Contains Confidential Information

PCA Case No. 2017-06

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

between

UKRAINE

and

THE RUSSIAN FEDERATION

in respect of a

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

Volume I – REJOINDER OF THE RUSSIAN FEDERATION

ARBITRAL TRIBUNAL:
Judge Jin-Hyun Paik, President
Judge Boualem Bouguetaia
Judge Alonso Gómez-Robledo
Professor Vaughan Lowe KC
Professor Alexander N. Vylegzhanin

8 December 2023

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I. INTRODUCTION

1. Pursuant to Procedural Order No. 11 of 29 September 2023, the Russian Federation hereby submits its Rejoinder. In this Rejoinder, the Russian Federation maintains all its objections and defences raised in the Counter-Memorial and supplements them accordingly in response to the arguments raised by Ukraine in its Reply.[1]

A. PROCEDURAL HISTORY

2. On 16 September 2016, Ukraine served on the Russian Federation a Notification under Article 287 and Annex VII, Article 1 of the 1982 United Nations Convention on the Law of the Sea ('UNCLOS' or the 'Convention') and Statement of the Claim and Grounds on which it is Based, dated 14 September 2016 in respect of a 'Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait'.

3. On 19 February 2018, Ukraine submitted its Memorial (the 'Memorial'), where it accused the Russian Federation of violating numerous provisions of the Convention.

4. On 21 May 2018, the Russian Federation submitted its Preliminary Objections to the Arbitral Tribunal's jurisdiction.

5. Following two rounds of exchange of pleadings on jurisdiction, a jurisdictional hearing was held between 10 and 14 June 2019.

6. On 21 February 2020, the Arbitral Tribunal issued its Award on jurisdiction (the '2020 Award'). The 2020 Award partially upheld the Russian Federation's objections, dismissing Ukraine's claims inasmuch they related to the issue of sovereignty over Crimea, and postponing its decision concerning the activities in the Sea of Azov and the Kerch Strait to the merits phase; the Arbitral Tribunal also invited Ukraine to revise its Memorial in light of these findings:[2]

> The Arbitral Tribunal unanimously:
>
> a) Upholds the Russian Federation's objection that the Arbitral Tribunal has no jurisdiction over Ukraine's claims, to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it

[1] Confidential information in this Rejoinder is marked with double chevrons (<< >>).

[2] 2020 Award, ¶492.

to decide, directly or implicitly, on the sovereignty of either Party over Crimea;

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

…

d) Requests Ukraine to file a revised version of its Memorial, which shall take full account of the scope of, and limits to, the Arbitral Tribunal's jurisdiction as determined in the present Award.

7. On 20 May 2021, Ukraine submitted its Revised Memorial (the 'Revised Memorial'). As will be shown below elsewhere in this Rejoinder, in framing its revised claims, Ukraine has ignored the Arbitral Tribunal's findings on jurisdiction and ensuing directions and attempts to circumvent them. Specifically, Ukraine did not exclude claims relating to the issue of sovereignty over Crimea. In addition, Ukraine went far beyond the task of 'revising' its Memorial, by inadmissibly introducing new claims without obtaining leave from the Arbitral Tribunal.

8. On 24 October 2022, the Russian Federation submitted its Counter-Memorial (the 'Counter-Memorial'), where it maintained its objections concerning jurisdiction and admissibility, presented its defence on the merits, and requested that Ukraine's claims be dismissed in their entirety.

9. On 24 March 2023, Ukraine submitted its Reply (the 'Reply' or 'Ukraine's Reply'). In the Reply, Ukraine continues to present its claims related to sovereignty, as well as new claims that were not present in its original Memorial.

10. On 29 September 2023, upon the Russian Federation's request, the Arbitral Tribunal fixed 8 December 2023 as the deadline for the submission of the present Rejoinder (the 'Rejoinder').

B. THE ORGANISATION OF THE REJOINDER

11. In this Rejoinder, the Russian Federation, as in its Counter-Memorial, requests the Arbitral Tribunal to find that it is without jurisdiction in respect of the dispute submitted by Ukraine. It also, and without prejudice to this principal submission, addresses the

merits of Ukraine' claims. The Russian Federation maintains in full its position as set out in the Counter-Memorial.

12. This Rejoinder is structured as follows:

a. In **Chapters I(C)** and **I(D)** below, the Russian Federation provides the general context of the dispute. It will demonstrate that Ukraine's claims are nothing more than part of its 'lawfare' campaign against the Russian Federation. Ukraine is systemically abusing the international dispute resolution system, and, in the present case, is ignoring the Arbitral Tribunal's findings and directions in the 2020 Award. Moreover, Ukraine's case is extremely hypocritical, and its claims do not align with its own conduct.

b. In **Chapter II**, the Russian Federation elaborates on its overarching jurisdictional objections in this case. Since the Sea of Azov and the Kerch Strait have long been internal waters on the basis of a historic title or by way of continuity, the Arbitral Tribunal lacks jurisdiction over Ukraine's claims relating to these two bodies of water unregulated by UNCLOS. Ukraine's separation from the USSR in 1991 had no effect on that issue. Ukraine has officially acknowledged the internal and historic status of the Azov Sea and Kerch Strait, both in treaties and in political declarations.

c. In **Chapter III**, the Russian Federation responds to Ukraine's claims regarding the alleged violation of navigational rights. First, the Russian Federation maintains that adjudicating this issue would be outside of the Arbitral Tribunal's jurisdiction. Second, the Russian Federation highlights that Ukraine's suggested interpretation of Articles 38, 43, and 44 of the Convention is incorrect and the Russian Federation was entitled to construct the Kerch Strait Bridge and implement traffic regulations in the region. Third, the Russian Federation recalls Ukraine's repeated political and legal consent to the construction of a bridge across the Kerch Strait.

d. In **Chapter IV**, the Russian Federation addresses Ukraine's claims on inspections. The Russian Federation maintains that the Arbitral Tribunal has no jurisdiction to rule on that claim. In addition, the Russian Federation highlights that inspections of vessels are in conformity with the Convention.

e. In **Chapter V**, the Russian Federation refutes Ukraine's arguments concerning the seizure and re-flagging of JDRs. First, this claim likewise falls outside of the Arbitral Tribunal's jurisdiction, as it is directly related to the issue of sovereignty over Crimea, or inadmissible as this claim has first been advanced in the Revised Memorial. Moreover, an investment tribunal has already considered this issue in a separate proceeding. Therefore, Ukraine is seeking double recovery. Alternatively, the Russian Federation proves that it did not violate Article 91 of the Convention.

f. In **Chapter VI**, the Russian Federation deals with Ukraine's claims on the protection of the environment and environmental monitoring. It demonstrates that all Infrastructure Projects, where necessary, were subject to a thorough and adequate environmental impact assessment, and the impact of such projects was closely monitored. Ukraine's attempt to import an 'objective standard' of assessment should fail as it is unsupported by international practice. The Russian Federation also proves that it has duly accounted and mitigated all environmental risks, and that Ukraine in any event failed to show any adverse impact to the environment in the area, and its case remains a hypothetical.

