, with potential repercussions across the Sea of Azov and the Black Sea.[478]

218. Russia does not contest the extent and nature of the Construction Projects; nor does it deny that it was under an obligation to conduct an EIA with respect to the Kerch Strait Bridge, the submarine natural gas pipeline, and the submarine power cables. In fact, Russia's own contemporaneous documents show that it anticipated that the Construction Projects could result in a range of severe environmental impacts.[479] As discussed below,

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[474] *Superplants for the Construction of the Kerch Bridge*, Construction.RU (18 August 2015) (**UA-829**).

[475] First [redacted] Report, ¶ 79; *see also* Natalya Aleksandrovna Sytnik et al., *Assessment of the Impact of the Construction of the Crimean Bridge on the Eco-System of the Kerch Strait*, Eurasion Union of Scientists: Biological Sciences, Vol. 10, No. 43 (2017), p. 12 (**UA-654**); *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**).

[476] Supplemental Translation of RU-103, *Public Roundtable Minutes*, in STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (2015), pp. 51-52 (**UA-830**).

[477] As explained in Ukraine's Revised Memorial, 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* First [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."

[478] UNCLOS, Art. 206; *see also* Revised Memorial of Ukraine, Chapter Six, Section II.A.2.i; First [redacted] Report, Part V.B.

[479] *See, e.g.*, STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 4, Book 1) (2015), p. 173 (describing a number of types of construction work, "during which suspended solids will transfer into water and turbidity will increase," including: "[d]riving of piles under the supports of the temporary bridge and supports of the railway and road bridges," "[d]riving of sheet piles during the construction of temporary sites," "[e]xcavation of piles of the temporary bridge and sheet piles during the dismantling of structures," and "[d]redging operations") (**RU-93**). According to the design documentation, such increase in turbidity is fatal to aquatic biological resources. *See id.* p. 173 ("Increased turbidity of water affects aquatic biological

Russia's and its experts' attempts to downplay the environmental risks relating to the construction of the Kerch Strait Bridge after the fact are simply without basis and contradicted by Russia's own contemporaneous evidence.[480]

219. Russia, however, incorrectly denies its obligation to conduct an EIA before the laying of the submarine fiber optic cable. First, Russia argues that Russian law does not require an EIA for laying of fiber optic communication cables, and that such a categorical exemption is within the "ambit of the wide discretion UNCLOS grants to States Parties as to whether a particular activity requires an assessment."[481] But Russia offers no legal basis for the "wide discretion" a State Party supposedly enjoys under Article 206, let alone for substituting its national law for the international obligations it accepted by acceding to UNCLOS.[482]

220. Article 206 requires that States Parties conduct an assessment when they have "reasonable grounds for believing" that planned activities "may cause substantial pollution or significant harmful changes."[483] As established in Ukraine's Revised Memorial, what constitutes "reasonable grounds" for the purpose of Article 206 is an "objective" standard, best determined by referring to the practice that would be adopted by a reasonable decision-maker in comparable circumstances.[484] Further, any such discretion is limited by

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resources directly, causing the death of organisms as a result of mechanical damage to their vital organs (as a rule, the respiratory system), and indirectly — a decrease in the transparency of water and impairment of the physiological functions of their organisms, which reduces their viability and eventually leads to death."); *see also id.* p. 182 ("Possible pollution of the water area with silt deposits and, in general, the disturbance of the structure of bottom sediments, which will occur during the driving of piles, pose a danger to marine mammals encountered almost all year round in the construction area.").

[480] *See infra* Chapter Four, Section II.

[481] Counter-Memorial of the Russian Federation, ¶¶ 442-444.

[482] The only authority Russia cites is the *South China Sea* tribunal's observation that the terms "reasonable" and "as far as practicable" "contain an element of discretion," as compared to the duty to communicate, which is "absolute." *See* Counter-Memorial of the Russian Federation, ¶ 443 (citing *South China Sea*, ¶ 948 (**UAL-11**)). The tribunal simply states what is obvious: the duty to conduct an EIA includes qualifiers that the duty to communicate are not subject to. Nothing in that observation supports Russia's attempt to read "wide discretion" into Article 206.

[483] UNCLOS, Art. 206.

[484] Revised Memorial of Ukraine, ¶ 197; *see also 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**); *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area,* ITLOS Case No. 17,

the need to read Article 206 in line with Articles 192 and 194, which require States Parties to take all measures necessary to avoid pollution.[485] In addition, Russia's assertion ignores that Article 206 requires only "reasonable grounds for believing that planned activities . . . *may* cause substantial pollution of or significant harmful changes to the marine environment."[486] As Russia's own legal authorities explain, this provision "expressly set[s] a low threshold of foreseeable risk."[487]

221. Second, Russia falsely claims that the "relevant scientific literature conclusively demonstrates that EIAs are typically not required for laying of fibre-optic submarine cables, as such projects have minor impact on the marine environment."[488] As [redacted] explained in his first report, the Construction Projects, including laying of a fiber optic submarine cable, can "reasonably be anticipated to cause significant sedimentological impacts with unknown nearfield effects on benthos and other marine organisms, as well as erosion and other hydrodynamic effects."[489] As [redacted] elaborates

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Advisory Opinion of 1 February 2011, ¶ 230 (under Annex III, Article 4, Paragraph 4 of the Convention, when deciding what measures are "reasonably appropriate," "the sponsoring State must take into account, objectively, the relevant options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole.") (**UAL-156**); Neil Craik, The International Law of Environmental Impact Assessment. Process, Substance and Integration (Cambridge, 2008), p. 98 (noting that "it would . . . be a mistake to consider the obligation to conduct EIAs under UNCLOS as being non-binding" as "[t]he reasonableness requirement maintains an objective standard for the determination of the threshold") (**UAL-199**).

[485] For the relationship between more general obligations under Articles 192 and 194 and specific obligations under Articles 204, 205, and 206, *see generally* Revised Memorial of Ukraine, Chapter Six, Section II.A.1. *See also* Alexander Proelss (ed.), United Nations Convention on the Law of the Sea: A Commentary (2017) , p. 1374, ¶ 9 (noting that the obligation under Article 206 "needs to be read in line with Arts. 192 and 194," and "[a]s these provisions require States to take all measures necessary to avoid pollution, their discretion under Art. 206 is *a priori* limited.") (**UAL-197**). The same commentary also points out that any such discretion may be further confined by "the precautionary principle in international environmental law." *Id.* In its *Advisory Opinion on Responsibilities and Obligations in the Area*, the ITLOS Seabed Disputes Chamber noted that the precautionary principle is "an integral part of the general obligation of due diligence of sponsoring States" applicable "in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks." *See Responsibilities and Obligations of States with respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ¶ 131 (**UAL-156**).

[486] UNCLOS, Art. 206 (emphasis added).

[487] Alan Boyle & Catherine Redgwell (eds.), Birnie, Boyle & Redgwell's International Law and the Environment, 4th ed. (Oxford, 2021), p. 191 (**RUL-105**).

[488] Counter-Memorial of the Russian Federation, ¶ 445 n.691.

[489] First [redacted] Report, ¶ 153.

in his second report, such environmental risks are documented in real-world assessments performed for submarine fiber optic cables in numerous jurisdictions.[490] In light of the anticipated environmental risks, it is standard international practice, reflected in well-established international standards, that an EIA is required for a submarine fiber optic cable.[491]

222. Russia's position is also contradicted by its own evidence. While Russia cites the "OSPAR" Commission's Guidelines in support of its position that no EIA was needed, the Guidelines unequivocally require that "the installation and operation of submarine cables should follow a formal approval procedure that includes the elaboration of an environmental impact assessment."[492] The Guidelines go further to explain that there are "[p]otential environmental impacts associated with subsea cables" — including "disturbance by the placement of cables," "underwater noise," and "contamination" including "[r]elease of harmful substances or nutrients" — which may occur during "their laying, operation and removal as well as in the case of accidents."[493] The Guidelines conclude that "[t]he nature, extent and significance of these potential impacts should be determined on a site-specific basis as part of an assessment of environmental impacts."[494] Russia does not even claim that any such site-specific assessment was conducted.

223. It is telling that Russia relies heavily for its position on views expressed by the International Cable Protection Committee ("ICPC"), a private membership association that represents, and advocates for, the interests of subsea telecom cable owners — comprising "97% of the world's subsea telecom cables."[495] The self-serving views of the industry

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[490] Expert Report of [redacted] (21 March 2023) ("Second [redacted] Report"), ¶ 12.

[491] Second [redacted] Report, ¶ 10.

[492] OSPAR Commission, Guidelines on Best Environmental Practice (BEP) in Cable Laying and Operation (2012), p. 15, ¶ 6 (**RUL-109**). OSPAR is the mechanism by which 15 Governments and the European Union cooperate to protect the marine environment of the North-East Atlantic. *See* OSPAR website, *About OSPAR* (**UA-831**).

[493] OSPAR Commission, Guidelines on Best Environmental Practice (BEP) in Cable Laying and Operation (2012), pp. 4-6 (**RUL-109**).

[494] *Id.* p. 4.

[495] Counter-Memorial of the Russian Federation, ¶ 445; *see also* International Cable Protection Committee, at https://www.iscpc.org/. *See* Lionel Carter, Douglas Burnet et. al, Submarine Cables and the Oceans: Connecting the World (2009) (joint report co-commissioned by the ICPC) (**RU-479**); Douglas Burnett, David Freestone & Tara Davenport, Workshop Report: Submarine Cables in The Sargasso Sea: Legal And Environmental Issues in Areas Beyond National Jurisdiction (16 January

stakeholders do not reflect an alleged consensus in the scientific literature, and certainly do not justify a categorical exemption from the obligation to conduct an EIA that Russia proposes.

224. In any event, Russia's generalized assessment of the impact of fiber optic submarine cables on the marine environment misses the mark. The relevant question is whether an EIA was required in this case, considering the circumstances of the particular environment at issue.[496] As [redacted] explains, conducting a robust EIA was critical in this case, given the particularly fragile and closely interconnected marine ecosystem of the Black Sea Basin.[497] Russia offers no evidence that it considered the impact that the laying of fiber optic cables would have in the specific context of the marine ecosystem at issue.[498]

225. Lastly, Russia raises the absurd point that laying of the fiber optic cable "was a security issue."[499] There is no security exception to Article 206 — let alone such a self-judging, blanket exception that Russia essentially proposes to adopt. In any event, Russia

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2015) (workshop co-organized by the ICPC) (**RU-480**); International Cable Protection Committee, Submarine Cables and BBNJ (29 August 2016) (ICPC's presentation slides) (**RU-481**); ECO Magazine, Sustainable Development: Submarine Cables in the Marine Environment (19 January 2017) (summarizing ICPC's white paper) (**RU-482**); International Seabed Authority, Submarine Cables and Deep Seabed Mining: Advancing Common Interests and Addressing UNCLOS "Due Regard" Obligations, ISA Technical Study: No. 14 (2015), p. 47 (Annex F authored by "ICPC Marine Environmental Advisor") (**RUL-111**). Further, even the sources not apparently associated with the ICPC are authored by the same individuals who have authored a number of ICPC workshop reports, such as Douglas Burnett and Tara Davenport. *See* Douglas Burnett, Robert Beckman & Tara Davenport (eds.), Submarine Cables: the Handbook of Law and Policy (2014) (**RUL-110**).

[496] *Request for an Advisory Opinion by the Republic of Colombia on the Environment and Human Rights*, Inter-American Court of Human Rights Advisory Opinion No. OC-23/17 of 15 November 2017, ¶ 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.") (citations omitted) (**UAL-154**); *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, 155 [hereinafter: "*Certain Activities and Construction of a Road*"] (**UAL-153**).

[497] Second [redacted] Report, ¶¶ 8, 14; *see also* Expert Report of [redacted] (16 March 2021) ("First [redacted] Report"), Section III; Expert Report of [redacted] (22 March 2023) ("Second [redacted] Report"), Section III.

[498] Second [redacted] Report, ¶¶ 8, 14.

[499] Counter-Memorial of the Russian Federation, ¶ 446.

offers no explanation as to why *an environmental assessment* in connection with an undersea fiber optic cable would have raised any security concerns.[500]

226. Unable to explain away its violation of Article 206, Russia alleges that Ukraine's claims concerning the fiber optic cable are inadmissible because they were introduced for the first time in its Revised Memorial.[501] As explained in Chapter Two, this argument has no merit.[502] Ukraine's claim concerning the fiber optic cable falls squarely within the subject-matter of the dispute and, in particular, its environmental component — *i.e.*, Russia's construction activities in the Kerch Strait carried out in violation of UNCLOS Articles 123, 192, 194, 204, 205, and 206.[503]

227. In sum, Russia had an obligation under Article 206 to conduct an EIA for each of the Construction Projects, including for the laying of the fiber optic cable. Standing alone, Russia's admission that it conducted no such assessment with regard to the fiber optic cable establishes an unambiguous violation of Article 206. But as explained in the next section, Russia's failure to conduct sufficient assessments with regard to the other Construction Projects establishes further violations of that provision.

B. Russia Failed to Take Adequate Steps to Assess the Environmental Impacts of Its Construction Projects as Required Under Article 206

228. With respect to the Kerch Strait Bridge, the gas pipeline, and the submarine power cables, Russia claims to have satisfied the EIA requirement under Article 206 by conducting "robust EIAs," pointing to what it claims to be "primary EIA materials."[504] While the argument lacks a factual basis, it also relies on Russia's misstatement of the law.

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[500] Russia asserts in a conclusory manner that the cable construction was intended to avoid using "the infrastructure of foreign telecommunications companies." *See* Counter-Memorial of the Russian Federation, ¶ 446. The burden of proof in showing that an environmental impact assessment or similar preliminary assessment of the risk involved has been done is upon the State undertaking the activity. *See Certain Activities and Construction of a Road*, ¶ 154 (**UAL-153**).

[501] Counter-Memorial of the Russian Federation, ¶ 441.

[502] *See supra* Chapter Two, Section II.C.

[503] *See Territorial and Maritime Dispute (Nicaragua v. Colombia)*, ICJ Judgment of 19 November 2012, ¶¶ 105, 111 (admitting a new legal claim raised in a reply, where the claim "cannot be said to transform the subject-matter of [the] dispute") (**UAL-175**).

[504] Counter-Memorial of the Russian Federation, ¶¶ 324, 359.

1. Russia's Attempt to Substitute National Discretion for Article 206's Objective Standard Fails

229. Russia argues that neither general international law nor Article 206 define the specific content of or procedures to follow while performing an EIA, and that Article 206 defers entirely to domestic laws to determine the "content or procedures" of an EIA.[505] In essence, Russia argues that the EIA obligation under Article 206 has no objective substance and is simply a "*renvoi* to domestic law."[506]

230. Russia's position is effectively an attempt to gut that provision of any substantive content and is not supported in the jurisprudence. While the EIA obligation under Article 206 may leave the *procedures* or *formats* for conducting the EIA to national discretion, it has been consistently interpreted to impose an objective international standard for determining the *adequacy* of environmental assessments — one defined in light of the specific circumstances of each case and consistent with an aim of minimizing the risk of significant environmental harm.

231. As the *South China Sea* tribunal found with regard to Article 206, for instance, 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.[507] This approach is consistent with an EIA obligation flowing from general international law.[508] The ICJ in *Pulp Mills* for instance found that an EIA should "hav[e] regard to the nature and magnitude of the proposed development and its likely adverse impact on the

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[505] *Id.* ¶¶ 326-333.

[506] *Id.* ¶¶ 327-333.

[507] *South China Sea*, ¶¶ 989-990 (**UAL-11**); *see also Request for an Advisory Opinion by the Republic of Colombia on the Environment and Human Rights*, Inter-American Court of Human Rights Advisory Opinion No. OC-23/17 of 15 November 2017, ¶ 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**).

[508] Despite its objection to the Tribunal's jurisdiction to assess Russia's compliance with general international law, Russia acknowledges that Article 206 reflects the obligations established under general international law. *See* Counter-Memorial of the Russian Federation, ¶ 327 n.429; *see also id.* ¶ 331 ("Article 206 of UNCLOS is consistent with the position under general international law and has to be construed in the light of that.").

environment."[509] The Court in *Certain Activities and Construction of a Road* required an "*appropriate* environmental impact assessment" to satisfy the obligation to conduct an environmental assessment, with an aim to "ensure that the design and execution of the project would minimize the risk of significant transboundary harm."[510]

232. Leading commentators agree.[511] As summarized in one of Russia's legal authorities:

> [T]he commitment under Article 206 is similar to the customary obligation to assess in that the modality of assessment is left to the state, but the obligation is not robbed of its objective content because the assessment undertaken will still have to be sufficient to discharge the duty to prevent harm that underlies it.[512]

233. In sum, the question before the Tribunal is whether the alleged EIA efforts by Russia were adequate, as judged by an objective international standard, in light of the nature and magnitude of the Construction Projects and their likely adverse impact on the environment.

234. In its Revised Memorial, Ukraine referred to the contemporary practice informing what that objective standard required in light of the Construction Projects' extent, nature, and location.[513] Ukraine relied on [redacted] first report, which explained that, to adequately assess the environmental impacts of the Construction Projects, an EIA in this

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[509] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment of 20 April 2010, ¶ 205 [hereinafter "*Pulp Mills*"] (**UAL-152**); *see also Certain Activities and Construction of a Road*, ICJ Judgment of 16 December 2015, Separate Opinion of Judge Dugard, ¶ 18 (rejecting the notion that "the environmental impact assessment obligation has no independent content and that there is simply a *renvoi* to domestic law" and describing "matters inherent in the nature of an environmental impact assessment that must be considered if it is to qualify as an environmental impact assessment") (omitting citation) (**UAL-200**).

[510] *Certain Activities and Construction of a Road*, ¶¶ 161, 173 (emphasis added) (**UAL-153**).

[511] *See, e.g.*, Alexander Proelss (ed.), United Nations Convention on the Law of the Sea – A Commentary (2017), p. 1376, ¶ 14 (explaining that the ICJ in *Pulp Mills* "clarified that States' discretion in this regard is not unlimited" and that "an EIA needs to be commensurate" to "the nature and the magnitude of the project as well as its likelihood of causing adverse impacts on the environment") (**UAL-197**); Alan Boyle & Catherine Redgwell (eds.), Birnie, Boyle & Redgwell's International Law and the Environment, 4th ed. (Oxford, 2021), p. 195 ("Nor is the [ICJ in *Pulp Mills*] saying that the scope or content of an EIA is for the state to decide in its sole discretion: there is no *renvoi* to national law.") (**RUL-105**).

[512] Neil Craik, The International Law of Environmental Impact Assessment. Process, Substance and Integration (Cambridge, 2008), p. 128 (**RUL-102**).

[513] Revised Memorial of Ukraine, Chapter Six, Section II.A.2; First [redacted] Report, Part V.C.

case should include, *at minimum*: (i) a thorough scoping exercise to define the specific project elements and associated environmental impacts to be assessed; (ii) contemporaneous baseline data covering a full-year cycle, based on the survey of the existing environment at the time of project contemplation; (iii) systematic, transparent, and comprehensive public and stakeholder consultations; and (iv) concrete monitoring, data collection, mitigation, and management plans.[514]

235. While Russia does not deny the importance or relevance of any such elements in adequately assessing the environmental impacts of the Construction Projects, it contests the legal relevance of international norms and contemporary practice. Russia's criticisms are misconceived. First, Russia argues that Ukraine seeks to "substitute the analysis of compliance with Article 206 of the Convention with scientific assessment of particular methodologies and approaches."[515] Russia mischaracterizes Ukraine's position. Ukraine's case concerns solely whether Russia's alleged EIA efforts were adequate under Article 206 and does not turn on whether Russia adopted a particular methodology over another. In any event, to the extent Russia attempts to sideline good scientific practice, such an effort is misconceived. International norms concerning what constitutes a reasonable and adequate EIA under Article 206 in a specific circumstance are necessarily informed by the state of scientific or technological knowledge available at the moment of assessment. As the ICJ held in *Gabčíkovo-Nagymaros Project*, for instance:

> In order to evaluate the environmental risks, current standards must be taken into consideration. . . . Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.[516]

236. Second, in relation to Article 206, Russia argues that in interpreting a treaty pursuant to Article 31 of the Vienna Convention, no reference can be made to other relevant

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[514] First [redacted] Report, Part V.C.

[515] Counter-Memorial of the Russian Federation, ¶ 334.

[516] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Judgment of 25 September 1997, ¶ 140 [hereinafter "*Gabčíkovo-Nagymaros Project*"] (**UAL-201**).

international standards.[517] Russia's criticism ignores the wording of Article 206. The ordinary meaning of such phrases as "reasonable grounds to believe" and "as far as practicable" is necessarily informed by the ability of current science and technology to diagnose the potential for environmental harm and to mitigate its occurrence. The current standards employed by the relevant international and national authorities in determining the necessity for and content of EIAs is an obvious place to look for evidence of those abilities.[518]

2. The Alleged EIA Materials Confirm that Russia In Fact Failed to Conduct an Adequate Assessment of the Environmental Impacts of Its Construction Projects and that Its Purported Efforts Were a Mere Formality

237. While Russia claims that it did conduct EIAs for the Construction Projects other than the submarine fiber optic cable, the documents Russia claims to be "primary EIA materials"[519] do not adequately assess the environmental impacts of such activities. In his second expert report, [redacted] describes multiple deficiencies in the alleged EIA materials, concluding that they cannot be used to adequately identify, assess, or mitigate the risk of significant environmental harm implicated by the Construction Projects.

238. As a preliminary matter, Russia has only submitted environmental impact information included in its "Design Documentation."[520] It has not submitted an actual EIA required under Russia's State Environmental Expert Review ("SEER" or "*Expertiza*" Review) process, called an "Assessment of Environmental Impacts" — or, based on that term's Russian acronym, an *OVOS*.[521] [redacted] explains that, to the extent Russia has foregone the SEER review of a formal *OVOS*, that shift, in and of itself, reflects a notable departure

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[517] Counter-Memorial of the Russian Federation, ¶¶ 335-336.

[518] *See*, *e.g.*, *Gabčíkovo-Nagymaros Project*, ¶ 140 (**UAL-201**); *see also infra* Chapter Five, Section I.A.

[519] Counter-Memorial of the Russian Federation, ¶ 359.

[520] *See*, *e.g.*, STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 4, Book 1) (2015) (**RU-93**); STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 6, Book 1) (2015) (**RU-133**); [redacted]

[521] First [redacted] Report, ¶¶ 47-48. In transliterated Russian, *Otsenka Vozdejstviya na Okruzhayushchuyu Sredu*.

from the usual Russian process to assess environmental impacts, and highlights the rushed nature of the assessment process Russia claims to have adopted.[522] [redacted] further explains that relying solely on the "design" documents to assess the environmental impact is not only unorthodox, but is also incompatible with the goal of adequately assessing the interconnected environmental risks in a holistic manner.[523]

239. Further, all of Russia's so-called primary EIA materials are heavily redacted or thinly excerpted. While the apparent need to be selective in disclosure is antithetical to the intrinsically transparent and public-facing nature of an EIA as a general matter, the materials for the submarine gas pipeline and power cables in particular are so minimally excerpted that they are not amenable to any meaningful review or analysis.[524] Russia has not offered any witness or expert testimony on the submarine gas pipeline and power cables either. The burden of proof in showing that an environmental impact assessment or similar preliminary assessment of the risk involved has been done is upon the State undertaking the activity.[525] The extent of the redactions, coupled with the lack of witness or expert testimony, should be sufficient for the Tribunal to give no weight to the design documentation in connection to the submarine gas pipeline and power cables and to conclude that Russia has failed to prove the adequacy of its alleged EIAs in connection to those projects. The

[522] Second [redacted] Report, ¶ 25.

[523] *Id.*

[524] [redacted] *See, e.g.*, [redacted]; [redacted]; [redacted].

[525] *Certain Activities and Construction of a Road*, ¶ 154 ("The Court observes that to conduct a preliminary assessment of the risk posed by an activity is one of the ways in which a State can ascertain whether the proposed activity carries a risk of significant transboundary harm. However, Costa Rica has not adduced any evidence that it actually carried out such a preliminary assessment.") (**UAL-153**); *id.*, Separate Opinion of Judge Dugard, ¶ 19 ("In the present case the Court has recognized that the following rules are inherent in the nature of an environmental impact assessment . . . . The burden of proof in showing that an environmental impact assessment or similar preliminary assessment of the risk involved has been done is upon the State undertaking the activity.") (**UAL-200**).

paragraphs below assess the EIAs that Russia has allegedly conducted based on the information available in the record.

i. Baseline Studies

240. According to [redacted], the alleged baseline studies conducted in connection with the Kerch Strait Bridge construction project are grossly inadequate, relying heavily on dated and generalized data, often from more than a decade ago, and which is not specific to the location or timing of the anticipated impacts.[526] As [redacted] explains, a reliable, contemporaneous baseline reflecting a full-year cycle of data is foundational to any assessment of an impact to the marine environment at issue, *i.e.*, whether the health of the environment has worsened, improved, or remained the same.[527] Instead, the Russian authorities appear to have cobbled together whatever historical data existed, without regard to its relevance to the proposed design and location of the Kerch Strait Bridge, in an attempt to create the illusion of an environmental assessment.[528] Nor can the minimal efforts to collect more recent data substitute for a robust baseline study, and, in any event, the data collected lacks the minimum temporal coverage necessary to serve as the basis for meaningful impact analyses.[529] [redacted] concludes that the baseline data gives Russia no basis to "effectively and accurately compare project construction and operational monitoring data to an established site-specific baseline."[530]

ii. Impact Analysis and Mitigation Measures

241. Given the lack of robust and site-specific baseline data, it was inevitable that the supposed impact analysis and recommended course of action would be overly generalized and conclusory, and not grounded on recognizable analytical methodologies. As [redacted] explains, "[t]he corresponding assessment was superficial and generalized, and failed to provide any concrete and data-driven mitigation or compensatory measures."[531] To illustrate, Russia's design documentation acknowledges a number of severe impacts of the construction of the Kerch Strait Bridge on marine animals, including mammals:

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[526] Second [redacted] Report, ¶¶ 55-60.

[527] *Id.* ¶ 19.

[528] *Id.* ¶¶ 55-60.

[529] *Id.* ¶¶ 61-64.

[530] *Id.* ¶ 23.

[531] *Id.*

> The construction works can interfere with the normal course of the Azov anchovy and, of course, of Azov dolphins. These marine mammals [(*i.e.*, dolphins)] are not resistant to stressful situations and therefore acoustic pollution of the underwater environment – noise caused by construction activities – can lead to anxiety and disturbance of animal behaviour, which can increase the risk of entanglement in nets. Construction noise can cause hearing damage. Possible pollution of the water area with silt deposits and, in general, the disturbance of the structure of bottom sediments, which will occur during the driving of piles, pose a danger to marine mammals encountered almost all year round in the construction area.[532]

242. [redacted] explains that, in light of such anticipated risks, a robust and tailored baseline study and monitoring of marine mammals should have been conducted in and near the Kerch Strait Bridge construction project site for an extended time prior to construction, as well as throughout the construction and operation period. Such efforts should have, for instance, focused on a combination of local sightings, marine mammal noise monitoring, and tracking of tagged mammals.[533] The data collected through such efforts could then have informed the adoption of appropriate mitigation measures, as well as monitoring plans.

243. Instead, the conclusion in Russia's design documentation about the anticipated adverse effect on Azov dolphins was based on speculation about the dolphins' intelligence:

> No experimental studies on the impact of construction noise on the Black Sea mammals have been carried out so far. At the same time, the behavioural reactions of dolphins, based on long-term observations, make i[t] possible to conclude that with the start of the works they will leave the construction area.[534]

244. [redacted] notes that, not only is this conclusion not grounded in science, it disregards the basic notion that driving marine mammals away from their habitats is, in and of itself, an adverse impact to the marine environment that causes redistribution of such species.[535]

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[532] STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 4, Book 1) (2015), p. 182 (**RU-93**).

[533] Second [redacted] Report, ¶ 67.

[534] STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 4, Book 1) (2015), p. 182 (**RU-93**).

[535] Second [redacted] Report, ¶¶ 83-84.

iii. Rushed and Inadequate Process

245. The evident inadequacy of the alleged EIAs is hardly surprising, in light of the grossly rushed process that Russia claims to have followed. Contrary to Russia's assertion, the timeframes for the alleged EIAs were far from "adequate."[536] As to the Kerch Strait Bridge, Russia claims that the entire "EIA" process — from the alleged collection of baseline data to the submission of the design documentation (rather than the *OVOS* that would normally be generated) to the Russian authority (*Rosprirodnadzor*) for administrative review — took less than a year, from 29 September 2014 to 7 September 2015.[537] According to Russia, this rushed EIA process was followed by the SEER process that lasted less than three months (from 7 September 2015 to 19 November 2015), which supposedly involved review of thousands of pages of documents.[538]

246. Notably, even that timeline is questionable at best. Russia's description relies heavily on the witness statement of [redacted] supposedly in charge of the environment-related issues during the construction of the Kerch Strait Bridge, including to establish when the EIA for the Kerch Strait Bridge allegedly began.[539] But the September 2014 start date used by Russia is almost 10 full months *before* [redacted] joined the [redacted], on 22 June 2015.[540] [redacted] does not claim to have first-hand knowledge about the alleged EIA process before she joined the [redacted]; she concedes that her description of pre-22 June 2015 events relies entirely on "design documentation" archived at the [redacted], which she has supposedly selected as relevant.[541] It is

[536] *See* Counter-Memorial of the Russian Federation, ¶ 361.

[537] While Russia claims that the process took "more than a year," the cited materials show that STG-Eco was sub-contracted for collection of baseline environmental data on 26 September 2014, to begin work from 29 September 2014. S*ee* Counter-Memorial of the Russian Federation, ¶ 370; STG-ECO, Construction of the Transport Crossing Across the Kerch Strait–Design Documentation (Part 4) (2015), pp. 198-199 (**RU-89**). That is less than a year from 7 September 2015, when the EIA materials were supposedly submitted to *Rosprirodnadzor* for the State Environmental Expert Review ("SEER") process.

[538] Counter-Memorial of the Russian Federation, ¶ 369.

[539] *Id.* ¶ 365.

[540] Witness Statement of [redacted] Statement"), ¶ 2 ("From 22 June 2015 to 19 December 2019, I worked at the Federal Government Institution [redacted]).

[541] [redacted] Statement, ¶ 5 ("The [redacted] allowed me to access the archived documents about the Kerch Bridge, from which I selected necessary documents referenced below.

telling that Russia's own contemporaneous evidence — the official "design documentation" — unequivocally and consistently describes the EIA as having begun at a substantially later date, "on 15 June 2015."[542] It is [redacted] interpretation of Russia's heavily redacted materials that Russia cites to establish an earlier start date.[543] The existence of those redactions should be sufficient to persuade the Tribunal to give no weight to [redacted] related testimony.

247. But even if the Tribunal accepts [redacted] account at face value, the timeframe of barely over 11 months is grossly inadequate for an EIA for a project as significant and invasive as the construction of the Kerch Strait Bridge. Notably, Russia does not contest [redacted] estimate that an adequate EIA that appropriately considered the key physical, chemical, biological, and social factors of the Kerch Strait Bridge would have taken at least two years, and realistically longer.[544]

248. The timeframe for the gas pipeline construction was even shorter. According to Russia's own account, the entire approval process — from hiring a contractor allegedly to "perform the EIA" to the final approval by the reviewing agency, *Rosprirodnadzor* — took about six months (from 10 August 2015 to 19 February 2016).[545] The actual EIA process, up to the submission of the EIA materials to *Rosprirodnadzor*, would have lasted just over three

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When describing the facts and events that took place before June 2015, I rely on design documentation known to me due to my job duties.").

[542] STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 9, Book 1) (2015), p. 10 ("The environmental impact assessment procedure in relation to the Project was commenced on 15 June 2015.") (**RU-100**); STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 9, Book 2) (2015), pp. 8-9 ("The environmental impact assessment of the Facility started on 15 June 2015.") (**RU-103**).

[543] [redacted] Statement, ¶ 11 ("The [redacted] for the first time published information about the commencement of the EIA process in June 2015 . . . However, the EIA works actually commenced long before June 2015."); *id.* ¶ 43 n.41 ("[T]he EIA process effectively commenced before June 2015.").

[544] First [redacted] Report, ¶ 151.

[545] According to Russia's evidence, the general contractor for the gas pipeline construction, SGM LLC, contracted Giprogazcentr JSC to design the pipeline on 24 July 2015. *See* Agreement No. 4700/1 between SGM LLC and Giprogazcentr JSC for the engineering surveys and project design work under the Project "Main Gas Pipeline Krasnodar Region-Crimea" (24 July 2015) (**RU-453**). Giprogazcentr JSC, in turn, sub-contracted Expert Centre LLC to perform the EIA, on 10 August 2015. *See* Agreement No. 4700/1/ETs between Giprogazcentr JSC and Expert Centre LLC for baseline data collection and engineering surveys (10 August 2015) (**RU-456**). According to Russia's own account, "Rosprirodnadzor issued its positive expert opinion on the EIA of the gas pipeline on 19 February 2016." *See* Counter-Memorial of the Russian Federation, ¶ 436.

months.[546] During this period, Russia claims to have (i) collected extensive baseline data; (ii) drafted hundreds of pages of design documentation materials focused on the EIA,[547] and (iii) held multiple public hearings.[548] According to Russia, the SEER by *Rosprirodnadzor* itself concluded in less than a month.[549] The timeline for the alleged EIA in connection with the submarine power cables remains unclear.[550] But it would have been less than a year, with the SEER by *Rosprirodnadzor* lasting only about a month.[551] As [redacted] explains, these timeframes are grossly inadequate and unrealistic for an EIA under any recognized standards.[552]

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[546] While it is unclear when the EIA materials were submitted to *Rosprirodnadzor*, Russia's documents submitted for SEER are dated 28 November 2015, suggesting that that may be the date of submission. *See* [redacted]. In any event, the submission would have been no later than 22 January 2016, on which the first meeting for the SEER of the submitted materials was held according to Russia's evidence. *See* Federal Service for Supervision of Natural Resources official website, *The Federal Service for Supervision of Natural Resources Starts Environmental Expert Review of Project to Build Main Gas Pipeline to Crimea* (**RU-465**).

[547] *See* [redacted].

[548] Counter-Memorial of the Russian Federation, ¶¶ 434-435.

[549] Federal Service for Supervision of Natural Resources official website, *The Federal Service for Supervision of Natural Resources Starts Environmental Expert Review of Project to Build Main Gas Pipeline to Crimea* (stating that the SEER "held its first meeting" on 22 January 2016) (**RU-465**); Counter-Memorial of the Russian Federation, ¶ 436 (noting that "Rosprirodnadzor issued its positive expert opinion on the EIA of the gas pipeline on 19 February 2016").

[550] It is unclear when exactly the EIA process began, although it would have been no earlier than 11 August 2014, when Russia supposedly approved by Resolution No. 790 of the Government of the Russian Federation the "Social and Economic Development of the Republic of Crimea and Sevastopol through 2020," which envisioned the construction of the power cables. *See* Letter from the Centre for Engineering and Construction Management of the Unified Energy System JSC to the Federal Grid Company of the Unified Energy System, No. 40/SD/335 (19 November 2021) p. 1 (**RU-467**). While it is also unclear when the EIA was completed, the alleged public hearing concluded on 28 November 2014, within less than four months of the issuance of the Resolution No. 790. *See* Counter-Memorial of the Russian Federation, ¶ 438.

[551] Federal Service for Supervision of Natural Resources official website, *On Conducting State Environmental Expert Review* (**RU-471**); *see also* Federal Service for Supervision of Natural Resources official website, *On 18 June 2015, the Federal Service for Supervision of Natural Resources Issued Order No. 498 "On the Organisation and Conduct of a State Environmental Expert Review of Design Documentation for the Project "Construction of the Electric Power Supply Bridge 'Russian Federation – Crimean Peninsula,' Cable Crossing across the Kerch Strait"* (excerpts) (**RU-472**).

[552] Second [redacted] Report, ¶¶ 27, 32.

249. The public consultations Russia alleges to have conducted as part of the EIAs are further evidence of the undue haste with which Russia completed its process. As discussed further below, Russia's evidence shows that the design documents were made accessible to the public for the first time just weeks before the conclusion of the alleged EIA process; hearings and public "roundtables" based on the design documents were similarly held only in the final month of the process.[553]

250. Such a rushed and inadequate process was not a coincidence. On several occasions, President Putin demanded that the Construction Projects be completed by pre-fixed, ambitious deadlines.[554] For instance, President Putin had on multiple occasions demanded that the Kerch Strait Bridge be commissioned by the end of 2018 — in time for the fifth anniversary of the purported annexation of the Crimean peninsula, and about four years from the date on which the EIA allegedly began — stressing that doing so would be critical for Russia's strategic interests in the Crimean peninsula.[555] Russia's own evidence shows that President Putin repeatedly demanded that the deadlines set for the construction of the Bridge be "strictly observed," including on the eve of an alleged public "roundtable" to discuss the environmental aspects of the project.[556]

iv. Legislative Requirements

251. As discussed in Ukraine's Revised Memorial, in Russia's haste to complete construction, the Russian Duma rushed through legislation specific to the Kerch Strait Construction Projects — Federal Law No. 221-FZ — to remove numerous checks and balances under Russian law related to the assessment of environmental impacts.[557] While

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[553] *See infra* Chapter Four, Section I.C.

[554] *See*, *e.g.*, President of Russia official website, *The President Launched First Stage of Power Bridge to Crimea* (2 December 2015) (**UA-832**).

[555] *Putin: Kerch Bridge Should Be Commissioned at the End of 2018*, RIA Novosti (20 August 2015) (**UA-833**); *Putin Hopes that the Kerch Bridge Will be Made with High Quality and on Time*, RIA Novosti (14 April 2016) (**UA-834**); Daria Litvinova, *Why Kerch May Prove a Bridge Too Far for Russia*, The Moscow Times (17 June 2016) (**UA-835**).

[556] *Kerch Bridge Construction Through Ecologist's Eyes*, Grazhdanskiye sily.ru (21 August 2015), p. 2 ("As a reminder, it was a day earlier that Russian President Vladimir Putin requested that the deadlines for the construction of the bridge across the Kerch Strait be strictly observed.") (**RU-418**).

[557] Revised Memorial of Ukraine, ¶ 225; Law of Russia "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

Russia takes issue with Ukraine's technical description of the accelerated timetable authorized by Federal Law No. 221-FZ, it does not deny that special measures were taken to fast-track the Construction Projects,[558] or that the deadline for construction was set not on the basis of engineering or environmental concerns but by President Putin.[559] Nor does Russia dispute that the deadline was so aggressive that no contractor would agree to construct the Kerch Strait Bridge until a close ally of President Putin finally said he would do so.[560]

252. Russia's technical clarifications about how Federal Law No. 221-FZ operates are immaterial and serve only to distract. They do not alter the fact that Federal Law No. 221-FZ: (i) restricts the SEER to 45 days; (ii) allows review of the design documents to be conducted in parallel with the SEER or the EIA; and (iii) allows simultaneous design review and certain preparatory work for construction.[561] As [redacted] explains, such modifications to the Russian legal framework "demonstrably and adversely impacted the quality" of any EIA and, "more generally, the efforts to prevent marine pollution."[562]

253. Notably, Russia relies solely on [redacted], a fact witness, for its sweeping argument that the "preparatory works" carried out prior to the approval of the alleged EIA "could not have any significant environmental impact."[563] This is not true. As [redacted] explains, the list of permissible "preparatory" activities in fact included a wide range of substantial construction works concerning ancillary support facilities, which themselves presented a range of pollution risks to the Kerch Strait area.[564]

Federation, No. 221-FZ (1 July 2015) [hereinafter "Russian Federation Federal Law No. 221-FZ"] (**UA-187-AM**).

[558] *See* Revised Memorial of Ukraine, ¶¶ 225-228; *see also Putin Signed a Law that Will Simplify the Construction of the Kerch Bridg*e, RIA Novosti (13 July 2015) (**UA-836**).

[559] *See* Revised Memorial of Ukraine, ¶ 152; *Putin: Kerch Bridge Should Be Commissioned at the End of 2018*, RIA Novosti (20 August 2015) (**UA-833**).

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

[561] Counter-Memorial of the Russian Federation, Chapter 6, Section I.B.

[562] Second [redacted] Report, ¶ 36.

[563] Counter-Memorial of the Russian Federation, ¶ 345 (quoting [redacted] Statement, ¶ 72).

[564] Second [redacted] Report, ¶¶ 37-42.

C. Russia Violated Articles 205 and 206 by Not Communicating Reports of Any EIA for Construction Activities in the Kerch Strait

254. Nor is there any evidence that the Russian Federation communicated any reports of an EIA or similar assessment as required by Articles 205 and 206, either by publishing them or providing them to "competent international organizations."[565] In the Revised Memorial, Ukraine confirmed that Russia had also failed to communicate reports of any EIAs directly to Ukraine.[566] Russia attempts to turn its own shortcomings into a line of attack against Ukraine: it criticizes Ukraine and [redacted] for failing to analyze its "primary EIA materials," suggesting that those materials could have been located based on "the simplest research" by Ukraine.[567]

255. This is patently untrue. Russia has produced no evidence — and in fact does not even claim — that its alleged EIA materials can be found anywhere in the public domain. If they are indeed publicly available, Russia would not have meticulously redacted substantial parts of the materials — including the alleged minutes for the "public" hearings — before submitting them as exhibits.[568]

256. More fundamentally, Russia's lengthy account of its alleged publicity efforts falls flat upon scrutiny and offers no basis to show that it has complied with the communication requirement under Article 206. Article 206 of UNCLOS provides, in relevant part, that States "shall communicate reports of the results of [the EIAs] in the

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[565] *See* First [redacted] Report, ¶¶ 152, 154-158; Revised Memorial of Ukraine, ¶¶ 229-230.

[566] Revised Memorial of Ukraine, ¶ 229.

[567] Counter-Memorial of the Russian Federation, ¶¶ 359, 433.

[568] *See*, *e.g.*, STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 4, Book 1) (2015) (**RU-93**); [redacted]; STG-ECO, Construction of the Transport Crossing Across the Kerch Strait Design Documentation (Annexes 2, 5, 8, 9 and 17) (2015) (**RU-132**); STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 6, Book 1) (2015) (**RU-133**); STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 8, Book 1) (2015) (**RU-131**); [redacted].

manner provided in article 205."[569] A State can satisfy Article 205 either by "publish[ing] reports" of the relevant results, or by "provid[ing] such reports at appropriate intervals to the competent international organizations, which should make them available to all States."[570]

257. Russia does not claim to have communicated the results of the alleged EIAs to any "international organizations" — or to have actively reached out to, or sought input from, Ukraine. In fact, as discussed below, Russia failed to communicate the results of any EIA to Ukraine even when Ukraine specifically asked Russia to do so.[571] Instead, Russia alleges that the "results of the EIA were made available to the wider public, and in that context any third parties could consult them to make their comments and suggestions on the content of the EIA."[572] As such, the only relevant question is whether Russia's alleged efforts to make the EIA results publicly available satisfy Article 206's requirement to "communicate," by "publish[ing] reports" of the relevant EIA results as allowed under Article 205. The answer is a resounding "no."

258. In most cases, Russia was careful to make only hard copies of the EIAs available in a small number of its local administrative offices, for a limited period of time — typically for barely a month before the conclusion of the alleged EIA processes.[573] Despite Russia's claim that the EIA materials were in some cases close to 2,000 pages long, Russia's evidence shows that hearings and public roundtables based on those materials were typically held only in the final month leading up to the conclusion of the EIA process.[574] Given the

[569] UNCLOS, Art. 206.

[570] UNCLOS, Art. 205.

[571] *See infra* Chapter Four, Section III.B.

[572] Counter-Memorial of the Russian Federation, ¶ 368.

[573] For the Kerch Strait Bridge, for instance, it was not until 31 July 2015, about a month before those materials were submitted for agency review (*i.e.*, SEER), when the alleged EIA materials were made accessible for the first time at designated locations. *See* [redacted] Statement, ¶ 52; *see also* Counter-Memorial of the Russian Federation, ¶ 369. Similarly for the gas pipeline, Russia's evidence shows that a physical copy of the EIA materials was made public for the first time on 22 October 2015, just over a month before it was submitted for the SEER on 28 November 25. *See* [redacted]; *see also* [redacted]. While Russia argues that the EIA materials for the power cables were available on the website of its contractor, Yuzhenergosetproekt OJSC (http://uesp.ru/download/ovos.pdf), the URL is now defunct. *See* Counter-Memorial of the Russian Federation, ¶ 438 n.678.

[574] For the gas pipeline, public hearings based on the EIA materials took place on 5 and 9 November 2015, less than a month before they were submitted to the reviewing agency on 28 November 2015.

rushed processes and the limited accessibility to the materials, it likely was not a coincidence that "[n]o comments regarding the EIA materials followed" after those hearings.[575]

259. Russia also claims that it has held public "roundtables" that anyone could attend, but offers no evidence that such roundtables were ever announced or advertised in advance. Russia's heavily redacted "minutes" of the alleged public discussions, where produced by Russia, do not provide any meaningful information about the content or nature of the discussions.[576] Indeed, the fact that Russia has found it necessary to redact these materials is fundamentally at odds with the claimed public nature of these consultations.

260. Russia explains at length that it has also posted for public review, and arranged public discussions on, "preliminary EIAs" and what it refers to as the "Terms of Reference" for the EIA.[577] Russia has failed to produce any such preliminary materials,[578]

See [redacted]. For the Kerch Strait Bridge, roundtables on the EIA materials were allegedly held on 17 August 2015 in Taman and on 18 August 2015 in Kerch, 2-3 weeks before they were submitted for agency review. *See* [redacted] Statement, ¶¶ 46, 54. For the power cables, Russia's sole evidence is supposed notices for scheduled hearings. *See* Letter from Yuzhenergosetproekt (Branch of Energo-Yug LLC) to the Ministry of Foreign Affairs of the Russian Federation, No. 01-2546 (26 November 2021) (enclosing Newspaper Publications Containing Notices of Public Hearings on the Submarine Power Cables EIA) (**RU-468**). Russia offers no evidence for its claim that public hearings actually took place as scheduled or for its claim that "the public also had an opportunity to give their comments and suggestions." *See* Counter-Memorial of the Russian Federation, ¶ 438.

[575] [redacted] Statement, ¶ 56.

[576] *See*, *e.g.*, STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 9, Book 2) (2015), p. 46 (**RU-103**); STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 9, Book 3) (2015), pp. 9-10 (**RU-106**).

[577] *See*, *e.g.*, Counter-Memorial of the Russian Federation, ¶¶ 368, 435.