g. In **Chapter VII**, the Russian Federation debunks Ukraine's claims on the protection of underwater cultural heritage ('UCH'). Unable to find and prove a violation of the Convention, Ukraine attempts once more to import into it additional obligations from extraneous legal instruments. The Russian Federation also shows that there is no merit to Ukraine's case both as to the scope of the Russian Federation's obligations and to the facts. For Ukraine's claim of extreme gravity, which is phrased as 'cultural erasure',[3] it brings a total of four isolated cases to illustrate it. The Russian Federation also demonstrates that all actions complained of by Ukraine have served the purpose of preserving the UCH in question.

h. In **Chapter VIII**, the Russian Federation responds to Ukraine's allegations concerning the alleged aggravation of the dispute. First, the Arbitral Tribunal is without jurisdiction to consider this claim. Alternatively, even if it were to have jurisdiction, the Russian Federation did not aggravate the dispute. If anything, it is Ukraine whose actions have aggravated the dispute at hand.

[3] Ukraine's Reply, ¶346.

i. In **Chapter IX**, the Russian Federation provides its objections in relation to the remedies requested by Ukraine and shows their inadequacy and disproportionality.

j. **Chapter X** concludes the Rejoinder and contains the Russian Federation's submissions, requesting that the Arbitral Tribunal adjudge and declare that it lacks jurisdiction to consider Ukraine's claims or hold them to be inadmissible or, alternatively, to dismiss them in their entirety.

C. GENERAL CONTEXT AND BACKGROUND TO THIS DISPUTE

13. Before going into the specific claims raised by Ukraine, several introductory remarks are warranted with respect to its case. They are crucial in order to have a proper understanding of this dispute, its background and context.

14. Ukraine generally asserts that it has instituted the present proceedings due to the Russian Federation's 'defying' of the Convention and 'injuring Ukraine'.[4] This is wrong.

15. At the heart of the dispute are two bodies of water, namely the Sea of Azov and the Kerch Strait. The Kerch Strait is a very narrow and shallow body of water which connects the Sea of Azov to the Black Sea. It separates the Crimean Peninsula and the Krasnodar Krai. The principal navigational route within the Strait, the manmade Kerch-Yenikale Canal, is yet even narrower.

16. Before 1991, the Sea of Azov, the Kerch Strait, and their coastal land territories formed a part of the Soviet Union, and, yet before that, the Russian Empire. In 1954, the Soviet leader Nikita Khruschev arranged for the transfer of the Crimean Peninsula, within the USSR, from one of its constituent entities (the Russian Soviet Federal Socialist Republic) to another (the Ukrainian Soviet Socialist Republic). In 1991, Ukraine seceded from the former USSR to become a new independent State, exercising its right to self-determination, while the Russian Federation remained as the continuator State of the Soviet Union.

17. Since between 1991 and 2014 Crimea was a constituent part of Ukraine, this meant that during that period the Kerch Strait also separated the two States. Both States also had direct access to the Sea of Azov.

[4] Ukraine's Reply, ¶1.

18. The relations between Ukraine and the Russian Federation with respect to the area in question were amicable and constructive. In 2003, Ukraine and the Russian Federation signed a bilateral treaty[5] regulating the status of the Kerch Strait and the Sea of Azov (the '2003 Treaty' or the 'Azov/Kerch Cooperation Treaty'). This treaty was ratified in 2004 by the Parliaments of both States.[6]

19. Under the 2003 Treaty, the Parties agreed that 'the Sea of Azov and the Kerch Strait are historically internal waters of the Russian Federation and Ukraine'.[7] This position was confirmed by Ukraine's President Leonid Kuchma in his 2003 Joint Declaration with Russia's President Vladimir Putin,[8] as well as by the Ukrainian parliament when it was preparing to ratify the 2003 Treaty.[9]

20. Ukraine and the Russian Federation also agreed that there existed a necessity to build a bridge over the Kerch Strait due to the increased economic and social demand for such infrastructure. In November 2006, the Ukrainian Minister of Transport, Nikolay Rudkovskiy, said in an interview to the Ukrainian media that the Ukrainian Cabinet of Ministers was seriously considering the possibility of building a bridge between the city of Kerch and the coast of Krasnodar Krai. He emphasised that such construction 'would

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[5] Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, 24 December 2003 (**RU-20-AM**).

[6] *See*, *e.g.*, Law of Ukraine No. 1682-IV 'On the Ratification of the Treaty Between Ukraine and the Russian Federation on Cooperation in the Use of the Sea of Azov and the Kerch Strait', 20 April 2004, available at: https://zakon rada.gov.ua/laws/show/1682-15/print (**RU-561**); Verkhovnaya Rada of Ukraine, On the Ratification of the Treaty Between Ukraine and the Russian Federation on Cooperation in the Use of the Sea of Azov and the Kerch Strait: Abstract Text, 20 April 2004, available at: https://zakon rada.gov.ua/laws/anot/1682-15 (**RU-562**); Federal Law No. 23-FZ 'On the Ratification of the Treaty Between Ukraine and the Russian Federation on Cooperation in the Use of the Sea of Azov and the Kerch Strait', 22 April 2004, available at: http://pravo.gov.ru/proxy/ips/?docbody=&nd=102086438 (**RU-563**).

[7] Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, 24 December 2003, Article 1(1) (**RU-20-AM**); *see* also 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, Law of the Sea Bulletin, 2004, Vol. 54 (**RU-21**), p. 131.

[8] Ukrainska Pravda, *How Kuchma gave up the Kerch Strait and the Sea of Azov. Transcript of the Press-Conference* (24 December 2003), available at: https://www.pravda.com.ua/rus/news/2003/12/24/4376146/ (**RU-564**).

[9] Preparatory Note to the Draft Law of Ukraine 'On the Ratification of the Treaty Between Ukraine and the Russian Federation on Cooperation in the Use of the Sea of Azov and the Kerch Strait', 20 March 2004, available at: https://w1.c1 rada.gov.ua/pls/zweb2/webproc4_2?pf3516=0188&skl=5: '*The treaty establishes the status of the Sea of Azov and the Kerch Strait as historically internal waters of Ukraine and the Russian Federation*… The entry into force of the Agreement… will contribute to the further strengthening of friendly relations between Ukraine and the Russian Federation, will allow preserving the Azov-Kerch water area as an integral economic and natural complex that is used in the interests of Ukraine and Russia.' [*Emphasis* added] (**RU-565**).

be an advantage for Crimea'.[10] Later, in 2008, the Head of the Government of the Russian Federation, Viktor Zubkov, and the Prime Minister of Ukraine, Yulia Timoshenko agreed in Kiev on the need to start designing such a bridge.[11]

21. It is notable that the idea of building a bridge across the Kerch Strait was further considered by the government of Ukraine's President Viktor Yushchenko, who came to power after the so-called 'Orange Revolution' of 2004. Yushchenko's government, despite being decidedly pro-Western and anti-Russian, was clearly aware that the construction of the bridge would benefit both Ukraine and the Russian Federation.