[578] According to Russia's evidence, such preliminary materials were supposedly made publicly available just 2-3 months before the completion of the EIA process. As to the Kerch Strait Bridge, for instance, Russia's evidence shows that the Terms of Reference document was made available on 15 June 2015, only in a handful of physical locations all either in Crimea or mainland Russia. *See* STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 9, Book 1) (2015), pp. 29-38 (**RU-100**); *see also* [redacted] Statement, ¶¶ 42-44. Further, while Russia also claims that "public environmental roundtables" were held to discuss Terms of Reference and the preliminary EIA, there is no evidence that any such roundtables were ever announced in advance. *See* [redacted] Statement, ¶ 46. The "minutes" of the allegedly public roundtables are heavily redacted such that nothing but the attendee's affiliations is disclosed. *See* STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 9, Book 1) (2015), pp. 237-238, 248-250 (**RU-100**).

and offers no support that they constitute "reports of the results" of the EIA within the meaning of Article 206.[579]

261. Temporary access to EIA documents through passive posting of the whereabouts of the materials — or last-minute public consultations — do not satisfy the obligation to "publish" under Article 205 of the Convention. Such efforts do not satisfy the ordinary meaning of the term "communicate" or "publish,"[580] or the intended meaning of the terms as informed by the context and the object and purpose of the Convention, which require broad dissemination of information including to other States. [581]

262. That interpretation is consistent with the context of Article 205, and in particular with that Article's parallel structure that allows compliance by either "publish[ing]" or dissemination of information to "all States" through international organizations.[582] As the parallel structure suggests, Article 205 "makes sure that both publication alternatives . . . correspond to the pursued aim," *i.e.*, that "information on the marine environment should, as a precondition for effective marine environment protection, be shared among all States."[583]

263. This interpretation was reaffirmed most recently by the *South China Sea* tribunal, which found that, "[t]o fulfil the obligations of Article 206, a State must not only prepare an EIA but also must *communicate it*" by "publish[ing] reports of the results . . . to

[579] While Russia has not submitted the alleged Terms of Reference or the preliminary EIA documents, Russia's evidence suggests that they were contained in a 21-page summary document. *See* STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 9, Book 1) (2015), pp. 256-258 (**RU-100**). Russia claims that the actual EIA material for the Kerch Strait Bridge alone spanned "more than 1,900 pages." *See* [redacted] Statement, ¶ 49.

[580] Oxford English Dictionary, *Communicate*, *v*. ("To impart (information, knowledge, or the like) (to a person; also formerly with); to impart the knowledge or idea of (something), to inform a person of; to convey, express; to give an impression of, put across.") (**UAL-202**); *id*. *Publish*, *v*. ("To make public or generally known; to declare or report openly or publicly; to announce; (also) to propagate or disseminate (a creed or system).") (**UAL-203**).

[581] *See*, *e.g*., UNCLOS, Preamble ("*Recognizing* the desirability of establishing . . . a legal order for the seas and oceans which will facilitate international communication, and will promote . . . the study, protection and preservation of the marine environment.").

[582] Alexander Proelss (ed.), United Nations Convention on the Law of the Sea - A Commentary (2017), p. 1369, ¶ 13 (**UAL-197**).

[583] *Id.*

the competent international organisations, which should make them available to all States."[584]

264. In sum, publication of EIA results within the meaning of Article 205 must involve a proactive effort using a medium of communication calculated to bring the results to the attention of other interested States. Russia's claimed efforts to publicize its alleged EIAs clearly do not constitute publication within that meaning and should instead be viewed as an attempt to avoid dissemination of the relevant information, not to promote it.

265. Russia's two final comments on the transparency of the alleged EIA processes are beside the point and serve only to distract from its violation of Article 206. First, Russia refers to an expert group for environmental support of the Kerch Bridge project created by its Ministry of Natural Resources and Environment on 19 February 2015. Russia, however, does not claim that this so-called expert group did anything to publish or communicate EIA results.[585]

266. Second, Russia's references to the communications between the Parties in the framework of the Ukrainian-Russian Commission on Fisheries in the Sea of Azov ("URC") are misleading. The URC serves to ensure the rational use of marine bio-resources in the Sea of Azov, and has little or nothing to do with public consultations on an EIA.[586] No EIA results or reports were shared with Ukraine in the context of the URC and Russia does not suggest otherwise. To the contrary, as discussed below in Section III of this Chapter, Russia failed to share the assessment and monitoring results even when specifically requested to do so by the Ukrainian delegation to the URC.[587]

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[584] *South China Sea*, ¶¶ 947-948 (emphasis added) (**UAL-11**).

[585] Counter-Memorial of the Russian Federation, ¶ 367. In support of its claim that "[a]ll interested third parties could contribute to the EIA preparation through this expert group," Russia cites a single letter from the World Wildlife Fund of Russia, which criticizes the lack of "assessment of how construction works and the prospective bridge itself will affect such vulnerable species as the Black Sea bottlenose dolphin and Azov dolphins." *See* Letter from the World Wildlife Fund Russia to the Chairman of the Environmental Support Expert Group of the project "Transport Crossing across the Kerch Strait," No. 173 (11 June 2015) (**RU-417**).

[586] Agreement between the State Committee of Ukraine for Fisheries and Commercial Fishing and the Fishery Committee of the Russian Federation on Aspects of Fishing in the Sea of Azov (14 September 1993) (**UA-71**).

[587] *See infra* Chapter Four, Section III.

II. Russia Underestimates and Has Failed to Mitigate the Environmental Risks Relating to the Kerch Strait Construction Projects

267. As its next line of defense, Russia attempts to paint Ukraine's case as an overstatement of environmental risks, based on a hypothetical "worst case" scenario. Russia argues, relying on [redacted] expert report as well as the witness statement of [redacted], that [redacted] "grossly exaggerates" potential environmental impacts relating to the Kerch Strait Construction Projects.[588] Russia also asserts that the potential impacts identified by [redacted] and his suggested mitigation measures are largely irrelevant, claiming that "[redacted] deliberations on these matters should be disregarded."[589]

268. Russia's position is detached from reality. As a preliminary matter, Russia's objections solely concern the Kerch Strait Bridge, and not any other projects. None of Russia's experts or witnesses testify to the environmental impacts of, or any mitigation efforts adopted for, the submarine gas pipeline or power cables. Nor does Russia's minimally excerpted design documentation for the submarine gas pipeline or power cables projects provide any meaningful information about their anticipated environmental impacts, or any mitigation efforts adopted for those projects. Given Russia's failure to engage with the environmental impacts anticipated to result from the installation of the submarine gas pipeline and power cables, the following sections therefore focus on the Kerch Strait Bridge.

269. As to the Kerch Strait Bridge, Russia's own evidence shows that Russia anticipated the very environmental impacts that [redacted] has identified: increased rates of surface and particulate disturbance; impacts on marine life of the construction-induced light, noise, and vibrations; a heightened risk of water pollution; potential impacts on the hydrodynamics of the Kerch Strait; and the ongoing risk of failure of the Bridge. Against this background, Russia's current attempts to downplay the impacts associated with the Construction Projects lack credibility.

270. It is worth noting that, as [redacted] has explained, these anticipated impacts are "by no means exhaustive" and there may well be "a significant number of potential environmental impacts" that should be studied.[590]

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[588] Counter-Memorial of the Russian Federation, ¶ 377.

[589] *Id.* ¶¶ 376-377.

[590] First [redacted] Report, ¶ 63.

A. Immediate Impacts

271. Increased surface and particulate disturbance. In the Revised Memorial, Ukraine showed that the increased surface and particulate disturbance associated with the construction of bridges, construction of pipelines, and laying of cables should have been expected to lead to "sedimental deposition and erosion, disturbance, resuspension, and general disruption," resulting in "an increase in suspended solids," that can be transported by wind, rain, and currents.[591]

272. Russia does not deny these anticipated impacts. In fact, [redacted] acknowledges that "[d]uring construction, suspended solids make it into the water, increasing its turbidity and forming the so-called 'turbidity zone'" and that the turbidity zone "affects aquatic biological resources."[592] [redacted] similarly "agree[s]" that the "construction could have increased the concentration of suspended solids in certain areas of the Strait."[593] Russia's design documentation for the Kerch Strait Bridge similarly recognizes that "suspended solids will transfer into water and turbidity will increase" during the construction,[594] and warns about the wide-ranging damage the increase in turbidity may cause to aquatic biological resources.[595] Russia's design documentation acknowledges, for instance, that:

> The most large-scale adverse impacts will occur precisely during dredging operations, backfilling, support driving, cutting and extracting auxiliary piles, and building dams and berths.
>
> . . . .

[591] Revised Memorial of Ukraine, ¶ 202.

[592] [redacted] Statement, ¶ 88.

[593] Expert Report of [redacted] Report"), ¶ 78.

[594] STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 4, Book 1) (2015), p. 173 (noting that the types of the construction works during which turbidity will increase include: (i) "Driving of piles under the supports of the temporary bridge and supports of the railway and road bridges"; (ii) "Driving of sheet piles during the construction of temporary sites"; (iii) "Excavation of piles of the temporary bridge and sheet piles during the dismantling of structures" and "cut[ting] off" such piles "[i]f it is impossible to excavate them; and (iv) "Dredging operations") (**RU-93**).

[595] STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 4, Book 1) (2015), p. 182 ("Possible pollution of the water area with silt deposits and, in general, the disturbance of the structure of bottom sediments, which will occur during the driving of piles, pose a danger to marine mammals encountered almost all year round in the construction area.") (**RU-93**).

> The process of dredging and dumping of soil into the dump area will have a significant impact on the quality of the aquatic environment, increase turbidity and the concentration of pollutants in the water. Increased turbidity can cause the death of fish, benthos, plankton.[596]

273. Russia's sole response is that the alleged EIA for the Kerch Strait Bridge "developed a detailed programme of mitigation and compensation of harm to aquatic bioresources."[597] As [redacted] explains, however, the purported mitigation measures were overly simplistic, if not misguided, and of limited effect. For instance, [redacted] explains that Russia relies heavily on its pre-developed compensation algorithms, which conveniently reduce the complex impacts on a variety of organisms into a single numerical value — *e.g.*, the number of Russian Sturgeon to be artificially reproduced.[598] As [redacted] explains, such an approach lacks any scientifically meaningful relationship with, and fails to compensate for, the actual environmental impacts on the broad range of species in the area.[599]

274. [redacted] also points out that, in any event, the alleged mitigation measures described by [redacted], and relied on by Russia and [redacted], are limited in scope.[600] [redacted] description confirms, for instance, that the only measure aimed at preventing the increase in turbidity was the setting up of a "fencing" structure, a stone layer that is intended to prevent sand from being washed away by sea water.[601] [redacted] admits, however, that such a structure was set up only around "temporary sites," a term that is defined nowhere in Russia's submission.[602] Notably, Russia makes no mention of such preventive measures having been taken with respect to project components that its own design documentation anticipated would create "the most large-scale adverse impacts," *i.e.*, dredging, dumping of soil, support driving, cutting and extracting of auxiliary piles, and building dams and berths.[603]

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[596] STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 4, Book 1) (2015), pp. 61, 91 (**RU-93**).

[597] Counter-Memorial of the Russian Federation, ¶ 383.

[598] Second [redacted] Report, ¶¶ 75-76.

[599] *Id.* ¶ 76.

[600] *Id.* ¶ 79.

[601] [redacted] Statement, ¶ 90.

[602] *Id.*

[603] Second [redacted] Report, ¶ 79.

275. Light, noise, and vibrations. Ukraine also explained that 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.[604] Russia does not deny these risks either. [redacted] agrees "that noise and vibration from pile driving could have affected marine mammals."[605] Russia's design documentation for the Kerch Strait Bridge likewise recognizes that noise and vibration could have demonstrable and significant impacts on resident species, including birds, fishes, and marine mammals:

> The construction works can interfere with the normal course of the Azov anchovy and, of course, of Azov dolphins. These marine mammals are not resistant to stressful situations and therefore acoustic pollution of the underwater environment – noise caused by construction activities – can lead to anxiety and disturbance of animal behaviour, which can increase the risk of entanglement in nets. Construction noise can cause hearing damage.[606]

276. Unable to dispute the anticipated environmental impact, Russia again claims that the alleged EIA for the Kerch Strait Bridge provided an adequate mitigation and compensation program.[607] In particular, [redacted] argues that the design documentation contemplated measures to deter the ingress of marine mammals into the construction areas and to suspend construction works during the spring and fall migration seasons.[608] But as [redacted] explains, the suggested method of using "visual, sound and sensory types of influences" to deter marine mammals from their own habitats is, in and of itself, an impact on the marine environment that calls for an appropriate assessment, rather than a mitigation measure.[609] [redacted] also points out that the contemplated mitigation efforts were limited in scope: the design documentation focuses entirely on specific types of dolphins and does not consider the impacts on other marine organisms that inhabit the area.[610]

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[604] Revised Memorial of Ukraine, ¶ 203.

[605] [redacted] Report, ¶ 86.

[606] STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 4, Book 1) (2015), p. 182 (**RU-93**).

[607] Counter-Memorial of the Russian Federation, ¶ 383.

[608] [redacted] Report, ¶¶ 87, 90.

[609] Second [redacted] Report, ¶¶ 82-83; STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 4, Book 1) (2015), p. 182 (**RU-93**).

[610] Second [redacted] Report, ¶ 83; STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 4, Book 1) (2015), p. 182 (**RU-93**).

277. Pollutants. In the Revised Memorial, Ukraine demonstrated the virtual certainty that pollutants would have entered the marine environment during the construction process, in light of the sheer size, nature, and extent of the Construction Projects. [redacted] "agree[s] that the construction of the Kerch Bridge posed potential risks of water pollution," but argues that considerable efforts were made to mitigate negative impacts on water quality.[611] But the alleged mitigation efforts, even assuming that they were carried out in an appropriate manner, were simply inadequate to address the range of sources of anticipated pollution.

278. In particular, [redacted] relies for his position on the four mitigation efforts described by [redacted]: (i) collection of polluted water from floating craft engaged in construction; (ii) construction of local treatment facilities ("LTFs") and a system of drainage channels that diverted stormwater into LTFs from temporary roads in Kerch, on Tuzla Island and the Tuzla Spit; (iii) washing of machinery as it entered temporary bridges; and (iv) special fueling and operation regulations for machinery.[612]

279. Contrary to [redacted] statement that those efforts constitute an "all-encompassing programme to mitigate any potential adverse impact on the quality of water," they are, at best, a limited subset of the measures that would be needed to mitigate an uncontrolled discharge of polluted water into the Kerch Strait.[613] Taken together, however, they fall far short of adequately assessing and mitigating the wide-ranging risks of water pollution attributable to the Kerch Strait Bridge construction project.[614] For instance, none of the efforts described by [redacted] address the significant risk of construction material-related pollution.[615] As [redacted] explained in his first report, the construction of the Kerch Strait Bridge would have involved the extensive use of active compounds such as concrete and concrete curing compounds, degreasers, diesel fuel, gasoline, welding supplies, paint, pesticides, surfactants, sealants, protective coatings, drying agents, epoxy resins, and numerous other compounds.[616] Nor do any of the identified measures adequately address the substantial risk of human-related waste, such as garbage and refuse, general solid waste,

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[611] [redacted] Report, ¶ 67.

[612] [redacted] Statement, ¶ 75.

[613] Second [redacted] Report, ¶ 89.

[614] *Id.*

[615] *Id.*

[616] First [redacted] Report, ¶ 82.

and food waste.[617] As previously noted, the Kerch Strait Bridge construction project alone is reported to have involved more than 6,000 workers from 20 different companies.[618]

B. Long-Term Impacts

280. Changes in the hydrodynamics of the Kerch Strait. Ukraine has shown that the Kerch Strait Bridge could reasonably have been expected to alter the hydrodynamics (water flow) within the Kerch Strait, potentially resulting in complex and lasting downstream effects on the marine environment such as fluctuations in salinity levels in the Sea of Azov and the Black Sea.[619]

281. Russia's own documents acknowledge that creating even a partial impediment to the flow of water through the Kerch Strait can change the current velocity, and that such a change in current velocity can trigger other substantial downstream effects, including "potential changes in temperature and salinity conditions," changes in "the warming properties of the Black Sea waters during a cold season," impacts on "the seasonal migration of fishes," "changes in oxygen . . . conditions," and "accumulation of anthropogenic pollutants."[620] Russia seeks, however, to play down the extent of the hydrodynamic impacts to be expected from the Kerch Strait Bridge, arguing that any such impact is marginal.[621]

282. For instance, [redacted] relies on the Zubov Institute's modeling to argue that the hydrodynamic impact of the Kerch Strait Bridge was found to be marginal, with the

[617] Second [redacted] Report, ¶ 89.

[618] First [redacted] Report, ¶ 79; Natalya Aleksandrovna Sytnik et al., *Assessment of the Impact of the Construction of the Crimean Bridge on the Eco-System of the Kerch Strait*, Eurasion Union of Scientists: Biological Sciences, Vol. 10, No. 43 (2017) (**UA-654**); *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**).

[619] Revised Memorial of Ukraine, ¶¶ 206-208.

[620] [redacted]

[621] Counter-Memorial of the Russian Federation, ¶ 387.

increase in current velocity anticipated to be no more than 2-5 cm/s.[622] But the modeling was undertaken with the primary aim of calculating the potential impact of constructing an approach dam to Tuzla Island — in other words, a different bridge design than the one ultimately adopted.[623] As such, and as [redacted] points out, the modeling does not provide sufficiently detailed data on the current velocities in the vicinity of the pylons.[624]

283. Notably, there is no evidence that any tailored modeling was carried out on the actual design adopted for the Kerch Strait Bridge. [redacted] finds this remarkable, especially in light of the recognition in Russia's design documentation, and by [redacted], that even a partial impediment to water flow through the Kerch Strait could have a hydrodynamic impact.[625] [redacted] stresses that an appropriate EIA in the case of the Kerch Strait Bridge would "include detailed baseline information on the current velocities in and around the pylons at different depths and envision a robust monitoring program, including to measure maximum velocities and look for possible erosion or deposition of sediments on an ongoing basis."[626]

284. Even assuming that the Zubov Institute's modeling had any relevance, Russia omits to mention that the 2-5 cm/s estimate by [redacted] is based on the Zubov Institute's "annually averaged" changes in current speed.[627] The annual "maximum" changes in current speed, according to the Zubov Institute modeling, is estimated to amount to 10 cm/s, up to five times [redacted] estimate.[628]

285. While the foregoing should sufficiently highlight the absence of a proper impact assessment on the hydrodynamics of the Kerch Strait, [redacted] adds yet another baseless estimate of his own. He argues that the supports of the Kerch Strait Bridge occupy no more than 10-15 percent of the waterline of the Kerch Strait, and therefore "one can

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[622] [redacted] Report, ¶¶ 93-98.

[623] *See* Counter-Memorial of the Russian Federation, ¶ 387 ("The Zubov Institute conducted a modelling of waves and currents in the Kerch Strait in a scenario when a dam created for the Kerch Bridge would partially block the Strait"); Second [redacted] Report, ¶ 99.

[624] Second [redacted] Report, ¶ 104.

[625] [redacted] Report, ¶ 104 ("The Tuzla Spit undoubtedly altered the Kerch Strait hydrodynamics.").

[626] Second [redacted] Report, ¶ 104.

[627] *Id.* ¶ 101.

[628] *Id.*; [redacted].

reasonably expect only a local 10-15% increase of current velocity in the immediate vicinity of the Strait."[629] There is no evidence (and [redacted] cites none) for this proposition, which [redacted] explains is "overly-simplistic."[630] Lastly, [redacted], Ukraine's expert on the marine ecosystem of the Black Sea Basin, points out that even assuming that the estimate of an increase in water velocity by 10-15 percent is accurate, such an increase is still sufficient to impact the migration pattern of marine species that are sensitive to current velocity.[631]

286. While Russia argues that the lack of any hydrodynamic changes has been confirmed by monitoring efforts, all of the inshore monitoring sites identified by Russia's Crimean Directorate for Hydrometeorology and Environmental Monitoring are located at a cross section of the Kerch Strait miles from the site of the Bridge.[632] According to [redacted], instrumentation at those locations cannot reliably monitor the hydrodynamic changes near the installations. Further, there is apparently no pertinent data on the actual changes in sediment erosion, transport, or deposition in the documentation, and [redacted] opinion on those issues was based in part on counsel's instruction.[633] Overall, [redacted] recommends that actual data at all of the passageways of the Kerch Strait Bridge should be collected using modern flow instruments, including to confirm if sediment scouring is occurring.[634]

287. Notably, based on its position that any hydrodynamic impact of the Kerch Strait Bridge would be marginal, Russia appears not to have assessed any of the consequential impacts that might reasonably be expected to occur as a result of changes in the water flow through the Strait.[635] In these proceedings, Russia therefore relies on [redacted] report to assess, after the fact, the existence and extent of such potential

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[629] [redacted] Report, ¶¶ 93-98.

[630] Second [redacted] Report, ¶ 105.

[631] Second [redacted] Report, ¶¶ 24-28.

[632] Second [redacted] Report, ¶ 106.

[633] [redacted] Report, ¶ 105 (stating that "[a]s I understand from the Counsel, who confirmed that with the relevant state authorities, the depth of the channel did not decrease").

[634] Second [redacted] Report, ¶ 107.

[635] *Id.* ¶ 108.

impacts.[636] As [redacted] explains, that is "not a scientifically-sound or credible approach to assess the potential risks and actual impacts."[637]

288. Eutrophication. In any event, [redacted] explains, [redacted] downplays the risk of the consequential impacts reasonably expected to stem from changes in hydrology, such as eutrophication. Ukraine has demonstrated that it was reasonable to expect that the Kerch Strait Bridge, by restricting the flow of water from the Sea of Azov into the Black Sea, could cause increased rates of eutrophication and related algal blooms in the Sea of Azov.[638] Russia's response is that any impact on eutrophication would be "negligible," since an excessive supply of nutrients, and not the Bridge, is the primary cause of eutrophication.[639] [redacted] argues that there "was no need for the assessment of eutrophication processes."[640]

289. As [redacted] explains, however, [redacted] statement oversimplifies a much more complicated phenomenon.[641] According to [redacted], eutrophication simply refers to an excess influx of nutrients,[642] and the key question is what causes complete loss of oxygen in the waters (*i.e.*, anoxia) associated with eutrophication.[643] [redacted] explains that higher nutrient levels do not necessarily lead to anoxia as long as there is sufficient oxygen to support aerobic respiration.[644] Rather, eutrophication and the accompanying loss of oxygen in the Sea of Azov is "directly tied" to water flow and certain salinity characteristics of the water, such as: (a) increasing salinity differences between the surface and bottom layers; and (b) reduced freshening of bottom layers, caused for instance by decreased flow from the Black Sea at the bottom layer.[645] Assessing and monitoring how

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[636] *Id.*

[637] *Id.*

[638] Revised Memorial of Ukraine, ¶¶ 209-210.

[639] Counter-Memorial of the Russian Federation, ¶ 395.

[640] [redacted] Report, ¶ 111.

[641] Second [redacted] Report, ¶ 20.

[642] First [redacted] Report, ¶ 21.

[643] Second [redacted] Report, ¶ 20.

[644] *Id.*

[645] *Id.*

the Bridge might affect the hydrodynamics of the Kerch Strait is therefore directly relevant to monitoring and mitigating the risk of eutrophication.[646]

290. [redacted] relies on a single chart for his view that there is no cause for concern about eutrophication. That chart shows the quarterly trend in the biomass of phytoplankton and zooplankton between 2016 and 2019.[647] In line with many of Russia's other supporting documents, the chart appears in a minimally excerpted report that includes nothing but that chart, without any pertinent information about the data that it summarizes.[648] In any event, [redacted] explains that to adequately assess the impact of the Bridge on eutrophication, appropriate spatial and temporal studies should have been conducted near the Bridge construction area.[649]

291. Salinity. Another potential consequence of hydrodynamic change in the Kerch Strait is that salinity levels will be impacted. As [redacted] has explained, and as recognized in Russia's design documentation, a change in the hydrodynamics in the Kerch Strait may affect the exchange of waters between the less saline Sea of Azov and the more saline Black Sea.[650] [redacted] has explained that such an impact could, in turn, greatly alter the ecology of the area, as even small changes in salinity gradients can affect many different organisms with varying salinity tolerances.[651]

292. Russia's sole basis mentioned in the Counter-Memorial for denying this possibility is that salinity levels in the Kerch Strait and Sea of Azov have been increasing over the years, which in Russia's view, contradicts [redacted] projected trend. But Russia relies for its position on the URC session of 2016, just about when construction began, which

[646] *Id.*; Second [redacted] Report, ¶¶ 111-112.