22. Finally, in December 2013, Ukraine signed a treaty with the Russian Federation to begin the construction of the Crimean bridge.[12]

23. Thus, three generations of Ukrainian leadership, regardless of their political orientation, and representing the entirety of the Ukrainian political spectrum, held views consonant with the position of the Russian Federation in the present case.

24. However, in 2014, a violent armed coup occurred in Ukraine. As a result, the constitutionally elected President of Ukraine, Viktor Yanukovich, was overthrown, and a new political regime came to power in Ukraine.

25. The Eastern parts of Ukraine, including Crimea, did not support the perpetrators of the coup. People in Crimea, unwilling to live under the new rule, elected to leave Ukraine. At a referendum held in March 2014, the Crimean people overwhelmingly decided to reunite with the Russian Federation, exercising their right to self-determination much like Ukraine itself did in 1991.[13]

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[10] Ukrainska Pravda, *The Cabinet of Ministers is Considering the Possibility of Connecting Ukraine with Russia* (17 November 2006), available at: https://www.pravda.com.ua/rus/articles/2006/11/17/4408751/ (**RU-566**).

[11] UNIAN, *Ukraine and Russia Determined 10 Priorities for Cooperation (the List)* (28 April 2008), available at: https://www.unian.net/society/112964-ukraina-i-rossiya-opredelili-10-prioritetov-sotrudnichestva-spisok.html (**RU-567**).

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

[13] TASS, *All-Russia People's Front: High voter turnout points to legitimacy of Crimea referendum* (17 March 2014), available at: https://tass.com/russia/723961 (**RU-32**); Resolution 'On the Independence of the Crimea' taken at an extraordinary plenary session of the Supreme Soviet of the Autonomous Republic of Crimea on 17 March 2014, available at: http://crimea.gov.ru/act/11748 (**RU-33**).

26. This decision sparked significant tensions in the region. Ukraine never recognised the Crimeans' choice and tried to punish them for it. As part of this campaign, Ukraine-backed extremist groups introduced a series of cruel blockades against Crimeans, aimed at depriving them of basic needs, such as food, water, electricity, and medicine, cutting off supply from the Ukrainian side of the border. This course of action was so blatant that even pro-Ukrainian Western media could not condone it.[14]

27. In addition, the OHCHR has visited the sites of the blockade and documented how it was conducted:[15]

> On 20 September, upon the initiative of the Crimean Tatar leadership, a trade blockade of Crimea from mainland Ukraine started … From its observations at the three checkpoints on the administrative boundary line in mid-November, HRMMU noted actions to enforce the blockade by Ukrainian activists in uniforms illegally performing law enforcement functions. The activists reportedly have an unofficial list of "traitors", which serves as a basis to illegally arrest and detain people. The law enforcement officers present at the checkpoints were often or generally passive, merely observing the situation.[16]
>
> A trade blockade of Crimea … has been in place since 20 September. HRMMU is concerned about the legality of this action and human rights abuses that have accompanied it, including illegal identity checks, vehicle searches, confiscation of goods, and arrests.[17]
>
> Since 20 September, hundreds of Ukrainian activists, including Crimean Tatars and members of nationalist battalions, have been blocking the flow of goods between mainland Ukraine and Crimea in both directions. The trade blockade was initiated by the former and current heads of the Crimean Tatar Mejlis, Mustafa Dzhemiliev and Refat Chubarov, and has been conducted simultaneously at all three crossing points on the Ukrainian-controlled side of the administrative boundary line (ABL): in Chaplynka, Chongar and Kalanchak … The organizers also … demanded that the next step should be to halt energy supplies to Crimea.[18]

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[14] BBC News, *Crimea Hit by Power Blackout and Ukraine Trade Boycott* (23 November 2015), available at: https://www.bbc.com/news/world-europe-34899491 (**RU-568**); Financial Times, *Ukraine Imposes Economic Blockade on a Blacked-Out Crimea* (23 November 2015), available at: https://www.ft.com/content/d5487eaa-9203-11e5-bd82-c1fb87bef7af (**RU-569**); *see* also Counter-Memorial, ¶155(b); RIA, *Ukraine Shuts off Canal That Gives Crimea 85% of its Water* (26 April 2014), available at: https://ria.ru/20140426/1005568129 html (**RU-330**).

[15] OHCHR, Report on the human rights situation in Ukraine 16 August to 15 November 2015, 9 December 2015, available at: https://www.ohchr.org/sites/default/files/Documents/Countries/UA/12thOHCHRreportUkraine.pdf (**RU-570**).

[16] *Ibid*.

[17] *Ibid*., ¶143.

[18] *Ibid*., ¶144.

> HRMMU travelled to the area of the blockade on 12-13 November… The volunteers enforcing the blockade – uniformed men sometimes wearing masks and balaclavas – have been systematically stopping private vehicles. They reportedly have lists of people considered to be 'traitors' due to their alleged support to the de facto authorities in Crimea or to the armed groups in the east… In [an] incident, a Crimean resident with a Russian passport issued in Crimea was beaten up… Their behaviour has in some cases been threatening when drivers refuse to show their identification or allow their vehicles to be searched. HRMMU is aware of the case of a driver who had his windows smashed for refusing to unload vegetables.[19]
>
> The activists have been enforcing the blockade in the presence of the police and border guards who observed the situation without intervening. HRMMU is concerned about instances of human rights abuses near the ABL.[20]

28. Ukraine did nothing to mitigate the situation and prevent the suffering of people in Crimea. To the contrary, Ukraine endorsed this blockade and fully supported it. [21]

29. Against this background, it became clear that creating a bridge over the Kerch Strait is not merely necessary, it became a matter of survival. Instead of just being a more economically beneficial and comfortable project, it became a vital way to connect Crimea, having no land connections to Russia, to the rest of the Russian Federation, and to facilitate the provision of transport and food supplies to the peninsula when Ukraine cut these off.

30. Therefore, the Russian Federation undertook to build a bridge connecting mainland Russia to Crimea. In 2018, the construction works were completed, and the new bridge (the 'Kerch Strait Bridge' or the 'Bridge') was opened to the public. In addition, several other projects were implemented (the Bridge and all such other projects are jointly referred to as the 'Infrastructure Projects'), which included the laying of a fibre-optic cable, electric cable, and a gas pipeline, all of which pursued the same aim of providing Crimeans with much needed basic resources, which were denied to them by Ukraine.