[647] [redacted] Report, ¶ 113 & Figure 20 (citing Fourth quarter 2019 Report on Environmental Monitoring of the Kerch Bridge Construction (**RU-270**)).

[648] Fourth quarter 2019 Report on Environmental Monitoring of the Kerch Bridge Construction (**RU-270**).

[649] Second [redacted] Report, ¶ 112.

[650] First [redacted] Report, ¶ 94; [redacted].

[651] First [redacted] Report, ¶ 94.

has no relevance for the potential impact of the Bridge.[652] More fundamentally, Russia's position reflects a broader pattern of Russia and its experts conflating a natural trend with a human-imposed impact, instead of measuring the impact against a baseline that incorporates the natural trend. As [redacted] explains, this pattern is symptomatic of Russia's failure to put in place an environmental assessment and monitoring system that is capable of discerning and measuring human-induced impacts.[653]

293. Ice formations and buildups. Ukraine has also shown that the Kerch Strait Bridge could reasonably be expected to cause an increase in seasonal ice formation on the northern side of the Bridge.[654] Russia denies that the Bridge will have any material impact on the ice regime in the area, arguing that Ukraine's concern "reaches a new level of fallacy" and "paint[s] a veneer that is as daunting as it is unrealistic."[655] Relying on [redacted] testimony, Russia argues that significant ice floes that formed around the Bridge pillars in February 2017 were "short-lived," cannot be attributed to the Kerch Strait Bridge, and do not demonstrate any increased risk of ice formation in the Kerch Strait.[656] But Russia's sweeping denial of any potential impact falls apart upon close review.

294. First, as [redacted] points out, the potential impact of the Bridge on the ice regime has been well researched.[657] A 2017 empirical study by *Lavrova et al.*, for instance, projected that "when the construction is over and the technological bridge is gone, by all appearances the main [Kerch] bridge will strongly affect ice conditions in the Kerch

[652] Counter-Memorial of the Russian Federation, ¶ 394 (quoting Minutes of the 2016 URC session (**RU-385**)).

[653] Second [redacted] Report, ¶ 115.

[654] Revised Memorial of Ukraine, ¶ 213.

[655] Counter-Memorial of the Russian Federation, ¶ 396.

[656] *Id.* ¶¶ 396-398, 423.

[657] Second [redacted] Report, ¶ 117.

Strait."[658] Russia does not engage with, let alone attempt to rebut, the findings of these empirical studies.[659]

295. Second, Russia attempts to downplay the February 2017 ice buildup as a one-time event, arguing that the "low heat storage capacity" of the Strait would not allow the buildup to "hold for long."[660] Russia fails to appreciate the warning raised in its own design documentation: that the potential "hydrological impact" of creating even a partial impediment to the Kerch Strait includes changes in "the warming properties of the Black Sea waters during a cold season as a result of a decrease in their incoming volume."[661]

296. Migration patterns. In his first report, [redacted] described a complex set of potential consequences of a change in the Kerch Strait ice regime, including impacts on "flow patterns," "erosional and depositional patterns," "habitats and life histories," and the "thermal regime of the local waters."[662] [redacted] explained that these consequences "will almost certainly impact, and potentially alter, natural biological migrations and cycles of many species."[663] He also explained that "ice dams could form between stanchions that would prevent the migration of certain species entirely."[664]

297. Russia denies that any change in the ice regime can have an impact on migration patterns, relying for this position exclusively on [redacted] view that "'ice dams' cannot form in the Kerch Strait and fish starts its migration after the ice melts."[665] No explanation or evidence is offered as to the other potential impacts on migration patterns

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[658] Olga Yu. Lavrova et al., *Long-Term Monitoring of Sea Ice Conditions in the Kerch Strait by Remote Sensing Data,* Proc. Of SPIE, Vol. 10422 (2017), p. 104220L-1 (**UA-407**); *see also* Institute of Water Problems and Land Reclamation, NAAS, About Some Environmental Consequences of Kerch Strait Bridge Construction, *Hydrology,* Vol. 6, No. 1 (2018), p. 7 ("[T]he [Kerch] bridge['s] presence, even at normal winter temperatures, will significantly deteriorate the ice situation in the Kerch Strait.") (**UA-220**).

[659] In fact, [redacted] approvingly cites the Institute of Water Problems and Land Reclamation study (**UA-220**) in his report. *See* [redacted] Report, ¶ 124.

[660] Counter-Memorial of the Russian Federation, ¶ 396.

[661] [redacted].

[662] First [redacted] Report, ¶ 112.

[663] *Id.*

[664] *Id.*

[665] Counter-Memorial of the Russian Federation, ¶ 398 (citing [redacted] Report, ¶¶ 133-136).

identified by [redacted].[666] According to [redacted], for instance, there are other ways in which the Kerch Strait Bridge can affect migratory patterns, such as the "artificial light at night" environment it creates.[667] [redacted] also notes that ice accumulations can cause an increase in current speed as well as a drop in seawater temperatures, both of which can substantially affect anchovy migration patterns.[668]

298. The "attractive nuisances" effect. Ukraine has demonstrated that the Kerch Strait Bridge could reasonably have been expected to create and cultivate an attractive nuisance, which occurs when a structure (or some other phenomenon) creates "conditions [that] favor predation" thus attracting large numbers of predatory species such as dolphins.[669] As [redacted] explained in his first report, predation can contribute to the depletion of local food resources for the predators, resulting in a decline of population and biomass of both the predatory species and food source.[670] In addition, a significantly larger population of dolphins congregating in a narrow and high-trafficked shipping channel would make them more vulnerable to the localized introduction of oil spills or other hazardous pollutants, as well as to harmful physical interactions with ships, such as physical contact with the ships' propellers.[671]

299. Russia does not dispute that mammals are attracted to the Bridge. Indeed, its environmental officials have confirmed that the Bridge has attracted hundreds, perhaps thousands of dolphins.[672] [redacted] similarly agrees that the Kerch Bridge can induce a concentration of marine mammals in the area.[673] But he argues that the potential congregation of marine mammals near the Kerch Bridge would not produce negative effects on their overall population, because (1) there is no evidence of a real possibility of oil spills;

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[666] Second [redacted] Report, ¶ 122.

[667] *Id.* ¶¶ 124-125.

[668] Second [redacted] Report, ¶¶ 29-32.

[669] Revised Memorial of Ukraine, ¶ 211 (citing First [redacted] Report, ¶ 105).

[670] First [redacted] Report, ¶ 106.

[671] *Id.* ¶ 108.

[672] Eleonora Goldman, *Crimean Bridge Construction Boosts Dolphin Population in Kerch Strait*, Russia Beyond (28 February 2017) (**UA-718**).

[673] [redacted] Report, ¶ 140.

(2) the marine traffic is already regulated in the Strait for navigation safety reasons; and (3) dolphins are sufficiently intelligent to be able to avoid collisions with ships.[674]

300. [redacted] testimony only confirms the absence of any program in place to assess, monitor, and mitigate the potential adverse impact of the congregation of a large number of mammals and other species around the Bridge. In fact, [redacted] concludes based on the materials Russia has submitted to date that "[b]eside scant recent observational information about dolphins (*i.e.*, counting the number of dolphins observed during an expedition), there is no information on this new 'induced' ecological community as a whole."[675] The apparent absence of such a program in place is particularly concerning given that, according to Russia's own data, toxic metals in the water column and local sediments near the Kerch Strait Bridge construction areas had already materially exceeded the maximum allowable concentrations while the construction was ongoing.[676]

301. Chronic and/or episodic pollution. Ukraine has highlighted that 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.[677] While Russia does not contest the risk of pollution, it argues that adequate mitigation measures have been implemented and that no compromise of water quality in the Kerch Strait has been monitored during the construction and operation of the Bridge.[678] As explained in Section II.A of this Chapter, however, Russia's alleged efforts fall far short of adequately assessing and mitigating the wide-ranging risks of water pollution stemming from the Kerch Strait Bridge construction project.[679]

302. Russia quickly focuses on a discrete issue of potential spills, dismissing the concerns raised by [redacted] in that connection as "a speculative point."[680] As [redacted] explains, however, the risk of spills is of particular concern in connection with

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[674] [redacted] Report, ¶¶ 141-144.

[675] Second [redacted] Report, ¶ 129.

[676] *Id.* ¶ 130.

[677] Revised Memorial of Ukraine, ¶ 216.

[678] Counter-Memorial of the Russian Federation, ¶¶ 378-379.

[679] *See supra* Chapter Four, Section II.A.

[680] Counter-Memorial of the Russian Federation, ¶ 380.

large-scale construction projects such as the Kerch Strait Bridge project.[681] Russia's design documentation acknowledges that it was "reasonable" to consider the impact of potential spills on the aquatic environment and "measures aimed at mitigating it,"[682] although ultimately, as [redacted] explains, it rushes to dismiss the risks, without "any specific effort to identify, characterize, quantify, or determine the extent or impacts of spills during construction."[683]

303. Russia argues that "not a single spill requiring emergency response and subsequent emergency environmental monitoring occurred throughout the construction."[684] Russia's narrow focus on large-scale spills that warrant an emergency response is telling and misses the mark. But in any event, to the extent Russia suggests that no chronic or episodic pollution occurred during the construction and operation of the Kerch Strait Bridge, that position is contradicted by its own data. As discussed in Section III.A of this Chapter, its own data depicts alarmingly high pollution levels in the vicinity of the Kerch Strait Bridge construction sites, as early as 2017.[685]

304. Russia also argues, relying on [redacted], that adequate emergency measures have been planned and implemented.[686] [redacted] notes, however, that while such measures (*e.g.*, pausing construction activities upon "a storm warning, the discovery of oil traces on the water surface, the discovery of fire or threatened fire, the discovery of damage or emergency situations that may cause oil spills"[687]) may be "essential first steps toward minimizing and mitigating the potential environmental impacts of an emergency," he would expect "substantially more highly developed and organized" emergency response measures, "with detailed planning for careful deployment of equipment, staff, and appropriate training."[688]

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[681] Second [redacted] Report, ¶ 133.

[682] STG-ECO, Construction of the Transport Crossing Across the Kerch Strait – Design Documentation (Section 7, Part 8, Book 1) (2015), p. 9. (**RU-131**).

[683] Second [redacted] Report, ¶ 133.

[684] Counter-Memorial of the Russian Federation, ¶ 381.

[685] *See infra* Chapter Four, Section II.

[686] Counter-Memorial of the Russian Federation, ¶ 381.

[687] [redacted] Statement, ¶ 102(a).

[688] Second [redacted] Report, ¶ 135.

305. Russia's reaction to the oil spill on Sevastopol beach in May 2016 is illustrative and corroborates [redacted] concerns. Russia asserts that the pollution (1) was most likely caused by a natural process called "downwelling," rather than by an oil spill, (2) was small in volume and short-term in duration, and (3) was unlikely to have caused any considerable harm to the marine environment.[689] The validity of this assessment aside, Russia has notably failed to provide any evidence that the pollution was studied when it occurred in May 2016. It relies entirely on the after-the-fact analysis in the expert report of [redacted].[690] [redacted], in turn, does not suggest that any prior investigations or studies have been conducted. As [redacted] notes, this apparent failure to take any steps for nearly six years is telling, especially in light of Russia's acknowledgement that initially, Rosprirodnadzor had considered that the pollution was caused by oil products discharged from an unidentified vessel.[691]

306. Risk of failure of the Kerch Strait Bridge. Finally, Ukraine has pointed out a number of environmental factors that subject the Kerch Strait Bridge to a higher-than-normal risk of failure. As [redacted] explained in his first report, for instance, the Kerch Strait Bridge is built upon a seabed subject to considerable seismic risk and punctuated by volatile mud volcanoes.[692] In light of the catastrophic environmental impact associated with the risk of failure, [redacted] concluded in his first report that such risks should have been

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[689] Counter-Memorial of the Russian Federation, ¶¶ 510-512 (citing [redacted] Report, ¶¶ 27-28, 31-35, 39-43, 45, 47).

[690] *Id.* ¶¶ 508-516. While Russia cites another study conducted by [redacted] in 2019, that undated study generally discusses the "curious phenomenon" of oil slicks and says nothing about the pollution observed in May 2016, further highlighting Russia's failure to investigate the specific incident in 2016. *See id.* ¶ 508 (citing Remote Sensing Department of Marine Hydrophysical Institute of the Russian Academy of Sciences official website, *Downwelling as a Source of Surface Filmy Pollution* (2019) (**RU-300**)).

[691] Counter-Memorial of the Russian Federation, ¶ 507. Russia's Counter-Memorial therefore confirms that it has failed to communicate and cooperate with Ukraine concerning the May 2016 oil pollution, despite its understanding that the pollution was a discharge of oil products from an unidentified vessel and in disregard of Ukraine's specific request for information. *See* Revised Memorial of Ukraine, ¶ 251 (citing *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**)). Russia's belated attempt to suggest, after nearly six years, the likely nature, cause, and extent of the observed pollution is without merit and cannot retroactively justify its violation of Articles 123, 192, 194, 198, 199, 204, and 205 of the Convention.

[692] First [redacted] Report, ¶¶ 119-120.

considered in any prospective ESIA.[693] Russia does not even claim to have conducted an ESIA of the risk of failure, and there is no evidence that any environmental risks have been studied.

307. Unable to deny the catastrophic environmental impacts of the Bridge's potential failure, Russia chooses to belabor description of its alleged efforts to ensure that the design and construction of the Bridge was subject to increased safety precautions.[694] Russia also argues, at considerable length, that it took account of relevant geological conditions through extensive studies by engineers.[695] These alleged efforts to ensure the Bridge's integrity simply reflect the substantial risks of collapse and are not a justification for failing to assess the potential environmental impacts of bridge failure.[696] But in any event, Russia's position that there is no risk of failure is also without basis.

308. First, all of Russia's "detailed" and "thorough" geological engineering surveys are minimally and selectively excerpted, and do not lend support for Russia's view that no risk of failure exists.[697] [redacted] concludes that the materials submitted by Russia do not provide a basis to consider the survey results in a meaningful manner.[698]

309. Second, even the minimally excerpted passages in those materials highlight that the risk which Ukraine flags is real. For instance, Russia cites an interview with [redacted].[699] When asked about the characteristics of the "sea bottom in the construction area," [redacted] responded that "[t]he bridge is located in an area measuring nine points on a seismic scale":

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[693] *Id.* ¶¶ 119-125.

[694] Counter-Memorial of the Russian Federation, ¶¶ 399-406.

[695] *Id.* ¶¶ 406-432.

[696] Second [redacted] Report, ¶¶ 141, 143-146.

[697] *Id.* ¶ 142.

[698] *Id.* Similarly, a report of the Schmidt Institute of Physics of the Earth of the Russian Academy of Sciences ("Schmidt Institute") is supposed to be a 295-page document based on its table of contents; only 7 pages (including 1 cover page and 2 Table of Contents pages) were produced. *See* Federal State Budgetary Institution of Science – Schmidt Institute of Physics of the Earth of the Russian Academy of Sciences, Final Report under Agreement No. 01/02-15/SI of 6 February 2015 on the performance of works on the topic "Seismic Impact Assessment for Five Sites as Part of the Construction of the Transport Crossing across the Kerch Strait" (2015) (**RU-435**); *see also* Second [redacted] Report, ¶ 142.

[699] Counter-Memorial of the Russian Federation, ¶ 411 (citing Kerch Bridge: Engineering Protection from Design to Implementation, Engineering Protection Magazine (1 July 2016) (**RU-426)**).

> [T]he scientists expected the seismicity to be between 8.5 and 9.3 points at different sections along the route of the crossing. There is yet another special feature – the upper layers of the geological rock mass have seismically unstable soils. Such soils are prone to liquefaction or losing their strength properties after dynamic seismic impact. . . .[700]

310. While Russia finds comfort in the statement in its engineering surveys that there were "no manifestations of mud volcanism in the designed section proper,"[701] [redacted] cautions against attaching more meaning to that statement than what it states — that mud volcanoes do not directly intersect the transit line itself, but "are situated in the vicinity of the area where the transit line of the transport crossing opens into the onshore area of the Kerch Peninsula, but without crossing the transit line itself."[702]

311. In sum, neither Russia nor its sources deny the well-studied risk of failure that the Kerch Strait Bridge presents. Given the real risk of collapse and the catastrophic impact such a collapse would have on the marine environment, [redacted] concludes that Russia should have considered this risk in an EIA.[703]

III. Russia Violated Articles 204 and 205 by Failing to Adequately Monitor the Risks or Effects of Its Construction Activities and by Failing to Communicate Monitoring Results

A. Russia Violated Article 204 by Failing to Adequately Monitor the Risks or Effects of Its Construction Activities

312. While Russia does not deny its general obligations to monitor the risks or effects of its construction activities, it resorts to its general approach of reading UNCLOS as devoid of any real content and ultimately allowing Contracting Parties to pay only lip service to the goal of environmental protection. In particular, it argues that "the Russian Federation has no obligation to *monitor* the environmental consequences of the Projects under

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[700] *Kerch Bridge: Engineering Protection from Design to Implementation*, Engineering Protection Magazine (1 July 2016), 4 (**RU-426**).

[701] Counter-Memorial of the Russian Federation, ¶ 410 (quoting [redacted]).

[702] Second [redacted] Report, ¶ 144; Federal State Budgetary Institution of Science – Schmidt Institute of Physics of the Earth of the Russian Academy of Sciences, Final Report under Agreement No. 01/02-15/SI of 6 February 2015 on the performance of works on the topic "Seismic Impact Assessment for Five Sites as Part of the Construction of the Transport Crossing across the Kerch Strait" (2015), pp. 288-289 (**RU-435**).

[703] Second [redacted] Report, ¶ 146.

UNCLOS" and that its "obligations are confined to *endeavouring*, *as far as practicable,* to monitor the risks or effects of pollution."[704] According to Russia, even if Ukraine could show that Russia's monitoring was incomplete or inaccurate, "that would still not amount to a breach of Article 204 of UNCLOS, absent a discrete showing that the Russian Federation has also failed to comply with its best effort obligations."[705]

313. Russia's attempt to empty the Article 204 obligation of any meaningful content is misplaced. As an initial matter, Russia's argument is directed entirely at Article 204(1), which contains qualifiers such as "endeavour" and "as far as practicable." Russia fails to address the obligations under Article 204(2), which contain no such qualifications: "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."[706] As Ukraine explained in its Revised Memorial, Russia's failure to properly monitor the effects of its construction activities violates both paragraphs of Article 204.[707]

314. Further, Russia's attempts to turn Article 204(1) into a merely aspirational provision is misplaced. As Russia's own legal authority notes, qualifiers such as "endeavour" and "as far as practicable" do "not render the provision meaningless, as any unjustified non-performance would still amount to a violation of Art. 204."[708] The two qualifiers are specifically "linked to the capability of a State to discharge its duty."[709] Russia recognizes, for instance, that the qualifier "as far as practicable" was proposed by Kenya in order to avoid excessive burdens for developing States.[710] But Russia neither claims nor offers any evidence that it lacks the capacity to properly monitor the risks or effects of marine pollution. Quite to the contrary, the record is replete with Russia's statements boasting of its prowess in the

[704] Counter-Memorial of the Russian Federation, ¶ 449 (emphasis in original).

[705] *Id.* ¶¶ 449-452.

[706] UNCLOS, Art. 204(2).

[707] Revised Memorial of Ukraine, ¶¶ 189, 192, 314(e).

[708] *Protection and Preservation of the Marine Environment* in Alexander Proelss et al (eds.)., United Nations Convention on the Law of the Sea: A Commentary (2017), p. 1362 (**RUL-115**).

[709] *Id.*

[710] *Id.*

environmental sciences and its technical capability to monitor environmental impacts in the Kerch Strait area.[711]

315. In any event, Russia's evidence demonstrates that it failed even to undertake best efforts to monitor the risks or effects of the Construction Projects.

316. In connection with the submarine power cables and gas pipeline, Russia submitted two monitoring reports, which supposedly summarize "the extent of the monitoring efforts in respect of the undersea gas pipeline and power cables," respectively.[712] The document relating to the undersea gas pipeline is an 11-page excerpt of what appears to be a 428-page document, and six pages of the excerpt are cover pages and a table of contents.[713] The five remaining pages contain short, generalized, and conclusory bullets summarizing supposed monitoring activities.[714] The document relating to the undersea power cables follows a similar pattern.[715] It is a five-page excerpt of what appears to be a 128-page document, and three pages of the excerpt are cover pages, a list of contractors, and a table of contents.[716] The two remaining pages are an excerpt of the introduction, containing short and conclusory bullets summarizing supposed monitoring activities.[717] As

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[711] *See, e.g.*, Witness Statement of [redacted] Statement"), ¶ 15 (describing Russian research institutes involved in the environmental monitoring of the Kerch Strait, the Black Sea, and the Sea of Azov as "the most reputable, renowned and respected Russian research institutions that study the relevant areas of the environment" which "employ prominent specialists who have studied the water and aquatic biological resources of the Sea of Azov and Black Sea for many years"); Counter-Memorial of the Russian Federation, ¶¶ 456-457 (arguing that the "collaboration between renowned scientific institutions guaranteed – and should serve in these proceedings as *prima facie* evidence of – the observance of 'accepted scientific methodologies' in the development and implementation of the Monitoring Programme"); *see also id.* ¶¶ 476-491 (arguing that Russia has "an effective system of state-sponsored site-specific environmental monitoring" in the Kerch Strait area and which predates the Construction Projects).

[712] Counter-Memorial of the Russian Federation, ¶ 475 (citing EcoSky, Table of Contents and summary materials provided in the Summary Report on Environmental Monitoring of the Main Gas Pipeline "Krasnodar Region – Crimea" Construction, Book 1, Textual section, U-19/16-SO-PEM (2017) (**RU-483**); Clean Seas, Final Report on Environmental Monitoring of the Electric Power Supply Bridge "Russian Federation – Crimean Peninsula" Construction (28 December 2016) (**RU-484**)).

[713] EcoSky, Table of Contents and summary materials provided in the Summary Report on Environmental Monitoring of the Main Gas Pipeline "Krasnodar Region – Crimea" Construction, Book 1, Textual section, U-19/16-SO-PEM (2017) (**RU-483**).

[714] *Id.*

[715] Clean Seas, Final Report on Environmental Monitoring of the Electric Power Supply Bridge "Russian Federation – Crimean Peninsula" Construction (28 December 2016) (**RU-484**).

[716] *Id.*

[717] *Id.*

[redacted] explains, such thinly excerpted documents do not provide a basis for a meaningful assessment of Russia's monitoring efforts.[718] Russia has therefore failed to show its compliance with Article 204 with respect to the installation of the submarine power cables and gas pipeline.

317. In connection with the Kerch Strait Bridge, Russia has provided with its Counter-Memorial excerpts of quarterly reports for the year 2017.[719] Although the excerpts do include limited substantive analyses and data, a single year's monitoring results, excerpted or not, do not provide an adequate basis to assess the adequacy of Russia's monitoring efforts.[720] To the extent the excerpts of the 2017 quarterly reports shed light on Russia's alleged monitoring efforts, they confirm that Russia has failed to adequately monitor the impacts on the marine environment of the construction and operation of the Kerch Strait Bridge.