31. Ukraine immediately doubled down on threatening the Crimeans, promising to attack and to destroy the Bridge. Ukraine's politicians, including members of the Ukrainian Parliament and its former acting President Alexander Turchinov, have routinely

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[19] *Ibid*., ¶145.

[20] *Ibid*., ¶146.

[21] Ruling of the Cabinet of Ministers of Ukraine No. 1035 'On the Restriction of Supply of Certain Goods (Works, Services) from the Temporarily Occupied Territory to Other Territory of Ukraine and/or Other Territory of Ukraine to the Temporarily Occupied Territory', 16 December 2015 (**RU-337**).

threatened to 'blow up' or 'destroy' the Kerch Strait Bridge,[22] showing a complete disregard for the people of Crimea.

32. Crimea was not the sole victim of Ukraine's violence and threats. The people of Donbass, who likewise rejected the Maidan regime and demanded autonomy, were subject to similar atrocious treatment. In April 2014, Ukraine's authorities launched an all-out military campaign, leading to thousands of civilian casualties and the destruction of civilian infrastructure. Despite attempts at international mediation and involvement of the UN Security Council, the Kiev regime single-mindedly pursued a military solution. Disregarding the Minsk Agreements – which were endorsed by the UN Security Council – Kiev subjected the Donbass to years of shelling and bombings, culminating in the escalation of 2022. Unable to realise their right to self-determination within Ukraine, the Donbass people have sought independence and eventual reunification with the Russian Federation. The DPR and LPR exercised their right to self-defence, together with the Russian Federation, to repeal the Maidan regime's attacks and liberate their territories from Ukrainian occupation.

33. By its actions, the current regime in Kiev has shown itself to be a faithful continuator of the Neo-Nazi junta that came to power in 2014 through violence and terror. In reality, the Ukrainian government does not represent in any way the interests of the people of Crimea, Donbass, Zaporozhye and Kherson, as its continued atrocities and blockades clearly demonstrate. Thus, it cannot even be considered a proper claimant in the present case.

34. This case is nothing more than an element of Ukraine's 'lawfare' campaign against the Russian Federation.[23] In all such cases initiated in various courts and tribunals, Ukraine's principal goal was to challenge the reunification of Crimea with the Russian Federation

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[22] Obozrevatel, *A 19-Kilometre-Long Target: How to Blow up the Crimean Bridge* (12 April 2018), available at: https://news.obozrevatel.com/ukr/abroad/19-kilometrova-mishen-yak-mozhut-pidirvati-krimskij-mist.htm (**RU-571**); Gazeta ru, *Ukraine Announced that the Plan to 'Sweep Away' the Crimean Bridge Failed* (10 September 2021), available at: https://m.gazeta.ru/politics/news/2021/09/10/n_16514126.shtml (**RU-377**); RIA, *Verkhovnaya Rada Threatens to Destroy the Crimean Bridge* (22 May 2018), available at: https://ria.ru/20180522/1521067767 html (**RU-572**); Lb.ua, *Turchinov: The Request for Miracles Dominates: I Am Not a Miracle-Maker* (15 July 2019), available at: https://lb.ua/news/2019/07/15/432155_aleksandr_turchinov_dominiruet html: 'Our cruise missiles will be able to destroy Russian warships of any class not only in the Black and Azov Seas, but also in their home ports, and, if *necessary, within a few minutes, demolish the bridge that Russia is so proud of.'* [*Emphasis* added] (**RU-573**).

[23] Law Confrontation with the Russian Federation, available at: https://lawfare.gov.ua/ (**RU-574**).

and obtain a legal pronouncement on that issue. In addition, Ukraine sought to drag the Russian Federation into a series of long and costly disputes. This arbitration is therefore not a good faith attempt at dispute resolution, and an abuse of the Convention's dispute settlement mechanism.

D. GENERAL OBSERVATIONS ON UKRAINE'S CASE

35. In addition to the context outlined above, Ukraine's case is inherently flawed *per se* as well. ***First***, Ukraine has completely ignored the Arbitral Tribunal's directions in the 2020 Award and continues to maintain claims that concern or touch upon the issue of sovereignty over Crimea (**i**). ***Second***, Ukraine continues to disregard the significant change of circumstances that has occurred as a result of the accession to the Russian Federation of the Donetsk, Lugansk, Kherson and Zaporozhye Regions in 2022 (**ii**). ***Third***, Ukraine continues to support new claims that it failed to bring in its Memorial and only introduced at a later stage without the Arbitral Tribunal's leave (**iii**). ***Fourth***, Ukraine's case is extremely hypocritical and detached from reality (**iv**).

i. Ukraine Has Ignored the 2020 Award

36. In the 2020 Award, the Arbitral Tribunal decided that it has no jurisdiction over any of Ukraine's claims that would require it to decide directly or implicitly on the issue of sovereignty over Crimea.[24] Accordingly, Ukraine was directed to revise its original Memorial and exclude any issues that would for the above reason fall outside the Arbitral Tribunal's jurisdiction. However, Ukraine failed to do so. Both Ukraine's Revised Memorial and Reply contain matters that are premised on the issue of sovereignty over Crimea. Those include, specifically, the claims on vessel inspections, navigation, and jack-up drilling rigs (the 'JDRs').

37. In respective sections of this Rejoinder dedicated to those issues the Russian Federation explains in more detail why it is impossible to render an award on them without deciding, directly or indirectly, on the issue of sovereignty over Crimea. However, at this stage some general comments are warranted.

[24] 2020 Award, ¶492.

38. Ukraine's assertions that it left the issues concerning sovereignty over Crimea outside its position do hot hold water.[25] It does not engage with the Russian Federation's explanations as to why the question of sovereignty over Crimea is at the heart of dispute over those issues[26] and merely tries to brush them away by stating that 'these claims … turn on the Kerch Strait's status as an international strait'.[27] However, as the Russian Federation has shown, it denies that the Kerch Strait is an international strait to begin with. It is the Russian Federation's position that this body of water constituted, first, internal waters of the Russian Federation and Ukraine, and currently constitutes internal waters of the Russian Federation since Ukraine ceased to be a coastal State. This is further addressed in sub-section (ii) below.

39. As the Russian Federation has explained in its Counter-Memorial, the analysis of Ukraine's claims on inspections of vessels and regulation of navigation relating to the Kerch Strait are issues that properly fall withing the ambit of sovereign powers of the Russian Federation as the coastal State and require an assessment of sovereignty over Crimea, which is beyond the Arbitral Tribunal's jurisdiction.[28] With respect to the JDRs, Ukraine likewise ignores the Russian Federation's explanations and continues to attempt to challenge the legality of Crimean authorities' acts.

40. Ukraine, clearly aware of the flaws in its position, preferred to disregard the Arbitral Tribunal's directions and chose to keep these issues within its position, in order to put more pressure on the Russian Federation and keep up the volumes of its 'lawfare'.

ii. <u>New Circumstances</u>

41. Additionally, Ukraine continues to ignore the fundamental change of circumstances that significantly affects the present case.