318. [redacted] explains, for instance, that, because Russia failed to establish a statistically robust and reliable baseline, the conclusions drawn from any after-the-fact monitoring efforts are of limited relevance.[721] The 2017 quarterly reports, for instance, generally compare the monitoring data to maximum tolerable or acceptable limits ("Maximum Allowable Concentrations," or "MAC"), rather than to baseline data.[722] While MACs may be useful in determining whether the Black Sea Basin has become intolerably polluted, it does not answer the specific questions at issue: whether, how, and to what extent the Construction Projects have impacted the marine environment.

319. Further, [redacted] observes that the methodologies adopted in the reports to analyze the environmental impact are "rudimentary and overly generalized."[723] He notes

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[718] Second [redacted] Report, ¶ 149.

[719] Counter-Memorial of the Russian Federation, ¶ 454. While [redacted] cites a quarterly report from 2019, that monitoring report is so leanly excerpted that it includes only one chart and no other information. *See* [redacted] Report, ¶ 113 (citing Institute of Land-Use Ecology, *Fourth quarter 2019 Report on Environmental Monitoring of the Kerch Bridge Construction* (2019) (**RU-270**).

[720] Second [redacted] Report, ¶ 150.

[721] *Id.* ¶ 156.

[722] *Id.* Russia argues that its monitoring reports in fact relied on "extensive baseline data collected before the construction commenced." Counter-Memorial of the Russian Federation, ¶ 465. Russia's alleged "baseline data" have been shown to be wholly inadequate in sections above. *See supra* Chapter Four, Section I.B.2.i.

[723] Second [redacted] Report, ¶ 157.

that there are numerous instances where data exceeding the MACs are "simply explained away," or attributed to naturally occurring phenomena without any further investigation into possible impacts from the construction activities.[724] To illustrate, the report for the fourth quarter of 2017 observes that "[t]hroughout 2017, there was a sharp increase in chlorine ions in Tuzla Lake," with the highest increase being recorded in October 2017 "when the chlorine ion content increased by 118.68‰ as compared to 2016, that is, by 3 times."[725] Despite this notable impact, the report concludes, without any indication of a follow-up investigation about the source of the pollution, that "[i]n our view, this could have been caused by seasonal changes in the water content of the lake due to lack of precipitation and shoaling."[726]

320. More broadly, [redacted] explains that the sampled data do highlight, albeit in a rudimentary manner, "a grave trend of serious pollution levels" near the Kerch Strait Bridge construction sites.[727] The report for the second quarter of 2017, for instance, observes that "[h]igh concentrations of oil products, benzo(a)pyrene and mercury were recorded" at or near the construction sites on the Kerch side, and that "[a] high level of main toxicants was accompanied by a high level of BOD_5 and chlorides" as well as "ammonia nitrogen."[728] The report also notes that "[t]he mercury content in bottom sediments" at one of the monitoring stations "exceeded the maximum allowable concentration levels."[729] The report concludes that "[t]he nature of pollution detected indicates increased anthropogenic impact

[724] *Id.*

[725] Fourth Quarter 2017 Report on Environmental Monitoring of the Kerch Bridge Construction, p. 360 (**RU-290**).

[726] *Id.*; *see also* Third Quarter 2017 Report on Environmental Monitoring of the Kerch Bridge Construction, p. 160 ("It is rather difficult to trace the ways in which heavy metals enter natural water bodies, since, along with very numerous industry-related sources, natural sources of heavy metals are no less numerous. The main sources include groundwater and surface run-off. Also in recent years, great attention has been paid to atmospheric transfer as an intermediate, but very important link in the supply of heavy metals entering the aquatic environment that make it to the atmosphere with industrial and transport emissions.") (**RU-143**); Second [redacted] Report, ¶ 157.

[727] Second [redacted] Report, ¶ 158.

[728] Second Quarter 2017 Report on Environmental Monitoring of the Kerch Bridge Construction, p. 316 (**RU-139**); *see also* Second [redacted] Report, ¶ 158.

[729] Second Quarter 2017 Report on Environmental Monitoring of the Kerch Bridge Construction, p. 316 (**RU-139**); *see also* Second [redacted] Report, ¶ 158.

on the water area," anticipating "a further increase in the concentration of metals in the water."[730]

321. Similarly, the report for the fourth quarter notes "[a]bnormally high concentrations of oil products in bottom sediments" at the monitoring stations, "which further increased by October."[731] The report warns that:

> Such a high toxicant content can result in a significant deterioration of the habitat of benthic organisms and entail negative consequences for all hydrobionts. Moreover, as a result of sediment spreading, a rather large amount of oil products can make it to the aquatic environment making the already bad situation in the water body worse.[732]

322. While Russia raises a host of comments in defense of its monitoring efforts, none of them has merit. First, Russia argues that its supposed collaboration with "renowned scientific institutions" must serve "as *prima facie* evidence" of compliance with Article 204's "accepted scientific methodologies" requirement.[733] Russia cites no support for this curious claim. In any event, Russia fails to show that it meets the illusory standard it invented; it relies solely on its fact witness, [redacted] at one of those "renowned" institutions, for its proposition that the institutions involved are in fact "renowned."[734]

323. Second, Russia argues that its monitoring program "fully corresponds to [redacted] criteria."[735] But as [redacted] explains, that conclusion is flawed for a number of reasons. First, it is simply incorrect that the monitoring reports comprehensively cover the parameters identified by [redacted]. [redacted] explains, for instance, that there is no evidence of "compliance monitoring" or "mitigation monitoring."[736] Those are two of the three components that [redacted] considered critical in after-the-fact

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[730] Second Quarter 2017 Report on Environmental Monitoring of the Kerch Bridge Construction, p. 316 (**RU-139**); *see also* Second [redacted] Report, ¶ 158.

[731] Fourth Quarter 2017 Report on Environmental Monitoring of the Kerch Bridge construction, p. 360 (**RU-290**).

[732] *Id.*

[733] Counter-Memorial of the Russian Federation, ¶ 457.

[734] *Id.* ¶ 45 (citing [redacted] Statements, ¶¶ 13-15).

[735] Counter-Memorial of the Russian Federation, ¶ 459 (citing [redacted] Report, ¶¶ 148-150 and Addendum A).

[736] Second [redacted] Report, ¶ 152.

monitoring, particularly where, as in the case of the Kerch Strait Bridge, the impact assessments are largely premised on the planned implementation of certain mitigation activities.[737] As another example, [redacted] explains that the quarterly reports contain no evidence that Russia is monitoring the operational conditions of the Bridge, despite well-documented studies of the impact of noise, light, and vibration on a variety of organisms.[738] In sum, it is simply not true that Russia's monitoring program "fully corresponds to [redacted] criteria."

324. More importantly, [redacted] explains that Russia's (and [redacted]) focus on the *parameters* of a monitoring program is misplaced. According to [redacted], a monitoring report may cover all the required parameters (which Russia's reports do not) and still lead to irrelevant or unreliable results if not carefully designed and implemented.[739]

325. Third, Russia argues that it has an effective system of State-sponsored environmental monitoring that had been carried out prior to and during the construction projects, and which presently continues.[740] But its reliance on an existing environmental monitoring system in the Kerch Strait area that is not specifically designed to capture the impacts of the Construction Projects is misplaced. For instance, Russia points to the monitoring results collected by Russia's State Directorates for Hydrometeorology and Monitoring of Environment and published by the Zubov Institute.[741] But according to [redacted], these monitoring programs were "not designed either to establish the baseline for the Kerch bridge construction site or to monitor the bridge's local impact."[742] He explains that the data were collected in a transect between Crimea and the Taman shoreline, more than 8 miles (13 km) to the northeast of the Kerch bridge construction site, placing them generally upstream from the site.[743]

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[737] *Id.*

[738] *Id.* ¶ 153; [redacted], Addendum A, at 54. Unable to justify this omission, [redacted] concludes only that: "I suppose that inclusion (or non-inclusion) of underwater noise monitoring in a monitoring programme lies at the professional discretion of experts who design it." *See* [redacted] Report, ¶ 156.

[739] Second [redacted] Report, ¶ 155.

[740] Counter-Memorial of the Russian Federation, ¶¶ 476-484.

[741] *Id.* ¶ 477.

[742] Second [redacted] Report, ¶ 164.

[743] *Id.*; I. Zavialov, A. Osadchiev, R. Sedakov, B. Barnier, J-M. Molines & V. Belokopytov, *Water Exchange Between the Sea of Azov and the Black Sea Through the Kerch Strait*, Ocean Science, Vol.

326. In this connection, Russia quotes a letter from the Zubov Institute stating that "the quality of water in the Kerch Strait cannot be asserted to have degraded."[744] This 1.5-page, double-spaced letter claims the absence of any environmental impact, but is not accompanied by any data.[745] Undeterred, the letter baselessly asserts that any impact is "certainly reversible since the construction scale is too insignificant compared to the constant exchange of water between the seas in both directions."[746] According to [redacted], this sweeping claim not only lacks any support, but is also alarming, as it disregards a potential concentrated impact in the vicinity of the construction site, and does not reflect a reasonable approach to marine environment protection.[747]

B. Russia Violated Article 205 by Failing to Communicate Reports of the Monitoring Results

327. Russia has also violated Article 205 by failing to appropriately communicate reports of the results obtained through any monitoring efforts. While Russia does not dispute its obligation under Article 205 to publish reports of the monitoring results,[748] it takes the view that the obligation was discharged. This claim is unsupported.

328. In fact, Russia has failed to share any pertinent monitoring results even when specifically requested by Ukraine. While Russia relies heavily in its Counter-Memorial on the communications between the Parties in the framework of the URC, it omits to mention that through the URC sessions, the Ukrainian delegation asked Russia specifically to provide the results of environmental monitoring, particularly on any negative impact of the construction of the Kerch Strait Bridge on marine biological resources and their living environment.[749] Despite its initial promise to provide the relevant information to Ukraine,[750]

16(1) (2020) (observing that the water flow at the Kerch bridge site is generally from Sea of Azov to the Black Sea, for most of the time) (**RU-244**).

[744] Counter-Memorial of the Russian Federation, ¶ 478 (citing Letter from the Zubov State Oceanographic Institute to the Ministry of Foreign Affairs of the Russian Federation, No. 956 (23 December 2021), ¶¶ 1.5, 1.7-1.8 (**RU-487**)).

[745] Letter from the Zubov State Oceanographic Institute to the Ministry of Foreign Affairs of the Russian Federation, No. 956 (23 December 2021) (**RU-487**).

[746] *Id.* ¶ 1.8.

[747] Second [redacted] Report, ¶ 166.

[748] Counter-Memorial of the Russian Federation, ¶¶ 490-491.

[749] URC XXX Session (October 2018) (**UA-837**).

[750] *Id.*

Russia ultimately reneged, taking an absurd position that the Ukrainian delegation should review the materials submitted in the current proceedings.[751] Putting the inadequacy of the monitoring materials submitted with Russia's Counter-Memorial aside, Russia's position confirms its blatant disregard of the obligation under Article 205.

329. As to the Kerch Strait Bridge, Russia confirms that only high-level *summaries* of underlying reports on the results of the environmental monitoring ("EM Summaries") were made public, and that the purported underlying reports ("EM Reports") were kept internal.[752] The publication of the EM Summaries does not meet the standard set under Article 205. As Russia acknowledges, the EM Summaries were "[o]nly brief results of environmental monitoring,"[753] that "were not intended, and under the applicable [Russian] laws are not required, to provide a comprehensive account of the environmental monitoring exercise, nor should they be deemed as the actual *reports* on environmental monitoring."[754] Such "brief results" clearly do not satisfy the Article 205 obligation, and Russia's description is practically an admission that it withheld the requisite information from other states in violation of Article 205.

330. Further, in connection with the undersea cables and gas pipeline, Russia does not even claim that any such summaries, let alone any monitoring reports or results, were either made public or communicated to any international organizations.

331. Last, Russia's system of state-sponsored site-specific environmental monitoring does not satisfy Article 205's requirement.[755] As explained above, such generic

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[751] URC XXXI Session (November 2019) (**UA-838**).

[752] Counter-Memorial of the Russian Federation, ¶ 462-463; [redacted] Statement, ¶¶ 110-111.

[753] [redacted] Statement, ¶ 111.

[754] Counter-Memorial of the Russian Federation, ¶ 463. To date, Ukraine still has not seen the full "EM Reports." Russia has only submitted heavily redacted versions of such reports with its Counter-Memorial. *E.g.* First Quarter 2017 Report on Environmental Monitoring of the Kerch Bridge Construction (**RU-142**); Second Quarter 2017 Report on Environmental Monitoring of the Kerch Bridge Construction (**RU-139**); Third Quarter 2017 Report on Environmental Monitoring of the Kerch Bridge Construction (**RU-143**); Fourth Quarter 2017 Report on Environmental Monitoring of the Kerch Bridge construction (**RU-290**); [redacted]; Summary Report on Submarine Gas Pipeline Monitoring (**RU-483**); Final Report on Environmental Monitoring of the Electric Power Supply Bridge "Russian Federation – Crimean Peninsula" Construction, 28 December 2016 (**RU-484**).

[755] Counter-Memorial of the Russian Federation, ¶¶ 476-484.

data taken miles away from the construction sites are not the type of monitoring data required under Articles 204 and 205.[756]

IV. By Failing to Adequately Assess, Monitor, and Publicize the Potential and Actual Effects of the Kerch Strait Construction Activities on the Marine Environment, Russia Has Demonstrated a Consistent Disregard for the "Protection and Preservation of the Marine Environment" in Cooperation with Other States in Violation of Articles 123, 192, and 194

332. In the Revised Memorial, Ukraine demonstrated that Russia's conduct in the Kerch Strait not only violates specific obligations contained in Articles 204, 205, and 206, but also violates its more general obligations under Articles 123, 192, and 194 to protect the marine environment and cooperate with its neighbors for that same purpose.[757]

333. For the reasons explained in the foregoing sections, Russia's Counter-Memorial confirms its violations of Articles 123, 192, and 194.[758] Russia has failed to conduct adequate EIAs — *any* EIA in the case of the fiber optic cable — or communicate their results as required under Article 206. Such failure independently violates Russia's 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.

334. Russia has also 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.

335. Russia accuses Ukraine of misrepresenting the contents and meaning of Articles 192 and 194. Russia contends that Ukraine has disregarded the "due diligence nature" of the Articles, which is "not intended to guarantee that significant harm be totally prevented."[759] But Russia's objection misses the point. Ukraine's case does not turn on the extent of harm to the marine environment that Russia failed to prevent. Rather, compliance

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[756] *See supra* Chapter Four, Sections III.A and III.B.

[757] Revised Memorial of Ukraine, ¶¶ 242-248.

[758] *Cf.* Counter-Memorial of the Russian Federation, ¶ 501.

[759] *Id.* ¶ 502 (quoting United Nations General Assembly, 56th Session, *Official Records, Supplement No. 10*, Report of the International Law Commission on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001), UN Doc. A/56/10, 2001, p. 154, commentary 7 to Article 3 (**RUL-116**)).

with the obligations to assess, monitor, and communicate the potential and actual effects on the marine environment — obligations that Russia has demonstrably failed to satisfy — is precisely what due diligence requires.[760]

336. Russia further argues that Article 194(2) "explicitly requires demonstration of 'damage by pollution,'" and that Ukraine has failed to meet its burden of proof.[761] Russia's argument is entirely misconceived. Article 194(2) requires States 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."[762] As the *South China Sea* tribunal explained, the obligation to "ensure" is "an obligation of conduct,"[763] *i.e.* to take the measures appropriate to achieving the desired result, rather than to achieve the result itself. Russia's sole support for its view is an ITLOS interpretation of a different provision, Article 139(2) of UNCLOS, that "it is necessary to establish that there is damage and that the damage was a result of the sponsoring State's failure to carry out its responsibilities."[764] But Article 139(2) specifically concerns state responsibility for damage caused, including by acts of private entities,[765] and Russia offers no support for its position that Article 139(2) provides an "analogous due diligence obligation" to Article 194(2).[766] Russia's interpretation that a

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[760] According to the *South China Sea* tribunal, for instance, Articles 192 and 194 obligate States to take "all measures necessary" to protect the marine environment and demand a "certain level of vigilance" in "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. *South China Sea*, ¶¶ 943-944 (quoting UNCLOS, Art. 194; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, ITLOS Reports 2015, Advisory Opinion of 2 April 2015, ¶ 131 (**UAL-198**); *Pulp Mills*, ¶ 197 (**UAL-152**)) (**UAL-11**).

[761] Counter-Memorial of the Russian Federation, ¶ 503.

[762] UNCLOS, Art. 194(2).

[763] *South China Sea*, ¶ 944 (**UAL-11**).

[764] Counter-Memorial of the Russian Federation, ¶ 503 (quoting Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber), ITLOS Case No. 17, Advisory Opinion of 1 February 2011, ¶ 182 (**RUL-101**)).

[765] UNCLOS, Art. 139(2) ("[D]amage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.").

[766] *See* Counter-Memorial of the Russian Federation, ¶ 503.

State cannot violate Article 194(2) unless an actual "damage by pollution" is shown directly contradicts the plain reading of the provision. Neither Article 139(2) nor the ITLOS Advisory Opinion in *Activities in the Area* relied upon by Russia imposes such an overarching burden to show actual damage to establish a breach of any other UNCLOS provision.

337. As a final point, Russia criticizes Ukraine for being the party "who made any cooperation impossible, unnecessarily turning the issue of environmental protection into a political dispute around sovereignty over Crimea."[767] In support, Russia notes that Ukraine "consistently refused to address environmental matters separately from its sovereignty-related claims with regard to Crimea," requesting information about environmental risks posed by the Kerch Strait bridge construction only in July 2017.[768] To Russia, Ukraine's position suggests that it had "no genuine concerns about the marine environment and only invoked the issue once to manufacture a claim."[769]

338. Russia's criticisms are deeply hypocritical. Once again, Russia brazenly seeks to extract litigation advantage from its own aggression and should accordingly be ignored. In addition, underlying Russia's argument is its flawed attempt to shift the burden of communication to Ukraine. Yet the Convention places upon Russia an "absolute" obligation to disseminate reports of the results of the EIAs and monitoring programs, which is not conditioned upon another State's request.[770] Whether or when another State may have explicitly requested such information is irrelevant and does not relieve Russia of its obligation to communicate.

339. In any event, Russia misrepresents the records of the Parties' communications. It was Russia that has failed to address Ukraine's concerns about the environmental risks, including those raised months before July 2017. In a diplomatic note dated 9 October 2015, Ukraine raised concerns relating to, among other things, "serious damage to living resources in the Black Sea and Azov Sea."[771] Russia did not communicate or

[767] *Id.* ¶ 492.

[768] *Id.* ¶¶ 492-496.

[769] *Id.* ¶ 496.

[770] *South China Sea*, ¶ 948 (**UAL-11**).

[771] *Note Verbale of the Ministry of Foreign Affairs of Ukraine to the Minister of Foreign Affairs of the Russian Federation*, No. 72/22-620-2476 (9 October 2015) (**UA-839**).

even mention its alleged EIAs, responding in vague terms that it "attaches great attention to ensuring . . . navigation safety and protection of the marine environment from pollution."[772]

340. In a diplomatic note dated 23 February 2016, Ukraine protested Russia's plan to build the Kerch Strait Bridge, raising concerns about its "unilateral acts causing a physical change to the marine environment in Ukraine's maritime zone."[773]

341. In a diplomatic note dated 12 May 2016, Ukraine expressed serious concerns about the official statement of the Russian authorities that "an unidentified vessel has discharged oil products in the Black Sea near the city of Sevastopol," requesting information about the environmental damage caused and any actions to "control and prevent further environmental damage,"[774] There was no Russian response.

342. Russia omits to mention the fundamental point: it never communicated the results of any EIAs or its monitoring reports, even when specifically asked to do so by Ukraine. Russia admits that in a diplomatic note dated 12 July 2017, Ukraine demanded that Russia "promptly provide to Ukraine all available information concerning the construction of the Kerch Strait Bridge, including concerning any related threats to the marine environment," including "any assessments made by the Russian Federation with regard to the environmental impact of its construction . . . and explanation of any steps taken or to be taken by the Russian Federation to eliminate all adverse consequences of the construction."[775]

343. Russia failed to communicate any EIAs, claiming in a note dated 4 August 2017, but without offering any support, that "[t]he bridge design takes into consideration all potential environmental risks in order to minimize damage to the marine environment during its construction and subsequent utilization" and that "[a]ppropriate environmental

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[772] *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation*, No. 1599/2дснг (16 February 2016) (**UA-840**).

[773] *Note Verbale of the Ministry of Foreign Affairs of Ukraine to the Minister of Foreign Affairs of the Russian Federation*, No. No. 72/22-194/510-485 (23 February 2016) (**UA-841**).

[774] *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**).

[775] Counter-Memorial of the Russian Federation, ¶ 496; *Note Verbale of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation*, No. 72/22-663-1651, 12 July 2017 (**RU-352**).

monitoring is being carried out at all stages of the bridge's construction."[776] This response must be read as either an admission that no independent environmental assessment had been conducted, or an outright refusal to share the results of any such assessment.

344. Against this background, Russia's attempt to blame Ukraine for objecting to Russia's sharing data concerning Crimea and the city of Sevastopol in international fora is unfounded.[777] Ukraine's refusal to act in any way that might be interpreted as acknowledging Russian sovereignty over territory unlawfully occupied by Russia is entirely understandable and cannot be held against it in the context of the present dispute. In any case, Russia had numerous other avenues to communicate its assessment and monitoring reports, including in response to Ukraine's bilateral request, but it chose not to do so.

[776] *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation*, No. 10352/2DSNG, 4 August 2017 (**UA-223**).

[777] Counter-Memorial of the Russian Federation, ¶ 497 (claiming that such objections "in practical terms, prevented the sharing of any environmental information relating to the Republic of Crimea within the framework of the Black Sea Commission").

Chapter Five: Russia Failed to Protect Underwater Cultural Heritage

345. Ukraine demonstrated in its Revised Memorial that Russia has violated its obligations under UNCLOS Article 303(1) by failing to protect "objects of an archaeological and historical nature found at sea"[778] (also referred to herein as "underwater cultural heritage" or "UCH").[779] Specifically, Ukraine identified numerous examples of interference with underwater cultural heritage in the waters around Crimea since February 2014, in which basic principles of marine archaeology were ignored in a reckless rush to raise UCH from the seabed.[780]

346. The significance of Russia's serial disregard of the duty to protect UCH extends far beyond the representative examples cited in the Revised Memorial. Far from being isolated incidents of technical non-compliance, Russia's willful interference with UCH off the coast of Crimea forms part of a broader pattern of cultural theft, the full ramifications of which have become all too apparent over the last year.[781] As explained in the Revised Memorial, the Article 303(1) duty to protect UCH is predicated on the longstanding recognition that objects of an archaeological and historical nature are part of the "cultural heritage of all mankind."[782] Yet, since its occupation of Crimea, and consistent with its broader project of cultural erasure aimed at non-Russian minorities, Russia has abused its control over underwater cultural heritage to promote a nationalist narrative completely at odds with the values underpinning Article 303.[783] President Putin's highly publicized inspection of a recently discovered Byzantine wreck by submersible in August 2015, and his

[778] Revised Memorial of Ukraine, ¶¶ 255–282.

[779] For the avoidance of doubt, references to "underwater cultural heritage" or "UCH" in this Chapter are to be read as co-extensive with the language of Article 303(1), and not constrained by definitions of those terms found in any other international instrument.

[780] Revised Memorial of Ukraine, ¶¶ 270–281.

[781] *See, e.g.*, Charlotte Mullins, *'Ukraine's Heritage is Under Direct Attack': Why Russia is Looting the Country's Museums*, The Guardian (27 May 2022) (**UA-842**).