42. As the Russian Federation has explained in its Counter-Memorial,[29] on 30 September 2022, referendums were held in the Donetsk People's Republic (the 'DPR'), the Lugansk People's Republic (the 'LPR'), the Kherson Region and the Zaporozhye Region. At these

[25] Ukraine's Reply, ¶¶85-89.

[26] Counter-Memorial, ¶¶254, 278-280.

[27] Ukraine's Reply, ¶86.

[28] Counter-Memorial, ¶¶249-254; 276-285.

[29] Counter-Memorial, ¶¶25-30.

referendums, the population of all these regions decided to accede to the Russian Federation, exercising their right to self-determination much like Ukraine itself did in 1991.

43. Importantly, upon these accessions, Ukraine ceased to be a coastal State with respect to the Sea of Azov, since all its former territories bordering it now became constituent parts of the Russian Federation, in the same manner as Ukraine acquiring these territories in 1991 – as a result of the exercise of the right to self-determination from the USSR.

44. The Russian Federation has explained that the Arbitral Tribunal's conclusions with respect to its jurisdiction over the issues relating to the sovereignty over Crimea are by analogy applicable to the sovereignty over these territories as well.[30]

45. In response, Ukraine merely attempts to put before the Arbitral Tribunal even more issues that are beyond its jurisdiction, accusing the Russian Federation of a 'discreditable attempt to capitalize on aggression and atrocity',[31] and referring to 'sham referendums'.[32] It also accuses the Russian Federation of inviting the Arbitral Tribunal to 'validate and compound this gross disregard for international law'.[33]

46. Ukraine's response to the Russian Federation's argument is inapposite, misses the point, and misrepresents the Russian Federation's position. The Russian Federation does not attempt to overrule 'well-settled jurisdictional rules'.[34] Its position is the opposite – it insists on maintaining consistency. The Arbitral Tribunal has already decided that it has no jurisdiction to determine sovereignty over Crimea. Now it is invited to extend the same logic to other territories over which both parties claim sovereignty. The Arbitral Tribunal is therefore requested to decline jurisdiction, where it would have to pronounce on the sovereignty over the other contested territories.

47. Ukraine's reference to the Order on Provisional Measures of the International Court of Justice (the 'ICJ') of 7 March 2022[35] is likewise inapposite. Whether or not the Russian

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[30] Counter-Memorial, ¶¶28-29.

[31] Ukraine's Reply, ¶76.

[32] *Ibid*.

[33] *Ibid*.

[34] *Ibid*., ¶79.

[35] Ukraine's Reply, ¶¶80-84.

Federation complied with the Order of 7 March 2022 is far beyond the jurisdiction of the Arbitral Tribunal. This issue could be considered within another pending case between the parties in the ICJ. That case is currently at its jurisdictional stage,[36] and the issue of compliance with the provisional measures order may only be considered at the merits stage, and only if the ICJ were to find jurisdiction to hear Ukraine's claims. Accordingly, Ukraine's reference is premature.

48. All factual assertions made by Ukraine are denied and are in any event irrelevant to this case.

49. Ukraine's reference to the *Mauritius/Maldives* case is likewise beside the point.[37] There, the ITLOS Special Chamber concluded as follows:

> If, indeed, the ICJ has determined that the Chagos Archipelago is a part of the territory of Mauritius, as Mauritius argues, the continued claim of the United Kingdom to sovereignty over the Chagos Archipelago cannot be considered anything more than 'a mere assertion'. [38]

50. Therefore, the Special Chamber referred to a matter that the ICJ had determined in an advisory opinion. Ukraine's case in the present proceedings hinges on a reliance on an Order on provisional measures that is not dispositive of the merits of the case before the ICJ.

51. This further illustrates the Russian Federation's point. Ukraine attempts to force the Arbitral Tribunal to make a pronouncement on matters of international law that go far beyond the interpretation and application of the Convention, i.e. the limits of the Arbitral Tribunal's jurisdiction. Ukraine's case is a badly conceived desperate attempt to obtain some assessments and inferences on the contested situation between itself and the Russian Federation.

52. The Russian Federation, to the contrary, invites the Arbitral Tribunal to not fall into Ukraine's trap and not render an award that would require it to comment on issues that are outside of its jurisdiction.

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[36] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening)*, CR 2023/18, pp. 57-58, ¶¶53-58 (Udovichenko) (**RUL-133**).

[37] Ukraine's Reply, ¶84.

[38] *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 (**UAL-174**).

iii. Ukraine's New Claims

53. As the Russian Federation has explained in the Counter-Memorial,[39] Ukraine has wrongly introduced a number of new claims in its Revised Memorial that were absent in its original Memorial and continues to defend this approach in its Reply.[40] The Russian Federation will provide more comments on these new claims in the respective chapters on JDRs, inspections of vessels and environmental impact assessment but will provide a few remarks here as well.

54. Ukraine's purported defence for its impermissible tactic is to resort to euphemisms. Thus, Ukraine denies that it submitted new claims, arguing that it 'updated' or 're-stated' its claims.[41] Yet, framing an abusive tactic in different terms does not render it less abusive or wrong, or make such claims admissible.

55. By asserting new claims, Ukraine has clearly disregarded Article 13(5) of the Rules of Procedure and the 2020 Award. Pursuant to Article 13(5) of the Rules of Procedure:

> During the course of the arbitral proceedings, either Party may, if given leave by the Arbitral Tribunal to do so, amend or supplement its claim or defence. *A claim may not be amended or supplemented in such a manner that it falls outside the scope of the dispute submitted in the Notification and Statement of Claim* as may be determined by the Arbitral Tribunal. [*Emphasis* added]

56. Ukraine deliberately violated the Rules of Procedure and the Arbitral Tribunal's instructions when it submitted new claims concerning the laying of the fiber optic cable in its Revised Memorial. [42]

57. As the ICJ noted in *Djibouti v. France*, an applicant must indicate '… the precise nature of [the] claim *and the facts and grounds on which it is based'*. [43] [*Emphasis* added]

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[39] Counter-Memorial, ¶¶9-10, 305-306, 441.

[40] Ukraine's Reply, ¶¶90-93.

[41] Ukraine's Reply, ¶90.

[42] Counter-Memorial, ¶441.

[43] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 206, ¶64 (**RUL-68**).

58. Claims advanced late are inadmissible, as they go against 'legal security and the good administration of justice'.[44] Indeed, if a claimant were to be allowed to constantly amend and alter its case, the other party would be put in a disadvantageous position.[45]

59. For instance, Robert Kolb noted that:

> In principle, the subject matter of the case is fixed by the documents initiating it – that is when the claim is first formulated. The originating documentation 'selects the battle-ground' and sets bounds to it: it is to this terrain that the Court and the parties must then address their attention. *To allow unilateral changes to the terrain would disrupt the proceedings, leading to delays and opening up the possibility of various kinds of tactical manoeuvring by the parties. This in turn might prejudice the respondent's rights and thus the equality of the parties*[46] [*Emphasis* added].

60. This is no different in practice of arbitral tribunals adjudicating disputes under UNCLOS. Thus, in *M/V 'Louisa'* the ITLOS applied the same approach and noted that the claimant did not refer to Article 300 of the UNCLOS in its application, but subsequently sought to rely on that provision for its claims:

> The Tribunal considers this reliance on article 300 of the Convention generated a new claim in comparison to the claims presented in the Application; it is not included in the original claim. The Tribunal further observes that it is a legal requirement that any new claim to be admitted must arise directly out of the application or be implicit in it (see *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at p. 266, para. 67).[47]

61. Ukraine's right to 'supplement' its case does exist, but it is not unlimited. In doing so, the claimant should not change the subject-matter of the dispute before the respective court or tribunal. The subject-matter of the dispute, naturally, includes the factual circumstances underpinning the legal claim. For instance, in *Fisheries Jurisdiction*, the ICJ noted that the Court establishes the subject-matter of the dispute 'from all the facts…'.[48] Accordingly, even if a claim is allegedly based on the same legal provision,

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[44] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 266-267, ¶¶69 (**RUL-56**).

[45] H. Xue, JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE (Brill | Nijhoff, 2017), p. 41 (**RUL-134**).

[46] R. Kolb, THE INTERNATIONAL COURT OF JUSTICE (Hart Publishing, 2013), p. 183 (**RUL-135**).

[47] *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, ITLOS Case No. 18, Judgment, 28 May 2013, ¶¶142-151 (**RUL-36**).

[48] *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432, pp. 450-451, ¶38 (**RUL-22**).

an entirely new set of facts cannot be introduced at a later stage of the proceedings. This would in essence constitute an entirely new dispute with a completely new subject-matter.

62. As the ICJ noted in *Certain Phosphate Lands in Nauru*, links of 'general nature' between the original claim and the new claim are insufficient for the latter to be admissible. An additional claim must be 'implicit in the application' and must 'arise directly out of the question which is the subject of the application'.[49]

63. Furthermore, in *Diallo*, the ICJ did not admit a claim based on facts known to the Applicant at the time of the filing of its Application, which it chose to omit therefrom, despite the similarity of the issues and the fact that they were 'closely related in subject-matter':

> 45. Thus, it cannot be said that the additional claim in respect of the events in 1988-1989 was 'implicit' in the initial Application.
>
> 46. For similar reasons, the Court sees no possibility of finding that the new claim 'arises directly out of the question which is the subject-matter of the Application'. *Obviously, the mere fact that two questions are closely related in subject-matter, in that they concern more or less comparable facts and similar rights, does not mean that one arises out of the other.* Moreover, as already observed, the facts involved in Mr. Diallo's detentions in 1988-1989 and in 1995-1996 are dissimilar in nature, the domestic legal framework is different in each case and the rights guaranteed by international law are far from perfectly coincident. *It would be particularly odd to regard the claim concerning the events in 1988-1989 as 'arising directly' out of the issue forming the subject-matter of the Application in that the claim concerns facts, perfectly well known to Guinea on the date the Application was filed*, which long pre-date those in respect of which the Application (in that part of it concerning the alleged violation of Mr. Diallo's individual rights) was presented[50] [*Emphasis* added].

64. Therefore, any claims based on new legal grounds or on facts known to Ukraine at the moment of the filing of the Memorial but not included therein, are inadmissible.

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[49] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240, at p. 266, ¶67 (**RUL-56**); see also H. Xue, JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE (Brill | Nijhoff, 2017), p. 40 (**RUL-134**).

[50] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, pp. 658-659, ¶¶45-46 (**RUL-136**).

iv. Hypocrisy of Ukraine's Case

65. Finally, it should be noted how hypocritical and self-contradictory Ukraine's case is. Ukraine goes to great lengths in order to maintain it, but sometimes, its arguments transcend reality and border on the absurdity.

66. For example, Ukraine makes utterly grave accusations of 'cultural erasure'.[51] Claims of such gravity must be held to a very high standard of proof and must be supported by overwhelming evidence. However, to support this claim, Ukraine brings a grand total of four isolated cases only supported by dubious media reports. This is also notwithstanding well-reported and documented disastrous state of affairs with cultural heritage in Ukraine itself.

67. In another example, Ukraine presents the 2003 Treaty, from which it itself benefited for years, as a non-operative declaratory agreement.[52]

68. Furthermore, Ukraine accuses the Russian Federation of mismanaging and damaging the marine environment in the Kerch Strait and Sea of Azov due to the Infrastructure Projects implemented by the Russian Federation in the Kerch Strait. It is ironic how Ukraine attempts to present it as 'champion' of environmental due diligence when it itself disregarded the environment in that region for decades.

69. For instance, in 2010, a publication noted how Ukrainian factories were mostly responsible for polluting rivers flowing into the Sea of Azov.[53] The situation did not improve with time, and even after the Kerch Strait Bridge's opening, dirty water from all over Ukraine continued flowing into the Black Sea and the Sea of Azov. In 2020, Ukrainian enterprises discharged 952 million cubic meters of dirty wastewater into the country's rivers.[54] Given that all of Ukraine's biggest rivers belong to the Black Sea and Sea of Azov basins, it is safe to assume that the toxic waste made their way into both seas.

70. In 2016, the Deputy Minister of Ecology and Natural Resources of Ukraine, Svetlana Kolomiets, admitted in an interview with Ukrainian media that

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[51] Ukraine's Reply, ¶346.

[52] Ukraine's Reply, ¶26.

[53] E. Butenko, A. Kapustin, Ecological Situation of Industrial Regions Donbass and Sea of Azov, *Technologies of Organic and Inorganic Substances and Ecology*, 2010, Vol. 5, Issue 6, pp. 50-53 (**RU-575**).

[54] Akcent, *Who and When Will Properly Tackle the Issue of Small Rivers in Zaporozhye* (2 November 2021), available at: https://akzent.zp.ua/kto-i-kogda-vozmetsya-za-problemu-malyh-rek-v-zaporozhe-vserez/ (**RU-576**).