[782] Revised Memorial of Ukraine, ¶ 257 (quoting Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S. 215, Preamble (14 May 1954) (**UA-120**)).

[783] *See, e.g.*, Magdalena Pasikowska-Schnass, *European Cultural Heritage Days: Russia's Cultural War Against Ukraine*, European Parliamentary Research Service (September 2022), p. 5 (referring to Russia's mistreatment of cultural heritage in Crimea to show that Russia's present invasion "is being pursued to propagate and bolster the Russian ideological narrative claiming cultural, linguistic and religious unity between Russia and Ukraine.") (**UA-843**).

subsequent comments appropriating the wreck as part of Russia's "historical roots," are symptomatic of this abusive agenda."[784]

Figure 1

347. It is unsurprising against this background that Russia would prefer not to have to answer for its mistreatment of UCH in violation of Article 303(1). The Tribunal should not indulge that preference. As an initial matter, Russia's attempt to avoid scrutiny by denying the Tribunal's jurisdiction to deal with Ukraine's claim in relation to UCH must be rejected. Russia argues that the Tribunal lacks jurisdiction to hear Ukraine's claim related to UCH because "UNCLOS does not apply to the Sea of Azov and Kerch Strait as internal waters."[785] However, for the reasons explained in Chapter Two, Section I.B. above, Ukraine has shown that the Sea of Azov and the Kerch Strait are not internal waters.[786] Even if the Sea of Azov and Kerch Strait were internal waters, Russia's sweeping assertion that the Convention cannot therefore apply is particularly inappropriate with regards to its obligation to protect UCH, given the breadth of Article 303(1)'s reference to objects "found at sea."[787]

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[784] *Putin Descends to Black Sea Bed in Submergence Vehicle to Explore Antique Vessels*, TASS Russian News Agency (18 August 2015), p. 4 (President Putin is quoted saying that "[t]his submergence 'is a good occasion to see once again how deep our historical roots are and how deep our history of relationships with the entire world is'") (**UA-844**).

[785] Counter-Memorial of the Russian Federation, ¶ 518.

[786] *See supra* Chapter Two, Section I.B.

[787] *See* Tullio Scovazzi, *Article 303*, in Alexander Proelss (ed.), United Nations Convention on the Law of the Sea - A Commentary (2017), p. 1951 ("Art. 303 has a general scope of application and in principle covers the other marine spaces: internal waters, the territorial sea, the exclusive economic zone (EEZ), the continental shelf and the high seas") (**UAL-197**). *See also* Sarah Dromgoole, Underwater Cultural Heritage and International Law (Cambridge, 2013), p. 33 ("Article 303 is located in Part XVI of the Convention, which is headed 'General Provisions'. Its location in that part is assumed to mean that – with the exception of paragraph 2, which relates specifically to the contiguous zone – the article applies generally and is not geographically restricted. The effect of this is that the duty on states in paragraph 1 applies to all sea areas." (**UAL-204**); Award on Preliminary

Moreover, even if Russia's jurisdictional objection were upheld, it would not apply to interferences with UCH in the Black Sea, such as those affecting the Byzantine shipwreck and the Airacobra aircraft.

348. The Tribunal should also remain alert to two further themes that permeate Russia's Counter-Memorial: its repeated mischaracterization of Ukraine's legal position and its attempt to minimize Russia's obligations under the Convention to the point of emptying the provisions of any substantive content. As Section I of this Chapter will demonstrate, the Article 303(1) obligation to protect cultural heritage amounts to more than empty words, and Russia can and should be held to account for its blatant disregard of its requirements.

349. Finally, Russia relies on questionable testimony and documentary evidence in an attempt to overcome the publicly reported facts establishing its complicity in the mistreatment of UCH around Crimea. Section II of this Chapter explains why the Tribunal should accord this evidence no weight.

I. Russia Misinterprets the Content of Its Underwater Cultural Heritage Obligations Under UNCLOS

350. In the Revised Memorial, Ukraine applied well-established principles of treaty interpretation to demonstrate that the Article 303(1) duty to protect UCH is informed by international standards, the precise content of which is shaped by contemporary best practice in the field.[788] Russia devotes a large part of its response to an effort to deny this commonsensical interpretation of the Convention's text in favor of a reading of Article 303(1) as a narrow obligation that only requires States Parties to pass laws relating to the protection of UCH.[789] Russia then relies on a misinterpretation of the very same international standards whose relevance it denies to justify the laxity of its own UCH regulatory practices. As explained below, neither part of Russia's internally self-contradictory position is supported.

Objections, ¶ 294 (declining to accept Russia's "rather sweeping premise . . . that the Convention does not regulate a regime of internal waters").

[788] Revised Memorial of Ukraine, ¶¶ 270-282.

[789] Counter-Memorial of the Russian Federation, Chapter Seven, Section II.

A. The Content of the Article 303(1) Duty to Protect Underwater Cultural Heritage Is Properly Interpreted in Light of Evolving Scientific and Technical Standards

351. The first stage of Russia's argument willfully mischaracterizes Ukraine's position so as to more easily dismiss it. In particular, Russia asserts that Ukraine is asking the Tribunal either to establish alleged violations of other UCH-related treaties or to import obligations from those treaties into UNCLOS.[790] An honest reading of the Revised Memorial confirms, however, that this is simply not the case.

352. In its Revised Memorial, Ukraine relied on the ordinary meaning of "protect" and its context within the Convention to show that Article 303(1) imposes an affirmative duty to protect UCH on Contracting Parties which encompasses accepted international standards of conduct.[791] Ukraine further demonstrated that the Rules concerning Activities Directed at Underwater Cultural Heritage annexed to the UNESCO Convention on the Protection of the Underwater Cultural Heritage (the "UCH Rules"[792]), are universally regarded within the UCH community as stating current best practice.[793] As such, they are recognized as international standards in their own right, the authority of which does not hinge on whether a State has acceded to the UNESCO Convention or not. As Russia itself stated when explaining its decision not to sign the UNESCO Convention, the UCH Rules reflect a consensus in the protection of UCH.[794] At the time, Russia "confirm[ed] its readiness to continue and develop cooperation for protection of [UCH] on the basis of

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[790] Counter-Memorial of the Russian Federation, ¶ 523.

[791] As explained in the Revised Memorial of Ukraine, ¶¶ 257–269, the ordinary meaning of "protect" is "to defend from injury, to keep safe and preserve from damage." *Id.* ¶ 259. This meaning is corroborated by the context of the Convention which details the right of protection in terms of necessary steps to take to prevent damage and is consistent with other relevant rules of international law, notably the 1972 World Heritage Convention according to which States must take effective and active measures for protection of cultural heritage. *Id.* ¶ 261 (citing Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 U.N.T.S. 151, 16 November 1972 (**UA-124**)). UNCLOS Article 303(1) speaks of a general duty to protect, the scope of which and content is not specified in the Convention. In such circumstances, relevant international standards inform the content of that duty. *See Pulp Mills*, ¶ 204 (**UAL-152**).

[792] 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**).

[793] Revised Memorial of Ukraine, ¶ 268.

[794] United Nations Educational, Scientific and Cultural Organization General Conference, 31st Session, *Records of the General Conference*, UNESCO Doc No. 31 C/Proceedings, Vol. II (Proceedings) (2 November 2001), p. 562, ¶ 22.4 (**UAL-205**).

[UNCLOS] and *the consensual aspects of the UNESCO Convention on the Protection of the Underwater Cultural Heritage, as contained in the annex to it,*" that is, the UCH Rules.[795]

353. Russia's recognition of the authoritative status of the UCH Rules is reflected in the Counter-Memorial itself. In its attempt to demonstrate compliance with Article 303(1), Russia discusses how its domestic legislation and administrative practices purportedly encompass the relevant international standards of UCH treatment by referring back to, *inter alia*, the UCH Rules.[796]

354. There is nothing out of the ordinary in treaty practice in looking to relevant external standards to shed light on the content of a legal obligation, especially when the obligation in question is enduring and its performance involves the deployment of scientific or technological means. For example, in *Gabčíkovo-Nagymaros Project*, the ICJ was called upon to interpret treaty provisions requiring the parties "jointly to take, on a continuous basis, appropriate measures for the protection of water quality, of nature and of fishing interests."[797] The Court observed:

> In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing — and thus necessarily evolving — obligation on the parties to maintain the quality of the water of the Danube and to protect nature.[798]

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[795] United Nations Educational, Scientific and Cultural Organization General Conference, 31st Session, *Records of the General Conference*, UNESCO Doc No. 31 C/Proceedings, Vol. II (Proceedings) (2 November 2001), p. 562, ¶ 22.4 (emphasis added) (**UAL-205**).

[796] Counter-Memorial of Russia, ¶¶ 549 n.892, 555 n.907. *See also* Institute of Archaeology of the Russian Academy of Sciences, Rules for Archaeological Fieldworks in the Body of Water Areas, (21 May 2019), ¶ 1.1 (stating that the Russian Academy of Sciences ("RAS") Rules of 2019 applicable to UCH "take into account essential rules of the . . . UNESCO Convention.") (**RU-523**); Letter from the Institute of Archaeology of the Russian Academy of Sciences to the Ministry of Foreign Affairs of the Russian Federation, No. 14102/2115 OP-1762 (28 June 2022) (in which the Russian Ministry of Foreign Affairs asked an undisclosed person allegedly working at the Institute of Archaeology ("IA") of the RAS whether the IA RAS takes into consideration and is guided by "international standards, in particular those provided by [the UCH Rules].") (**RU-531**).

[797] *Gabčíkovo-Nagymaros Project*, ¶ 107 (**UAL-201**).

[798] *Id.* ¶ 140. The Court further observed that: "Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past." *Id.* ¶ 140.

355. Notwithstanding Russia's mischaracterization, such an interpretative exercise clearly does not equate to asking the Tribunal to rule on breaches of other treaties or to import legal obligations from those treaties into UNCLOS. Ukraine simply asks the Tribunal to read Article 303(1) in light of the consensus, to which Russia belongs, recognizing the UCH Rules as current best practice.

356. Russia's assertion that the UCH Rules have not obtained the status of customary international law and cannot therefore be applied by the Tribunal is wide of the mark for the same reason.[799] Whether the Rules constitute customary international law or not is simply irrelevant to the interpretive exercise Ukraine invites the Tribunal to undertake, *i.e.* to give effect to Article 303(1)'s ordinary meaning in context, and in light of the object and purpose of the Convention, which mandates taking account of evolving scientific and technological standards.

357. Because the Tribunal plainly has jurisdiction to interpret Article 303(1) of the Convention to resolve the Parties' dispute, Russia's invocation of cases in which Tribunal's declined to exceed their jurisdiction is also inapposite.[800]

B. Russia's Attempt to Minimize the Content of Its Duty to Protect Underwater Cultural Heritage Under the Convention Should Be Rejected

358. The second part of Russia's interpretive argument is directed at shrinking the Article 303(1) obligation to ensure that it places no meaningful constraint on Russia's mistreatment of UCH within its control. Russia is unable to deny Ukraine's core contention that Article 303(1) requires it to make diligent efforts to prevent harm to UCH. But it seeks to minimize the content of that obligation, arguing that the obligation is satisfied so long as a State Party introduces policies, legislation, and administrative controls *capable* of preventing or minimizing the risk to UCH, regardless of the vigor with which such measures are actually enforced on a day-to-day basis.[801] Article 303(1) requires much more than this.

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[799] Counter-Memorial of the Russian Federation, ¶ 526.

[800] For example, in *Arctic Sunrise*, the Netherlands was seeking a declaration that Russia had violated the International Covenant on Civil and Political Rights in its arrest and detention of the Greenpeace activists aboard the MV Arctic Sunrise (*The Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Merits Award of 14 August 2015, p. 14, ¶ 37(1)(c) (**UAL-4**)). Ukraine seeks only a declaration that Russia has violated Article 303(1) of the Convention, not one that Russia has violated legal obligations arising under the UCH Convention.

[801] Counter-Memorial of the Russian Federation, ¶ 519 (Russia claims that the "due diligence" obligation, which is an obligation of conduct, would only require the "'introduction of policies,

359. An interpretation of Article 303(1) that allows it to be satisfied by actions on paper alone is not consistent with the ordinary meaning of that provision's requirement that States Parties protect UCH, namely to "defend or guard from danger or injury; . . . to preserve from attack, persecution, harassment, etc.; to keep safe, take care of; . . . to shield from attack or damage."[802] Nor is such an interpretation compatible with the object and purpose of the Convention, in particular the desire to establish "a legal order for the seas and oceans."[803] Such a legal order could not exist if the Convention's requirements could be satisfied by little more than hortatory measures on the part of the States Parties.

360. Consistent with this, UNCLOS tribunals have interpreted due diligence as requiring more than the writing of rules. In *South China Sea,* quoted by Ukraine in the Revised Memorial, the tribunal defined the concept of "due diligence" as requiring "not only adopting appropriate rules and measures, but also a 'certain level of vigilance in their enforcement and the exercise of administrative control.'"[804] A failure by a State to monitor compliance or to enforce the law was held by the same tribunal to constitute a failure of due diligence.[805]

361. The same active conception of due diligence is reflected in scholarly literature. This duty has, for example, been described as "an international minimum standard providing a test whereby a State's conduct is compared to what a 'reasonable' or 'good' government would do in a specific situation. Since the principle is an international minimum standard, its requirements are context-specific, requiring different measures in different circumstances."[806]

362. For these reasons, Russia's heavy focus on the paper requirements — as opposed to the actual implementation — of its laws and regulations is misplaced. As the examples of abuse cited by Ukraine demonstrate, the existence of such written sources of law

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legislation, and administrative controls which are capable of preventing or minimizing the risk' of damage.")

[802] Oxford English Dictionary, "*protect*, v." (online ed.) (2020) (**UAL-158**).

[803] UNCLOS, Preamble.

[804] Revised Memorial of Ukraine, ¶ 260 (quoting *South China Sea*, ¶ 944 (**UAL-11**)); *see also Pulp Mills*, ¶ 197 (**UAL-152**).

[805] *South China Sea*, ¶¶ 745-757, 960-966 (**UAL-11**).

[806] Timo Koivurova & Krittika Singh, *Due Diligence* in Max Planck Encyclopaedias of International Law (August 2022), ¶ 5 (**UAL-206**).

are no guarantee of genuine compliance with the Article 303(1) duty to protect UCH in the absence of active and diligent enforcement.

C. Russia Distorts the Content of the Relevant International Standards of Conduct

363. Russia next seeks to demonstrate that its conduct satisfies international standards in any event. It does so by purporting to contrast Ukraine's description of the relevant standards in the Revised Memorial with its own interpretation of what those standards require. Russia's argument is, however, doubly flawed. First, Russia exaggerates the differences between the Parties concerning the relevant UCH best practices by again mischaracterizing Ukraine's position. Second, Russia reads the relevant international standards as toothless, although even then concedes that those standards require underwater archaeological activities to be under the control of qualified archaeologists and that *in situ* preservation is the preferred preservation option.[807]

364. As to the use of divers, Russia asserts that Ukraine's "critique implies that divers are not allowed to participate in archaeological expeditions."[808] In fact, as Russia's own references to the Revised Memorial demonstrate, Ukraine's complaint was that "amateur dive club members" were being given "unfettered access to culturally significant sites" and were interfering with artifacts outside the control of qualified underwater archaeologists.[809] This is consistent with the passage from the Explanatory Report to the Valletta Convention on which Russia relies, which makes clear that, in the context of excavations, "members of the general public . . . must be under the control of a qualified person who is responsible for the excavation."[810]

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[807] For the avoidance of doubt and contrary to Russia's allegation in its Counter-Memorial at paragraph 576 that "Ukraine's whole case rests" on two standards, Ukraine's claim does not depend solely on Russia's disregard of international good practice concerning the role of unqualified divers and *in situ* preservation. Ukraine's Revised Memorial also highlighted how Russia breached its duty to protect UCH by failing to conduct the required surveys and non-intrusive analysis prior to removing UCH from the seabed, thereby ignoring UCH Rule 4. *See* Revised Memorial of Ukraine, ¶¶ 270 n.571, 272 & n.580, 273-274). Similarly, Ukraine showed that Russia used inappropriate methods when removing UCH from the seabed and subsequently failed to take necessary measures for the preservation of extracted items, therefore ignoring UCH Rule 24. *See id.* ¶¶ 270 n.571, 271 & n.574.

[808] Counter-Memorial of the Russian Federation, ¶ 531.

[809] *Id.* ¶ 531 & n.855.

[810] Council of Europe, Explanatory Report to the European Convention on the Protection of the Archaeological Heritage (Revised), ETS No. 143 (16 January 1992), p. 5 (describing requirements in relation to Article 3, paragraph ii of the Valletta Convention) (**RUL-123**).

365. In an attempt to legitimize the activities of the Rostov Dive Club, Russia paints a distorted picture of the extent to which diver involvement is welcomed in underwater archaeology. Under the UCH Rules, divers can observe[811] but as soon as activities directed at UCH are involved, such activities must be undertaken under the direction and control of a qualified underwater archeologist.[812] Russia refers to the Explanatory Report of the Valletta Convention to inflate its claim about the role of the general public and non-professional divers.[813] However, the Explanatory Report limits the role of non-professionals to one of "assistance," to take place "under the control of a qualified person who is responsible for the excavation."[814] Similarly, Russia's interpretation of Rule 5 of the UNESCO Code of Ethics for Diving on Submerged Archaeological Sites is misleading.[815] The Rule states that "[o]nly archeologists may remove objects."[816] The explanatory note does not allow divers to remove such objects but reiterates the requirement that archeological excavations be authorized and under the supervision of a professional archeologist. This is confirmed by the UNESCO Website to which Russia refers.[817]

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[811] UCH Article 2(10) provides "[r]esponsible *non-intrusive* access *to observe or document in situ* underwater cultural heritage shall be encouraged to create public awareness, appreciation, and protection of the heritage except where such access is incompatible with its protection and management." *See* Convention on the Protection of the Underwater Cultural Heritage, 2562 U.N.T.S. 158 (2 November 2001) (emphasis added) (**UA-120**).

[812] UCH Rule 22 notes that activities directed at UCH "*shall only* be undertaken *under the direction and control of*, and *in the regular presence* of, a *qualified underwater archaeologist* with scientific competence appropriate to the project." *See id.* Article 23 adds that "[a]ll persons on the project team shall be qualified and have demonstrated competence appropriate to their roles in the project." *Id.*

[813] Counter-Memorial of the Russian Federation, ¶¶ 534-535.

[814] Council of Europe, Explanatory Report to the European Convention on the Protection of the Archaeological Heritage (Revised), ETS No. 143 (16 January 1992), p. 5 (**RUL-123**). *See* European Convention on the Protection of Archaeological Heritage (Revised) (1992), Art. 3.ii ("To preserve the archaeological heritage and guarantee the scientific significance of archaeological research work, each Party undertakes . . . to ensure that *excavations* and other potentially destructive techniques *are carried out only by qualified, specially authorised person*") (emphasis added) (**UA-121**).

[815] Counter-Memorial of the Russian Federation, ¶ 537 n.863.

[816] UNESCO, UNESCO Code of Ethics for Diving on Submerged Archaeological Sites (2011), Rule 5 (**RUL-125**).

[817] UNESCO's website confirms that non-qualified archaeologist divers should only observe and not interfere with UCH. *See* UNESCO website, *UNESCO Presents a Collection of Underwater Heritage & Diving Cards to Raise Awareness on the Protection of the Underwater Cultural Heritage* (18 February 2015) ("Leisure, non-professional and professional divers interested in submerged archaeological site can become the guardians of certain sites and be a valuable assistance to national authorities. . . . If you think you may have discovered a new site or artefact, take pictures, document its location, make notes and alert the responsible authorities.") (**RU-512**).

366. As to *in situ* preservation, Russia again mischaracterizes Ukraine's position as being that *in situ* preservation is always the only option.[818] In fact, the Revised Memorial states that the UCH Rules require that "*in situ* preservation be considered the first option,"[819] and that "UCH be preserved *in situ* to the extent possible."[820]

367. Russia tries to undermine this strong preference in the prevailing international standards, but is not convincing. For instance, Russia refers to a commentary that points out that *in situ* preservation is "not the only right way forward" or "an overriding objective" of UCH protection.[821] However, Russia fails to note that the author of the commentary also emphasizes that "excavation is destructive, therefore clear research objectives are essential,"[822] that excavation and preservation *ex situ* need to be "backed up with strong arguments and a detailed description of planned execution"[823] and that, to assess whether there are "good grounds for rejecting [*in situ* preservation]," many aspects must be considered.[824]

368. Similarly, Russia refers to specific prior examples where the decision was taken to remove UCH from the seabed during an infrastructure project.[825] However, the contrast between those examples and the facts at issue in this case only serves to confirm the

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[818] Counter-Memorial of the Russian Federation, ¶¶ 540–546.

[819] Revised Memorial of Ukraine, ¶ 267.

[820] *Id.* ¶ 270.

[821] Counter-Memorial of the Russian Federation, ¶ 541 (citing Martijn Manders, *In Situ Preservation: 'the preferred option'*, Museum International, Vol. 60(4) (December 2008) (internal citation omitted) (**RUL-126**)); P. J. O'Keefe, *Underwater Cultural Heritage* in F. Francioni, A. F. Vrdoljak (eds), The Oxford Handbook of International Cultural Heritage Law (2020), p. 302 (**RUL-127**).

[822] Martijn Manders, *In Situ Preservation: "The Preferred Option*," Museum International, Vol. 60(4) (December 2008), p. 33 (**RUL-126**).

[823] *Id.* p. 32.

[824] Patrick. J. O'Keefe, *Underwater Cultural Heritage*, in F. Francioni et al (eds.), The Oxford Handbook of International Cultural Heritage Law (Oxford, 2020), p. 302 ("It is important to recognize that this is the first option. Preservation *in situ* is not an overriding objective. It must be considered before anything else is done but there may be good grounds for rejecting it. The nature of the heritage must be considered; for example, is it made of wood or metal. What is the site like; is it subject to change such as currents shifting sand? Can the site be monitored — not only for natural alterations but for human interference? Is it likely to attract attention from such people as treasure seekers? It must be recognized that 'treasure' encompasses not only gold, silver, and precious gems but also ceramics and other objects now valuable because of age and rarity such as cannons.") (**RUL-127**).

[825] Counter-Memorial of the Russian Federation, ¶ 544.

extent to which Russia disregarded its UCH obligations in relation to the Kerch Strait Construction Projects.[826] For instance, Russia relies on the fact that UCH objects were removed to accommodate the Nord Stream pipeline to build its narrative that *ex situ* preservation can be justified to make way for development projects. However, Russia fails to mention that, in the Nord Stream project, the number of UCH objects removed remained very low compared to those preserved *in situ*.[827]

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369. In sum, Russia's attempt to undermine the legal basis for Ukraine's UCH claim is built entirely on mischaracterizations of Ukraine's position and a self-serving attempt to neuter Article 303(1) by depriving it of any content independent of the legislative and regulatory choices made by the various States Parties. Independent of its treatment of the specific factual issues underpinning this claim, it is important that the Tribunal address and dismiss these Russian arguments, thereby reaffirming that the Convention's UCH provisions are substantive in nature and not just hollow words.