> At present, practically in all surface water bodies in Ukraine … the level of pollution has increased. A significant part of groundwater reserves have lost their importance as sources of drinking water. This situation has developed in Ukraine due to neglect of the laws in the field of development and reproduction of water resources for a long time.[55]

71. Specific attention is warranted to the notorious Azovstal factory that was also consistently polluting the Sea of Azov, greatly harming its environment,[56] as well as harming the health of the citizens of Mariupol. This enterprise has for years consistently been one of the top environmental polluters in Ukraine, according to Ukraine's own ministries and ministers.[57] As a result, the analysis of bottom sediments carried by Ukrainian ecologists revealed dangerously high levels of cancerogenic heavy metals, such as cadmium and arsenic.[58]

72. Ukraine has also been consistently performing dredging works in the region with no regard for the environment. For instance, in 2018 and 2019, Ukraine conducted massive dredging works in the vicinity of the Mariupol Port in the Sea of Azov,[59] as well as in other seaports. Such works, which involved replacement of millions of cubic meters of soil from seabed in the Black Sea and the Sea of Azov, were conducted with no environmental impact assessment or any considerations of this sort.

73. This example is not standalone. In another instance, Ukraine has been building a canal trying to connect Danube and the Black Sea through the Bystroe Estuary (protected area

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[55] UNIAN, *No clean water. The problem of a Well-Watered Ukraine* (22 March 2016), available at: https://unian.net/ecology/naturalresources/1297260-bez-chistoy-vodyi-glavnaya-problema-mnogovodnoy-ukrainyi.html (**RU-577**).

[56] Ecohubmap, *Pollution of the Azov Sea, Ukraine*, available at: https://www.ecohubmap.com/hot-spot/pollution-of-the-azov-sea-ukraine/3clplklgf02m1q: '2013: Environmentalists say 1,200 industrial enterprises discharge wastewater into the Sea of Azov. The primary sources of pollution are industrial enterprises and ports of Mariupol - the Azovstal plant, named after Ilyich, the Azovmash concern. The total harmful discharges are estimated at 5 billion cubic meters annually' (**RU-578**); RT, *'An Environmental Disaster Is a Plant on the Seashore': Doctor of Science in the Field of Ecology of Metallurgy – About Azovstal* (20 May 2022), available at: https://russian rt.com/science/article/1005128-azovstal-ekologiya-katastrofa. (**RU-579**).

[57] Ministry of Ecology and Natural Resources of Ukraine, *List of 10 Facilities Which Are the Biggest Environmental Polluters at the General State Level* (5 August 2012), available at: https://archive.ph/20120805124451/www menr.gov.ua/content/article/201#selection-2213.0-2221.87 (**RU-580**); BBC News, *Ukrainian Enterprises Have Become More Polluting – Ministry of Ecology* (4 July 2017), available at: https://www.bbc.com/ukrainian/news-russian-40499604 (**RU-581**); Economic Pravda, *Who Pollutes Air and Water the Most: Top 10 Enterprises* (4 December 2018), available at: https://www.epravda.com.ua/news/2018/12/4/643250/ (**RU-582**);

[58] UKMC Center, *In 5 Industrial Cities of Ukraine, the Level of Environmental Pollution Is Several Times Higher Than the International Recommended Norms – Research* (11 December 2018), available at: https://uacrisis.org/uk/70102-industrial-emissions-in-5-ukrainian-cities (**RU-583**).

[59] Second Expert Report of [redacted], 7 December 2023, ¶¶97-100.

of the Danube Biosphere Reserve).[60] Despite Ukraine being found in breach of the Espoo Convention, in 15 years it did not conduct an EIA, nor did it suspend its works; instead, it doubled down on dredging, harming the flora and fauna of the Danube River. Therefore, Ukraine's attempts to present itself as caring for the environment of the region are cynical and laughable.

74. In addition, Ukraine makes all sorts of accusations against the Russian Federation relating to 'aggression'. However, it was Ukraine that went on to attack the Kerch Strait Bridge, a civilian object, and has done so on multiple occasions. While most of these attempts have failed, as they were deflected and prevented by the Russian armed forces, a few eventually succeeded. Ukraine took responsibility for the attacks and promised to continue them, which naturally goes against its position in this case.[61]

75. On 8 October 2022, Ukraine attacked the Kerch Strait Bridge for the first time. As a result of the explosion, two car spans were destroyed, and a nearby train with oil tanks caught fire.[62] The attack also led to loss of civilian human life, including a federal judge from Moscow and a family going to Crimea for vacation.[63]

76. Ukraine's attack caused an oil fire,[64] which, according to studies, creates a significant environmental and health hazard:

> Oil fires release harmful substances into the air – sulfur dioxide, nitrogen dioxide, carbon monoxide, polycyclic aromatic hydrocarbons, and lead. These can be transported over a large area before deposition in soils and cause

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[60] See Environment, Law, People, *War is Not the Reason to Violate the Espoo Convention and Destroy the Environment* (6 April 2023), available at: http://epl.org.ua/announces/vijna-ne-pryvid-porushuvaty-konventsiyu-espo-ta-nyshhyty-dovkillya/. (**RU-584**).

[61] CNN, *Ukraine Claims Responsibility for New Attack on Key Crimea Bridge* (17 July 2023), available at: https://edition.cnn.com/2023/07/16/europe/russia-crimea-bridge-intl-hnk/index.html (**RU-585**); Reuters, *Ukraine's SBU Claims Responsibility for Last Year's Crimea Bridge Blast* (26 July 2023), available at: https://www.reuters.com/world/europe/ukraines-sbu-claims-responsibility-last-years-crimea-bridge-blast-2023-07-26/ (**RU-586**); Ukrainska Pravda, *Ukraine's Defence Intelligence Chief On Recent Explosions Near Crimean Bridge: There Was Another Target* (24 August 2023), available at: https://www.pravda.com.ua/eng/news/2023/08/24/7416928/ (**RU-587**).

[62] Kommersant, *The Ministry of Emergency Situations Reported Seven Burnt Tanks in the Train on the Crimean Bridge* (8 October 2022), available at: https://www kommersant.ru/doc/5606230 (**RU-588**).

[63] RIA, *The Number of Dead at the Crimean Bridge Rises to Four* (11 October 2022), available at: https://ria.ru/20221011/terak-1823210039.html (**RU-589**).

[64] AlJazeera, *Traffic Resumes on Crimea Bridge, Probe Into Blast Under Way* (9 October 2022), available at: https://www.aljazeera.com/news/2022/10/9/crimea-bridge-resumes-traffic-after-blast: 'The 19km (12-mile) Kerch bridge was hit by a blast around dawn on Saturday, killing three people, setting several oil tankers ablaze and collapsing two car lanes, Russian investigators said' (**RU-590**).

> severe short-term health effects for people and wildlife, especially people with pre-existing respiratory problems.[65]

77. On 17 July 2023, Ukraine attacked the Kerch Strait Bridge for a second time, once again causing damage to it,[66] and creating a great peril to the environment surrounding the Bridge.

78. On 5 August 2023, Ukraine attacked the SIG oil tanker 32 nautical miles away from the Kerch Strait. While, luckily, no actual damage to the environment ensued, the risk caused by this attack was immense.[67] The damage to the environment that could have been caused by the attack exceeded any hypothetical and imaginary damage that Ukraine has accused the Russian Federation of during this Arbitration.