II. Russia Fails to Credibly Rebut the Four Examples of Interference with Underwater Cultural Heritage in Violation of Article 303(1) Cited by Ukraine

370. Russia devotes the remainder of its Counter-Memorial chapter on UCH to a factual defense of its conduct in relation to the specific incidents described in the Revised Memorial. In particular, Russia annexes to its Counter-Memorial a witness statement by the

[826] At paragraph 544 of its Counter-Memorial, Russia refers to the Nord Stream project as a "notable example of a responsible approach to UCH within an infrastructure project." The care taken to protect UCH in that project, however, stands in sharp contrast to the sloppy practices employed in connection with the Kerch Strait Construction Projects. For example, Russia acknowledges that, in the case of Nord Stream, "the pipeline was rerouted" in order to preserve UCH. *See* Counter-Memorial of the Russian Federation, ¶ 544. Russia also puts on record the heritage impact assessment that was conducted for the Nord Stream Project which shows that comprehensive studies were conducted for several years and consultation with experts occurred before any decision was made to extract UCH. *See* Nord Stream, Nord Stream Espoo Report: Key Issue Paper. Maritime Cultural Heritage (February 2009) (**RU-518**). A comparable assessment in connection with the Kerch Strait Construction Projects is notably absent from Russia's evidence in this case.

[827] *See* Nord Stream, Fact Sheet –Underwater Cultural Heritage in the Baltic Sea (November 2013), p. 2 ("In the Russian waters, [out of] a total of 27 wrecks or parts of wrecks [that] have been located," only "two admiralty *anchors* dating back to the 18th to 19th centuries were salvaged" while "[i]n the German waters, the pipeline route passes through [a bay] . . . where 20 ship were sunk during the Great Nordic War (1700–17210)" and only "[o]ne of the smaller wrecks was removed") (**RU-519**).

purported leader of the expedition to the sunken Byzantine vessel[828] and three letters from various institutions that claim to have been involved in the other three incidents.[829]

371. In deciding how much weight to give this evidence, the Tribunal can look to relevant guidance in the case law of the ICJ and ITLOS. Specifically, the ICJ has observed that affidavits sworn later "for purposes of litigation as to earlier facts will carry less weight than affidavits sworn at the time when the relevant facts occurred."[830] ITLOS has looked to similar considerations when deciding how much weight to accord witness testimony. In the *M/V "Norstar"* case, for example, ITLOS observed that:

> the Tribunal will assess relevance and probative value of [witness and expert] testimonies by taking into account, inter alia: whether those testimonies concern the existence of facts or represent only personal opinions; whether they are based on first-hand knowledge; whether they are duly tested through cross-examination; whether they are corroborated by other evidence; and whether a witness or expert may have an interest in the outcome of the proceedings.[831]

372. As explained in more detail below, Russia's evidence relating to the four incidents fares very poorly under these tests. The affidavit and the letters put into evidence by Russia all represent after-the-fact statements made expressly for the purposes of litigation. The information in them is not corroborated by contemporaneous documents, and some of it is actively contradicted by the public record at the time the incidents occurred. In short, Russia's post-hoc attempt to claim compliance with Article 303(1) in relation to these four incidents falls far short of the standard of evidence required by international adjudicatory bodies and should be given no weight by the Tribunal.

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[828] *See* Witness Statement of [redacted] Statement") put forward in support of Russia's interference with the Byzantine-era ship.

[829] *See* Letter from the Institute of Archaeology of the Russian Academy of Sciences to the Ministry of Foreign Affairs of the Russian Federation, No. 14102/2115 OP-1762 (28 June 2022) (in support of Russia's interference with the terracotta sculpture head fragment) (**RU-531**); Letter from Battery 29 BIS to the Ministry of Foreign Affairs of the Russian Federation, No. 0149 (15 June 2022) (in support of Russia's interference with the Kitty Hawk and the Airacobra) (**RU-546**); Letter from the Ministry of Defence of the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation, No. 174/1790 (24 November 2021) (in support of Russia's interference with the Airacobra) (**RU-552**).

[830] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, ICJ Judgment of 8 October 2007, p. 76, ¶ 244 (**RUL-30**).

[831] *M/V "Norstar" Case (Panama v. Italy)*, ITLOS Case No. 25, Judgment of 10 April 2019, ¶ 99 (**UAL-138**).

A. Russia's Interference with the Byzantine Ship

373. In the Revised Memorial, Ukraine showed that Russia breached its duty to protect UCH by allowing divers from the Rostov diving club with no qualifications in underwater archaeology to lead an expedition to a newly discovered Byzantine shipwreck. Public sources demonstrated that UCH was removed from the seabed in the course of this expedition, and handled in an apparently unprofessional manner.[832] Specifically, Ukraine provided contemporaneous evidence from publicly available sources demonstrating the violations, including blog articles found on the Rostov Dive Club website and contemporaneous news articles reporting on the Rostov Dive Club's interference with UCH objects.[833]

374. In response to Ukraine's showing, Russia offers only an after-the-fact witness statement by [redacted].[834] [redacted] claims responsibility for supervising the expedition and taking "all decisions," including in relation to "assistance" received from the Rostov Dive Club.[835] [redacted] purports to explain away each of the issues identified by Ukraine, insisting that the expedition was in all regards managed consistent with the highest international standards.

375. However, the [redacted] Statement suffers from numerous evidentiary weaknesses that render it inherently suspect. First, the [redacted] Statement is not a contemporaneous account of the events that it describes but rather one written in full knowledge of the criticisms that have been levelled at the expedition by Ukraine in these proceedings. Nor is [redacted] testimony corroborated by reference to contemporaneous documents. For example, while the Statement asserts that the expedition was fully compliant with the Russian regulatory framework for underwater archaeology, none of the documents that would have been generated by that compliance — such as the permit for the expedition or the after-action scientific report required under Russian law —

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[832] Revised Memorial of Ukraine, ¶¶ 272–275.

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

[834] [redacted] Statement, ¶ 14.

[835] *Id.* ¶¶ 14, 17.

have been put into evidence by the Russian Federation.[836] Russia's lack of contemporaneous documentary evidence is telling in light of its domestic UCH protection legal framework, which allegedly heavily relies on official authorization and monitoring — yet none is submitted.[837]

376. [redacted] testimony is also suspicious because it is contradicted by contemporaneous evidence that indicates that Mr. Roman Dunaev, the head of Rostov Dive Club, a diver and not an archeologist,[838] was the one who supervised the expedition. Russian press reports from May 2015 explain that Mr. Dunaev was the one who "organised the search," who contacted the Russian Geographical Society and the Ministry of Defense to ask "for help to organize a joint expedition" and ultimately led the underwater part of the expedition.[839] [redacted] is only mentioned as offering scientific support[840] or as "an expedition participant,"[841] not as the expedition supervisor. Similarly, the Rostov Dive Club confirmed in August 2015 that "[t]he uniqueness of the operation lies in the fact that for the first time underwater archaeological work is carried out directly by divers,"[842] a statement that is obviously at odds with the requirement in the UCH Rules that divers may only assist qualified underwater archaeologists.

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[836] [redacted] asserts that he was in charge but there is no evidence of: (i) his appointment, (ii) the scope of his expedition, (iii) the permit he was allegedly given by the State for his expedition, (iv) the request by the competent authorities that the permit holder shall transfer the artifact to the State division of the Museum Fund, or (v) any monitoring conducted by the competent authorities of the archeological works and [redacted] compliance with his legal obligations.

[837] Counter-Memorial of the Russian Federation, ¶¶ 551–561 describes Russia's legal framework and refers, *inter alia*, to the fact that (i) all activities involving UCH are subject to advance authorization by RAS, (ii) the permit holder is required to transfer the artifact to the state division of the Museum Fund, and (iii) competent authorities conduct monitoring of the archeological works and compliance with legal obligations.

[838] Rostov Dive, *About Us* (1 September 2011) (where Roman Dunaev is described as a diver by reference to his diving qualifications) (**UA-845**).

[839] Evgeniya Artemova, *In the Depths of Centuries*, Interfax.ru (27 May 2015) (**UA-846**); *see also Rostov Divers Found A Sunken Byzantine Ship in the Black Sea*, Donday.Ru (29 May 2015) (**UA-847**).

[840] Rostov Dive, We Are Opening A New Project "Russian Underwater Research Expedition" (27 May 2015) (**UA-848**).

[841] Evgeniya Artemova, *In the Depths of Centuries*, Interfax.ru (27 May 2015) (**UA-846**).

[842] Rostov Dive, *Byzantine Ship Reveals its Secrets* (13 August 2015) (**UA-849**).

B. Russia's Interference with the Terracotta Sculpture Head Fragment

377. Another example of removal of UCH from the seabed around Crimea cited in the Revised Memorial was the extraction of an ancient terracotta sculpture head during the construction of the Kerch Strait Bridge.[843] Again, the evidence put into the record by Russia with its Counter-Memorial in relation to this incident should be given no weight by the Tribunal.

378. In contrast to the Byzantine shipwreck discussed above, with respect to which Russia has at least offered a witness who may be called for cross-examination, Russia's response concerning the terracotta sculpture is contained in a letter from the Institute of Archaeology of the Russian Academy of Sciences. Not only does this mean that the author of the letter will not be subject to cross-examination, the name of the author is redacted from the letter, further limiting Ukraine's ability to test the reliability of the evidence.[844] As with the [redacted] Statement, the letter was written after the fact and is not corroborated by reference to contemporaneous documents.

379. Moreover, even if the content of the letter is credited, it raises more questions than it answers. The letter indicates that the terracotta sculpture head was just one of a very large number of UCH artifacts that were lifted from an area of seabed close to Kerch during the construction of the Bridge.[845] Other sources indicate that close to 70,000 items of UCH were contained within this horde.[846] The letter asserts without explanation that there was no option but to remove all this UCH from the seabed because the area of interest lay on the path of the Bridge and that path could not be altered.[847] But, as explained earlier, because *in*

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[843] Revised Memorial of Ukraine, ¶ 277; *see also* 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**).

[844] *See M/V "Norstar" Case (Panama v. Italy)*, ITLOS Case No. 25, Judgment of 10 April 2019, ¶ 99 (**UAL-138**).

[845] Letter from the Institute of Archaeology of the Russian Academy of Sciences to the Ministry of Foreign Affairs of the Russian Federation, No. 14102/2115 OP-1762 (28 June 2022), p. 3 (**RU-531**).

[846] N.V. Zavoykina, S.V. Olkhovsky, *Commercial Record from the Underwater Excavations At Cape Ak-Burun in Eastern Crimea*, Proceedings of the Department of Classical Archeology of the IA RAS, Vol. 1 (December 2019), p. 105 (**UA-850**).

[847] Letter from the Institute of Archaeology of the Russian Academy of Sciences to the Ministry of Foreign Affairs of the Russian Federation, No. 14102/2115 OP-1762 (28 June 2022), p. 3 (noting that "it was technically impossible to change the configuration of the projected bridge crossing to bypass the discovered archaeological heritage site 'Ak-Burun Bay' at a safe distance") (**RU-531**).

situ preservation is the preferred option, any decision to remove UCH requires a high level of justification, which one would normally expect to be documented. And yet Russia has failed to produce any analysis weighing the preservation options for the terracotta sculpture head and the accompanying thousands of other items of UCH, or explaining why the construction project could not be adapted to leave the UCH undisturbed (as notably was done in the case of the Nord Stream project which Russia now holds up as a model).[848]

C. Russia's Interference with the Kitty Hawk and Airacobra Aircraft

380. The Revised Memorial also described two instances in which Russia had removed military aircraft from the World War II era from the seabed, namely a Kitty Hawk lifted from the construction zone for the Kerch Strait Bridge[849] and an Airacobra extracted from the Black Sea close to Crimea.[850] In both instances, the extraction was effected in a reckless manner and at least one of the aircraft – the Kitty Hawk – was damaged in the process.[851]

381. In response, Russia has submitted with its Counter-Memorial a letter from the Regional Public Organization "Historical and Cultural Leisure Centre 'Battery 29 BIS'" addressing both incidents, as well as a letter from the Ministry of Defense of the Russian Federation addressing the Airacobra incident only. Again, these letters lack evidentiary weight but, if taken at face value, raise more questions than they answer.

382. The letters are of no evidentiary value for many of the same reasons highlighted previously. As with the [redacted] Statement and the letter from the Institute of Archaeology, these additional letters are after-the-fact statements that are not corroborated with reference to contemporaneous documents. Neither of the authors of the letters has

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[848] *See supra* Chapter Five, Section I.C.

[849] *See* Revised Memorial of Ukraine, ¶ 271; *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), p. 2 ("Even scuba divers from the bridge construction site were involved.") (**UA-236**).

[850] *See* Revised Memorial of Ukraine, ¶ 278; *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**).

[851] *See* Revised Memorial of Ukraine, ¶ 271; *Drone Captures Lifting of U.S.-Made Warplane that Sank Near Russia In WW2*, Russia Today (6 May 2017) (**UA-237**).

been offered for cross-examination by the Russian Federation and, again, the signature to the letter from the Ministry of Defense has been redacted.

383. The letters are, however, striking for what they say about Russia's approach to underwater historical objects from World War II. Russia's Counter-Memorial acknowledges that Russian law provides a distinct regime for the protection of World War II underwater objects,[852] which are not classified as UCH in line with the UNESCO Convention definition limiting UCH to items that have been "partially or totally under water, periodically or continuously, for at least 100 years."[853] The letters from Battery 29 BIS and the Ministry of Defense spell out the consequences of this distinction. According to Battery 29 BIS, because the aircraft could not be considered archaeological objects under Russian law, the expeditions to them were not considered archaeological either.[854] The letter from the Ministry of Defense also expressly argues that the Airacobra is the exclusive property of the Russian Federation, notwithstanding that it served in the armed forces of the Soviet Union, of which Ukraine was a part. As a consequence, "the Russian Federation may, at its sole discretion, dispose of the Soviet military aircraft lifted from the Black Sea bottom and transfer it to the Russian museum collection."[855] Moreover, "[t]here is no specific documentation establishing a procedure for removing this aircraft from the water."[856] The letter concludes with the remarkable observation that "[o]ver the past period, more than 20,000 objects of military-technical history have been transferred to the museums of the Russian Ministry of Defence and the museums of the Republic of Crimea."[857]

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[852] Counter-Memorial of the Russian Federation, ¶ 549.

[853] Convention on the Protection of the Underwater Cultural Heritage, 2562 U.N.T.S. 158 (2 November 2001), Art. 1(1)(a) (**UA-120**).

[854] Letter from Battery 29 BIS to the Ministry of Foreign Affairs of the Russian Federation, No. 0149 (15 June 2022) p. 2 ("Given that the Kitty Hawk is an object of the Great Patriotic War, and is not an archaeological object under the Russian legislation, the expedition was not an archaeological one) and p. 5 ("The Airacobra fighter is an object of the Great Patriotic War, as well, and, hence, that was a military search expedition rather than an archaeological one under the legislation on cultural heritage protection.") (**RU-546**).

[855] Letter from the Ministry of Defence of the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation, No. 174/1790 (24 November 2021), p. 2, ¶ 2 (**RU-552**).

[856] *Id.* p. 2, ¶ 4.

[857] Letter from the Ministry of Defence of the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation, No. 174/1790 (24 November 2021), p. 3 (**RU-552**).

384. It is clear from this that the Russian Federation is engaged in a large-scale campaign to recover World War II objects from the seabed around Crimea for the sole benefit of the Russian Federation and without regard to generally accepted international standards for underwater archaeology reflected in the UCH Rules. This campaign is part of a broader effort to appropriate and "russify" Crimean history, and to erase the contributions and cultures of other ethnic groups on the peninsula. In view of the Counter-Memorial's insistence that, as a non-signatory of the UNESCO Convention, Russia is not bound by the UCH Rules, it is ironic that its Ministry of Defense relies on the UNESCO Convention to explain why World War II objects are not subject to archaeological protections.[858] Yet, Russia is a State Party to the United Nations Convention on the Law of the Sea, Article 303(1) of which imposes on it a duty to protect "objects of an archaeological and historical nature found at sea," without excluding sites that are less than 100-years old.[859] The Ministry of Defense's assertion that it can effectively do as it chooses with World War II objects found in the waters around Crimea is as good as an admission that Russia is involved in ongoing violations of Article 303(1).

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385. The Tribunal should accordingly find that Russia has failed to comply with its duty to protect UCH in accordance with Article 303(1), interpreted in light of the relevant international standards. Russia's attempt to demonstrate compliance in relation to the four

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[858] *Id.* p. 2., ¶ 2 ("Under the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001, cultural or archaeological heritage are the sites that are at least 100 years old."). For the avoidance of doubt, and as previously explained in Chapter Five, Section I.A above, Ukraine does not ask the Tribunal to rule on legal rights or obligations arising under the UNESCO Convention. Instead, Ukraine relies on commonly accepted rules of interpretation according to which the content of the Article 303(1) duty to protect UCH should be interpreted in light of contemporary best practice, which is widely considered (including by the Russian Federation) to be reflected in Annex 1 to the UNESCO Convention. In contrast, Russia's position that World War II artifacts are outside the scope of the Article 303(1) duty to protect requires the narrower definition of UCH in the UNESCO Convention to be read retroactively into UNCLOS, notwithstanding that Russia has not even acceded to that later instrument.

[859] *See* Tullio Scovazzi, *Article 303*, in Alexander Proelss (ed.), United Nations Convention on the Law of the Sea - A Commentary (2017), pp. 1952–1953, ¶ 8 ("Art. 303 does not provide any definition of 'objects of an archaeological and historical nature'. The expression is, however, sufficiently broad to also cover artifacts of relatively recent origin, such as ships and aircraft sunk during the events of World War II. While these events do not enter into the sphere of archaeology, they are of an historical nature."), ¶ 9 ("Due to the distinct character of two treaties (the UNCLOS and the CPUCH [UNESCO Convention on the Protection of the Underwater Cultural Heritage]) that, for the reasons explained below, have very little in common, it can be concluded that the more precise definition in CPUCH cannot be used as a means of interpreting Art. 303") (**UAL-204**).

examples of interference with UCH in violation of Article 303(1) lacks credibility and should be given no weight by the Tribunal.

Chapter Six: Russia Has Continued to Aggravate the Dispute Between the Parties

386. After Ukraine filed its Notification in this case, Russia persisted in and completed its construction of the Bridge and other projects, continued to interfere with international shipping, and continued to disturb underwater cultural heritage. In doing so, Russia has substantially aggravated the dispute before this Tribunal, violating its obligations under Articles 279 and 300 of the Convention to settle disputes peacefully, in accordance with Article 2(3) of the Charter of the United Nations ("U.N. Charter").

387. In its Counter-Memorial, Russia seeks to escape liability for its violations of Articles 279 and 300 by arguing, first, that the Tribunal lacks jurisdiction over Ukraine's underlying claims, upon which the aggravation claims are dependent. Russia's second argument goes further, asserting that "there is nothing in the plain text of Article 279 of the Convention to suggest that it encompasses the alleged obligation to refrain from aggravation"[860] and that Article 300 is "hortatory" and of a "general nature."[861] Third, in the alternative, Russia seeks to explain away its aggravating acts as the "legitimate exercise of sovereign powers over its territory."[862] Ukraine responds to these three arguments in Sections I, II, and III of this Chapter, respectively. In sum, Russia is wrong on the law and the facts. The Tribunal can and should hold Russia responsible for aggravating this dispute in violation of Articles 279 and 300 of the Convention, as well as international law.

388. While Ukraine's aggravation claims before this Tribunal exclude military actions undertaken by Russia as part of its full-scale invasion of Ukraine, Russia's recent actions in the Black Sea Basin nevertheless underscore Russia's disrespect for UNCLOS and indifference towards the consequences of its actions. One need look no further than Russia's actions in the Black Sea, which have created a global food crisis.[863]

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[860] Counter-Memorial of the Russian Federation, ¶ 604.

[861] *Id.* ¶ 605.

[862] *Id.* ¶ 607.

[863] *See, e.g.*, Sam Mednick, *Concerns Rise as Russia Resumes Grain Blockade of Ukraine,* Associated Press (30 October 2022) ("Russia resumed its blockade of Ukrainian ports on Sunday, cutting off urgently needed grain exports to hungry parts of the world") (**UA-800**).

I. The Tribunal Has Jurisdiction to Interpret and Apply Articles 279 and 300 of the Convention

389. Any dispute between the Parties over the interpretation or application of Articles 279 and 300 of the Convention, including on the existence or scope of a duty not to aggravate disputes, falls within the jurisdiction of this Tribunal. Under Article 288 of UNCLOS, the Tribunal has "jurisdiction over *any* dispute concerning the interpretation or application of this Convention" (subject to the provisions of Article 297 and declarations made in accordance with Article 298 of the Convention).[864]

390. In this case, the Parties hold opposite views concerning the scope and content of Articles 279 and 300, and how those articles apply to the facts. Ukraine submits, consistent with the views already adopted by the *South China Sea* tribunal, that these provisions impose a duty not to aggravate a dispute while it is subject to compulsory dispute settlement.[865] Ukraine further submits that Russia has violated its duty not to aggravate through the actions set out in Chapter Seven of the Revised Memorial and Section III below. Russia disagrees with these positions, arguing among other things that Articles 279 and 300 do not encompass an obligation to refrain from aggravating a dispute and that, in any case, its acts do not amount to aggravation.[866] This "conflict of legal views" concerning the interpretation of Articles 279 and 300 and their application to the facts (discussed in Section II below) is plainly within the Tribunal's Article 288 jurisdiction.[867] Russia's argument that "neither [Article 279 nor Article 300] provides sufficient basis to establish jurisdiction"[868] under UNCLOS misunderstands the jurisdiction conferred by Article 288 and should therefore be rejected.

II. UNCLOS Prohibits the Aggravation of Disputes

391. Russia's interpretation of the substantive content of Articles 279 and 300 is also incorrect. Article 279 of the Convention requires States Parties to "settle any dispute between them concerning the interpretation or application of this Convention by peaceful

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[864] UNCLOS, Arts. 288 (emphasis added), 297, 298.

[865] *See South China Sea*, ¶ 1171 (**UAL-11**).

[866] Counter-Memorial of the Russian Federation, ¶¶ 604-605.

[867] *See Mavrommatis Palestine Concessions,* PCIJ Judgment of 30 August 1924 (defining a dispute as "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons.") (**UAL-83**).

[868] Counter-Memorial of the Russian Federation, ¶ 599.

means in accordance with Article 2, paragraph 3, of the Charter of the United Nations."[869] U.N. Charter Article 2(3) in turn provides that "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[870] A crucial and widely recognized corollary of the duty to settle disputes peacefully is the duty not to aggravate or extend them.[871] To that effect, the Manila Declaration on the Peaceful Settlement of Disputes confirms that U.N. Charter Article 2(3) encompasses a duty to "refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security and make more difficult or impede the peaceful settlement of the dispute."[872] Article 279's express reference to the settlement of disputes "by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations," thus imposes a duty not to aggravate a dispute while it is subject to compulsory dispute settlement.[873]

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[869] UNCLOS, Art. 279; Counter-Memorial of the Russian Federation, ¶ 603.

[870] U.N. Charter, Art. 2(3) (**UAL-1**).

[871] *See South China Sea*, ¶ 1169 ("This duty [to refrain from aggravating or extending the dispute] exists independently of any order from a court or tribunal to refrain from aggravating or extending the dispute and stems from the purpose of dispute settlement and the status of the States in question as parties in such a proceeding.") (**UAL-11**).

[872] U.N. General Assembly Resolution 37/10, U.N. Doc. A/37/590, Manila Declaration on the Peaceful Settlement of International Disputes (15 November 1982), Annex ¶ 8 ("States parties to an international dispute, as well as other States *shall refrain from any action which may aggravate the situation* so as to endanger the maintenance of international peace and security and *make more difficult or impede the peaceful settlement of the dispute*" (emphasis added) (**UA-851**). *See also* International Court of Justice President H.E. Judge Abdulqawi A. Yusuf, *The Topicality of the Fundamental Principles Concerning the Peaceful Settlement of International Disputes, as set out in the Manila Declaration of 1982*, speech before the Hague Academy of International Law and the Permanent Missions of Andorra, Brazil, Chile, Gabon, Germany and Ukraine to the United Nations (18 October 2019) ¶ 2 ("the [Manila] Declaration was the Assembly's latest effort to elaborate on Article 2, paragraph 3, of the Charter") (**UA-852**); U.N. General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, U.N. Doc. A/RES/25/2625 (24 October 1970) [hereinafter "Friendly Relations Declaration"] (**UA-853**).

[873] Russia is also mistaken when it claims that "[n]othing in the *travaux préparatoires* to the Convention indicates any reference to the alleged obligation of non-aggravation." *See* Counter-Memorial of the Russian Federation, ¶ 599. The working paper proposing the initial version of Article 279 relied on "[r]elevant provisions on international instruments," which included a quotation to the Friendly Relations Declaration, stating that "States parties to an international dispute, as well as other States, shall refrain from any action which may aggravate the situation." *See* Third United Nations Conference on the Law of the Sea, Australia, Belgium, Bolivia, Colombia, El Salvador, Luxembourg, Netherlands, Singapore and United States of America: Working Paper on the Settlement of Law of the Sea Disputes, U.N. Doc. A/CONF.62/L.7 (27 August 1974) p. 86 (**UA-854**).

392. Article 300 of UNCLOS, in turn, establishes a duty 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."[874] This is not "hortatory" language, as Russia argues,[875] but instead constitutes a specific articulation of the principle that treaty obligations "must be performed by [parties] in good faith," as prescribed by Article 26 of the Vienna Convention.[876] Aggravating ongoing disputes is not good faith performance of the obligation to resolve disputes peacefully.

393. Interpreting treaty language nearly identical to UNCLOS Article 300,[877] the ICJ has held that States are under an "obligation to settle their disputes by peaceful means . . . and to do so in good faith."[878] Just as the ICJ found this language to impose a specific obligation on Members of the United Nations, UNCLOS Article 300 likewise imposes such an obligation on States Parties to UNCLOS. The *South China Sea* tribunal spoke to this precise issue when it explained:

> Where a treaty provides for the compulsory settlement of disputes, the good faith performance of the treaty requires the cooperation of the parties with the applicable procedure. . . . *The very purpose of dispute settlement procedures would be frustrated by actions by any party that had the effect of aggravating or extending the dispute, thereby rendering it less amenable to settlement*.[879]

394. 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

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[874] UNCLOS, Art. 300.

[875] Counter-Memorial of the Russian Federation, ¶ 605.

[876] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.") (**UAL-43**).

[877] *Compare* U.N. Charter Art. 2(2) ("All Members . . . shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.") (**UAL-1**), *with* UNCLOS, Art. 300 ("States Parties shall fulfil in good faith the obligations assumed under this Convention . . . .").

[878] *Aerial Incident of 10 August 1999 (Pakistan v. India)*, ICJ Judgment of 21 June 2000, ¶¶ 53-55 (**RUL-64**); *see also Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (16 September 2015) ¶¶ 589-593 ("The existence of such a duty [to arbitrate in good faith] is undeniable" and includes "the duty to refrain from harming the procedural integrity of the arbitration or aggravating the dispute.") (**UAL-207**).

[879] *South China Sea*, ¶ 1171 (emphasis added) (**UAL-11**).

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."[880]

395. Russia concedes that the *South China Sea* tribunal "consider[ed] that the principle of non-aggravation is contained in [Articles 279 and 300 of UNCLOS]," but nonetheless dismisses that unanimous decision as "isolated," "obscure," and "not clearly explained."[881] In support, Russia cites a single article to claim that the *South China Sea* tribunal's unanimous holding was "subject to criticism."[882] Russia's claim ignores the vast weight of scholarship in support of the *South China Sea* decision.[883] For example, scholars have observed that the *South China Sea* ruling on aggravation provides "clarity" and is consistent with prior law,[884] and that "[t]here is little doubt that parties are under the obligation not to aggravate a dispute in international law."[885]

396. Russia is also wrong that the *South China Sea* tribunal "relied on the ICJ case law developed within the framework of Article 41 of the ICJ Statute on provisional

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[880] *Id.* ¶ 1176.

[881] Counter-Memorial of the Russian Federation, ¶ 602.

[882] *Id.* (citing Chris Whomersley, *The Award on the Merits in the Case Brought by the Philippines against China Relating to the South China Sea: A Critique*, Chinese J. of Int'l L. (26 September 2017) (**RUL-132**)).

[883] *See, e.g.*, P. Chandrasekhara Rao and Philippe Gautier, The International Tribunal for the Law of the Sea: Law, Practice and Procedure (Elgar International Law and Practice Series 2018), ¶ 1.051 ("The effect of [UNCLOS Part XV, Section 1] is to oblige the States concerned to observe a certain restraint in the sense that they should avoid taking unilateral actions which could aggravate the dispute.") (**UAL-208**); Henrique Marcos & Eduardo Cavalcanti de Mello Filho, *Peaceful Purposes Reservations in the Law of the Sea Convention and the Regulation of Military Exercises or Maneuvers in the Exclusive Economic Zone*, U. Pen. J. of Int'l L., 44(2) (2023), p. 436 n.95 (otherwise legal actions may nevertheless "aggravate an ongoing dispute and, as such, violate Article 2(3) of the UN Charter and Article 279 of LOSC.") (**UAL-209**).

[884] Steven R. Ratner, *The Aggravating Duty of Non-Aggravation*, The European J. of Int'l L., Vol. 31 no.4 (2021), 1317 (stating that the *South China Sea* ruling provides "clarity" and is consistent with prior law, namely, the Permanent Court of International Justice ("PCIJ") ruling in *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*) (**UAL-210**). That case recognized that "the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute." *The Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, PCIJ Order of 5 December 1939, p. 199 [hereinafter "*The Electricity Company of Sofia and Bulgaria*"] (**RUL-130**).

[885] Yoshifumi Tanaka, *Lawfulness of Chinese Activities in the South China Sea*, in The South China Sea Arbitration: Toward an International Legal Order in the Oceans (Oxford, Hart Publishing 2019), p. 158 (favorably discussing the *South China Sea* decision, and stating "[t]here is little doubt that parties are under the obligation not to aggravate a dispute in international law.") (**UAL-211**).

measures"[886] and is therefore not applicable in the UNCLOS context. The *South China Sea* tribunal first considered the "principle universally accepted by international tribunals and likewise laid down in many conventions . . . [which does] not allow any step of any kind to be taken which might aggravate or extend the dispute."[887] The tribunal then canvassed the wide-ranging support for this duty against aggravation in PCIJ and ICJ precedent, treaty practice, U.N. declarations, and the Vienna Convention.[888] With this context established, the *South China Sea* tribunal turned to the text of the Convention, holding that "the same principles find expression in Article 279" and that "actions by either Party to aggravate or extend the dispute would be incompatible with the recognition and performance in good faith of these obligations," as required by Article 300 of the Convention.[889] The *South China Sea* tribunal thus located the non-aggravation duty *within the text of the Convention itself*, while also recognizing this principle as a matter of general international law.

397. Article 293(1) of the Convention, empowering this Tribunal to apply "other rules of international law not incompatible with this Convention,"[890] provides an additional basis to address Russia's aggravation of this dispute. The PCIJ long ago recognized "the principle universally accepted by international tribunals and likewise laid down in many conventions . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute."[891] The duty against aggravation thus constitutes one of the "other rules of international law not incompatible with this Convention" to which the Tribunal may have recourse under Article 293, as the *South China Sea* tribunal found.[892]

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[886] Counter-Memorial of the Russian Federation, ¶ 600.

[887] *South China Sea*, ¶ 1167 (citing *The Electricity Company of Sofia and Bulgaria*, p. 199 (**RUL-130**)) (**UAL-11**).

[888] *Id.* ¶¶ 1167-1171.

[889] *Id.* ¶ 1172.

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

[891] *The Electricity Company of Sofia and Bulgaria*, p. 199 (**RUL-130**).

[892] *South China Sea*, ¶ 1173 (**UAL-11**); Yoshifumi Tanaka, *Lawfulness of Chinese Activities in the South China Sea*, in The South China Sea Arbitration: Toward an International Legal Order in the Oceans (Oxford, Hart Publishing 2019), p. 158 ("[t]here is little doubt that parties are under the obligation not to aggravate a dispute in international law") (**UAL-211**); *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case Nos. ARB/12/14 and ARB/12/40, Procedural Order No. 9 (8 July 2014), ¶ 104 ("the Tribunal wishes to expressly stress the Parties' general duty,

III. Russia Continues to Aggravate This Dispute, Making It More Difficult to Resolve

398. As discussed in Ukraine's Revised Memorial, there was no Kerch Strait Bridge when this case was filed. By continuing to build a low-clearance bridge where previously there was an unobstructed navigable waterway, failing to conduct proper environmental assessment and monitoring of its construction projects, continuing to impede navigation to and from busy Ukrainian ports, and continuing to remove from the sea floor and damage artifacts of cultural value to all humankind, Russia has ratcheted up its violations after the launch of this dispute and made it more challenging for the Tribunal to craft relief that restores the status quote ante.[893] In so doing, Russia has violated its obligations to abstain from any measure which might aggravate or extend this dispute.[894]

399. In particular, since the filing of this arbitration, Russia has unlawfully aggravated and extended the dispute by, among other things:

- continuing and completing construction of a bridge that obstructs important categories of vessels seeking passage through the Kerch Strait;[895]
- constructing a bridge, submarine gas pipeline, and undersea cables across the Kerch Strait in the absence of any apparent environmental assessment or monitoring program, notwithstanding foreseeable and significant impacts on the fragile marine ecosystem of the Black Sea Basin;[896]
- interfering with Ukrainian and third-State 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;[897]

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which arises from the principle of good faith, not to take any action that may aggravate the dispute or affect the integrity of the arbitration") (**UAL-212**); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009), ¶¶ 60, 62 (the right to "the non-aggravation of the dispute" is a "self-standing right[]" that has been "well-established since the case of the *Electricity Company of Sofia and Bulgaria*") (**UAL-213**).

[893] *See* Revised Memorial of Ukraine, ¶ 290.

[894] *See South China Sea*, ¶ 1173 (**UAL-11**).

[895] Revised Memorial of Ukraine, ¶ 286.

[896] *Id.*

[897] *Id.* ¶ 288.

- stopping and inspecting hundreds of vessels heading to Ukrainian ports, and doing so at a disproportionate rate as compared to those headed to Russian ports;[898]

- escalating its assault on free navigation by implementing a six-month closure of parts of the Black Sea from April 2021 through the end of October 2021, including by closing off the southern entrance to the Kerch Strait to foreign military and other government vessels;[899] and

- continuing to disturb and support amateur disturbance of archeological artifacts, risking the permanent destruction of, and injury to, unique artifacts of immense value to all humankind.[900]

400. Russia's actions described above have necessarily prejudiced Ukraine's rights in this case, and aggravated the dispute under UNCLOS, as Ukraine explained in its Revised Memorial.[901]

401. In its Counter-Memorial, Russia characterizes the aggravating acts identified by Ukraine as "Russia's legitimate exercise of sovereign powers over its territory – either in its internal waters or in its territorial sea."[902] Russia adds that "Ukraine's allegations in essence constitute claims of sovereignty over Crimea and, therefore, are not covered by the Convention."[903] This contention is misplaced — as explained in Chapter Two, not one of Ukraine's claims in its Revised Memorial is premised on Ukraine's sovereignty over Crimea.[904] Instead, Ukraine's claims are premised on the fact that the Sea of Azov is not internal waters and the Kerch Strait is an international strait subject to the regime of transit passage; and, even if they were internal waters as Russia claims, Russia must comply with the Convention with regard to both.[905] Russia cannot excuse its aggravating acts as the lawful exercise of sovereignty over these waters.

402. In addition to challenging the Tribunal's jurisdiction over Ukraine's aggravation claims, Russia briefly asserts that some of Ukraine's factual claims of

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[898] *Id.*

[899] *Id.*

[900] *Id.* ¶ 289.

[901] Revised Memorial of Ukraine, Chapter 7.

[902] Counter-Memorial of the Russian Federation, ¶¶ 607; 608-613.

[903] *Id.* ¶ 608.

[904] *See supra* Chapter Two.

[905] *See supra* Chapter Two. *See* Award on Preliminary Objections, ¶ 294 (declining to accept Russia's "rather sweeping premise . . . that the Convention does not regulate a regime of internal waters").

aggravation are unfounded or unsubstantiated. In particular, Russia repeats its claims that the decision to build the low-clearance Kerch Strait Bridge was justified by "economic and humanitarian necessity,"[906] that "the practice of vessels' inspections in the Kerch Strait and the Sea of Azov was legitimate, justified by valid security concerns in the region and serve the security and crime-prevention purposes,"[907] and that "the suspension of innocent passage of foreign military and government vessels" responded to "legitimate security concerns."[908] These claims are duplicative of Russia's defenses to its violations of the navigational provisions of the Convention and have been amply rebutted by Ukraine in Chapter Three of this Reply. Russia also argues that there is insufficient evidence to show lasting harm to the marine ecosystem of the Black Sea basin or interference with the underwater cultural heritage in these waters.[909] This is similarly incorrect, as Ukraine has shown, respectively, in Chapters Four and Five of this Reply.

403. Finally, Russia has further aggravated and extended the dispute before this Tribunal by claiming exclusive sovereignty over the Sea of Azov, whereas it previously claimed sovereignty over those waters jointly with Ukraine.[910] The status of the Sea of Azov is a central issue in dispute between the Parties, and Russia should not attempt to alter the facts during the pendency of the dispute by unilaterally declaring itself exclusive sovereign over the entire Sea of Azov. By taking such unilateral action and then boldly informing the Tribunal that it no longer needs to resolve the dispute Ukraine has brought to it regarding Russia's actions in the Sea of Azov, Russia has taken steps that aggravate and enlarge the dispute between the Parties.

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[906] Counter-Memorial of the Russian Federation, ¶ 609.

[907] *Id.* ¶ 610.

[908] *Id.* ¶ 611.

[909] *Id.* ¶¶ 612-613.

[910] *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 . . . ."); *id.* ¶ 211 ("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.").

Chapter Seven: Ukraine Is Entitled to Relief Under the Convention for Russia's Internationally Wrongful Acts

405. Ukraine established in its Revised Memorial and in the preceding Chapters that Russia has breached its obligations under UNCLOS and that Ukraine is thus entitled to relief for the injuries it has suffered as a result of Russia's internationally wrongful acts.[911] In particular, Ukraine is entitled to a declaration establishing Russia's violations of the Convention. Further, Russia must cease its violations and provide Ukraine with appropriate assurances and guarantees of non-repetition,[912] and Russia must make full reparation so as to "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."[913]

406. In its Counter-Memorial, Russia does not dispute the principle that a party to UNCLOS is entitled to complete relief for the injuries suffered as a result of another State Party's violations of the Convention. Nor does Russia dispute that the Tribunal has the power to award the relief requested by Ukraine. While Russia rejects "all requests for any form of relief, as set out in Ukraine's Revised Memorial,"[914] it fails to overcome Ukraine's showing that it is entitled to relief with respect to the rights of freedom of navigation in the seas, transit passage through international straits, exclusive flag state jurisdiction, the protection of the marine environment, the protection and preservation of underwater cultural heritage, and Russia's acts aggravating this dispute, as further explained below.

I. Ukraine Is Entitled to Relief for Russia's Violations of the Rights to Freedom of Navigation, Transit Passage, and Exclusive Flag State Jurisdiction

407. Ukraine demonstrated in its Revised Memorial and in Chapter Three of this Reply that it is entitled to relief for the injuries it has suffered as a result of the Russian Federation's violations of the rights to freedom of navigation, transit passage, and exclusive

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[911] *See* Revised Memorial of Ukraine, Chapter Eight.

[912] 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 ("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**).

[913] *Factory at Chorzów (Germany vs. Poland)*, PCIJ Judgment of 13 September 1928, p. 47 (**UAL-27**).

[914] Counter-Memorial of the Russian Federation, ¶ 24.

flag state jurisdiction. Specifically, Ukraine has requested declarations establishing Russia's violations of Articles 2, 38, 43, 44, 58, 87, and 92 of the Convention.[915] Ukraine also seeks appropriate assurances that Russia will immediately cease efforts to stop, delay, or otherwise impede free navigation and transit passage of Ukrainian and third-State vessels in and through the Kerch Strait and Sea of Azov, as well as appropriate guarantees of non-repetition of its conduct. Finally, Ukraine established its entitlement to full reparation "in an adequate form"[916] which, in the circumstances of this case, requires modifying the central span of the Kerch Strait Bridge to provide for a height clearance that is sufficient to restore passage for larger vessels that historically transited the Strait,[917] and releasing to Ukraine the two Ukrainian-flagged JDRs Russia unlawfully seized and re-flagged.

408. Russia's Counter-Memorial confirms the critical facts underpinning Ukraine's navigation claims. In particular, Russia concedes that it built a bridge that impedes transit passage of classes of large vessels that previously transited the Strait, that it has stopped and inspected vessels in transit to and from Ukraine's ports, that it closed the Strait to navigation to foreign governmental traffic for a period of six months, and that it re-flagged two Ukrainian JDRs without following the laws of Ukraine as the flag State.[918] Russia's concessions alone explain why its actions have contravened freedom of navigation. Ukraine's requested relief in the area of navigation, transit passage, and flag state jurisdiction is reasonable and necessary to provide full reparation to Ukraine, and it should be awarded in full.

II. Ukraine Is Entitled to Relief for Russia's Failure to Protect the Marine Environment

409. In its Revised Memorial, Ukraine also explained that it is entitled to relief for the injuries it has suffered as a result of Russia's disregard of its duty to protect the marine environment, as well as its duties to cooperate with other States to prevent and mitigate potential and actual harms to the marine environment. Specifically, Ukraine requested declarations that Russia is in violation of its obligations under Articles 123, 192, 194, 198,

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[915] *See* Revised Memorial of Ukraine, Chapter Six.

[916] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Art. 31, cmt. (1) (quoting *Factory at Chorzów (Germany v. Poland)*, PCIJ Judgment of 26 July 1927, p. 21 (**UAL-140**)) (**UAL-33**).

[917] Revised Memorial of Ukraine, ¶ 307.

[918] *See supra* Chapter Three.

199, 204, 205, and 206.[919] Ukraine also sought assurances and guarantees of non-repetition, including assurances that Russia would take all appropriate steps to protect the marine environment and guarantees of non-repetition with regard to its failure to communicate appropriate environmental assessments to Ukraine, other potentially affected States, and competent international organizations. Finally, Ukraine asked the Tribunal to order Russia to 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 Construction Projects.[920] Given the urgency of the threat, Ukraine called for Russia to be required to publish a comprehensive report on the reparatory and mitigation measures it would undertake within 15 months of the issuance of the Award, and to commence implementation of the measures in question no later than three months thereafter.[921]

410. As established in this Reply, Russia's Counter-Memorial does nothing to undermine the appropriateness of the above-summarized requests for relief. In particular, Russia's claim to have carried out environmental impact assessments for three of the four Construction Projects turns out, on closer inspection, to have no substance. Rather than conduct the comprehensive testing needed to establish a temporally and spatially appropriate baseline for subsequent monitoring of the Construction Projects' impacts, under pressure from President Putin to finalize a land route to Crimea, the Russian authorities threw together whatever historical data was at hand and supplemented it with some short-lived and token tests designed to give the appearance of an environmental assessment. Rather than honestly appraise the host of environmental impacts that projects of this size could reasonably be expected to produce, Russia's environmental assessors deliberately minimized the impacts, essentially brushing them under the carpet. As a result, the relief requested in the Revised Memorial remains as urgent as ever. In particular, in addition to declarations of Russia's numerous violations of the environmental provisions of UNCLOS and guarantees of cessation and non-repetition, it remains vital that Russia be required to undertake the scientifically rigorous testing that it failed to do in the first instance, to provide

[919] Revised Memorial of Ukraine, ¶ 296.

[920] *Id.* ¶¶ 309-310.

[921] Ukraine respectfully reiterates its request 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. *See id.* ¶ 311.

a solid basis for a full and reliable assessment of the environmental impacts arising from the Construction Projects, and that it define and promptly undertake the necessary mitigation measures flowing out of that assessment.

III. Ukraine Is Entitled to Relief for Russia's Interference with Underwater Cultural Heritage

411. Ukraine demonstrated in its Revised Memorial that Russia has recklessly extracted fragile underwater cultural heritage with floating cranes, causing significant damage; allowed amateur dive club members unfettered access to culturally significant sites; and repeatedly disturbed and removed underwater cultural heritage found at sea — all in a manner contrary to international best practice.[922] Notwithstanding Russia's repeated mischaracterizations of Ukraine's position, attempts to minimize its obligations under UNCLOS, and introduction of non-contemporaneous and uncorroborated evidence designed to whitewash its conduct, Russia fails to rebut the various examples of abusive practices cited by Ukraine in the Revised Memorial. Accordingly, Ukraine remains entitled to a declaration establishing that Russia's unlawful conduct has violated Article 303(1) of the Convention and that Russia must cease excavating underwater cultural heritage sites until it can guarantee that any further excavation will comply with internationally accepted archaeological standards.[923] Russia must also provide appropriate assurances and guarantees of non-repetition in this regard.

IV. Ukraine Is Entitled to Relief for Russia's Aggravation of the Dispute

412. Finally, with regard to Ukraine's claims of aggravation, Ukraine is entitled to a declaration that Russia has violated its obligations under Articles 279 and 300 not to extend and aggravate the present dispute, including by unilaterally declaring itself sovereign over the Sea of Azov, whereas it previously claimed sovereignty over those waters jointly with Ukraine. Ukraine has also demonstrated its entitlement to full reparation, which must wipe out all consequences of Russia's unlawful conduct, including not only Russia's initial violations of UNCLOS, but also the further steps Russia took after this dispute was launched, in contravention of Articles 279 and 300.

* * *

[922] Revised Memorial of Ukraine, Chapter Six, Section III.B; *supra* Chapter Five.

[923] Revised Memorial of Ukraine, ¶ 297; *supra* Chapter Five.

413. In sum, Russia has comprehensively violated multiple core areas of the Convention. To vindicate these rights under the Convention and redress the injury to Ukraine and the broader community of UNCLOS States Parties, the Tribunal should award Ukraine the relief requested in its Revised Memorial and herein, to which Ukraine is entitled under the Convention and international law.[924]

[924] As Ukraine explained in its Revised Memorial — 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. In particular, it is currently not possible for Ukraine to determine the amount of compensation it is owed by the Russian Federation, and Ukraine reserves the right to seek adequate compensation at a later stage. *See* Revised Memorial of Ukraine, ¶ 312.

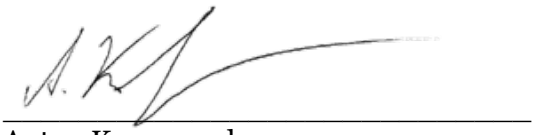
Chapter Eight: Ukraine's Submissions

414. For the reasons set out in this Reply and as set out in Ukraine's Revised Memorial, Ukraine respectfully reaffirms its Submissions,[925] and requests that the Tribunal award Ukraine its costs for these proceedings pursuant to Article 25 of the Rules of Procedure.

415. Ukraine further requests the Tribunal to adjudge and declare that 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, including Russia's further aggravation of this dispute by unilaterally declaring itself the sole sovereign over the entirety of the Sea of Azov.

416. Ukraine reserves the right to modify and extend its Submissions, including in response to any facts or events that may transpire or come to light during the pendency of this arbitration.

Kyiv, Ukraine, 24 March 2023



Anton Korynevych
Agent for Ukraine

[925] *See* Revised Memorial of Ukraine, Chapter Nine.