79. On 25 November 2023, Ukraine's Security Service (SBU) has once again issued a statement threatening to destroy the Bridge. Its Head, Vasily Malyuk has stated as follows: 'There will be many surprises in the future. And not only regarding the Crimean bridge. *The bridge is doomed'*.[68] [*Emphasis* added].

80. Similarly, Ukraine has launched numerous military attacks at the JDRs in question, resulting civilian casualties.[69]

81. Therefore, Ukraine's claims are nothing but blatant hypocrisy. Ukraine does not care for Crimeans or their safety. It has never cared for and continues to disregard the marine environment or underwater cultural heritage. Instead, it uses these issues and good causes in order to drag the Russian Federation to courts and arbitral tribunals and use them to try to have Ukraine's sovereignty claims heard while hidden behind them. This is a textbook

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[65] New Security Beat, *Fire and Oil: The Collateral Environmental Damage of Airstrikes on ISIS Oil Facilities* (13 January 2016), available at https://www.newsecuritybeat.org/2016/01/fire-oil-collateral-damage-airstrikes-isis-oil-facilities/#:~:text=Oil%20fires%20release%20harmful%20substances,polycyclic%20aromatic%20hydrocarbons%2C%20and%20lead (**RU-591**)

[66] AP News, *Key Russian Bridge to Crimea is Struck Again as Putin Vows Response to Attack that Killed 2* (17 July 2023), available at: https://apnews.com/article/crimea-bridge-russia-explosions-eafa1696fc5f2377cb83ac4b317c5386 (**RU-592**).

[67] Vzglyad, *Ukraine Resorts to Environmental Terrorism in the Black Sea* (5 August 2023), available at: https://vz.ru/society/2023/8/5/1224454.html (**RU-593**).

[68] Telegram, Security Service of Ukraine, *The Crimean Bridge is Doomed – Head of SBU Vasily Malyuk* (25 November 2023), available at: https://t me/SBUkr/10469 (**RU-594**).

[69] *Rg.ru*, Yet Another Attack by Ukraine Against Chernomorneftegaz, 26 June 2022 (**RU-398**); *Crimea.ria.ru*, Senator Kovitidi: The Attack of the Armed Forces of Ukraine against Chernomorneftegaz Could Have Been Catastrophic for Odessa, 20 June 2022 (**RU-399**).

example of manipulation and abuse of the dispute resolution system. Therefore, the Russian Federation maintains that Ukraine's case should be treated with great caution and, ultimately, should be dismissed in its entirety.

II. THE DISPUTE CONCERNS THE SEA OF AZOV AND KERCH STRAIT AS HISTORIC OR ALTERNATIVELY, INTERNAL WATERS, AND FALLS OUTSIDE THE ARBITRAL TRIBUNAL'S JURISDICTION

82. It is the position of the Russian Federation that the present dispute, as presented by Ukraine, concerns the Sea of Azov and the Kerch Strait, which have long been internal waters on the basis of a historic title, uninterrupted by the declaration of independence of Ukraine in 1991, and that the Arbitral Tribunal lacks jurisdiction over Ukraine's claims relating to these two bodies of water.

83. This section deals with the status of the Sea of Azov and the Kerch Strait as internal waters. As explained in the Counter-Memorial,[70] such status is based on two grounds. First, the two bodies of water had been internal waters prior to the independence of Ukraine in 1991, by virtue of a historic title. This title remained valid when this arbitration was initiated in 2016. Second, and alternatively, the two areas of sea have since 1856, at the latest, been the internal waters of the Russian Empire and later the USSR, and this status had continued until 1991. During the post-1991 era, absent any modification by agreement between the Russian Federation and Ukraine, the internal waters status of the Sea of Azov and the Kerch Strait has not changed.

84. Two major legal consequences flow from the above. First, since the dispute involves a historic title, the Arbitral Tribunal lacks jurisdiction over Ukraine's claims pursuant to the declarations filed by both Parties in accordance with Article 298(1) of UNCLOS.

85. Second, the fact that the Sea of Azov and the Kerch Strait comprise internal waters entails that Ukraine's claims that allege violations of UNCLOS within the Sea of Azov and the Kerch Strait cannot be upheld as the Convention does not regulate substantive rights or obligations within internal waters, except in very limited situations.

A. A DISPUTE INVOLVING HISTORIC BAYS OR TITLES FALLS OUTSIDE THE ARBITRAL TRIBUNAL'S JURISDICTION

86. Article 298(1)(a) of UNCLOS provides that:

> When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under

[70] Counter-Memorial, Chapter 2.

> section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
>
> (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or *those involving historic bays or titles*… [*Emphasis* added]

87. As noted in the Counter-Memorial,[71] the Russian Federation made a declaration under this provision on 12 March 1997 upon ratification of UNCLOS, and Ukraine submitted a similar declaration on 26 July 1999. [72]

88. It is beyond doubt that any dispute involving historic bays or historic titles is excluded from the jurisdiction of the dispute settlement mechanisms envisaged under Section II of Part XV of UNCLOS, where a State party to the Convention has filed a valid declaration pursuant to Article 298, as the Russian Federation and Ukraine both did.

89. Article 298(1)(a)(i) does not specify whether, for a dispute to be deemed as 'involving' historic bays or titles, it must first be established that such bays or titles *actually* exist. In the present dispute, the Parties have had a disagreement as to the existence of such a bay or title since the initiation of this arbitration in 2016. The Arbitral Tribunal has attached great importance to this issue by including it as part of the merits of the case.[73] The preliminary question is therefore whether the Arbitral Tribunal should proceed with an examination of the existence *vel non* of a historic bay or title, consistent with the terms of Article 298(1)(a)(i).

90. In the *South China Sea* arbitration, the tribunal affirmed its jurisdiction on the basis that, on a general reading of the meaning of the term 'historic title', China had not claimed such a title in that case.[74] The tribunal decided, therefore, that China's declaration filed under Article 298 was inapplicable. In contrast, the Russian Federation and previously the Russian Empire and the USSR have clearly and consistently claimed a historic title with respect to the Sea of Azov and the Kerch Strait, treating them as a 'historic bay' or

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[71] Counter-Memorial, Section 2.I.

[72] United Nations, Multilateral Treaties Deposited with the Secretary- General, Chapter XXI, No. 6 (**UA-8**).

[73] 2020 Award, ¶¶292-293.

[74] *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award of 12 July 2016, PCA Case No. 2013-19, p. 96, ¶225 ('"Historic title"… is used specifically to refer to historic sovereignty to land or maritime areas'), and p. 97, ¶229 ('China does not claim historic title to the waters of South China Sea, but rather a constellation of historic rights short of title') (**UAL-11**).

'historically internal waters' since 1856.[75] This is confirmed by the UN Secretariat's *Memorandum on Historic Bays* which points to the Sea of Azov as the first example of State practice in this regard.[76]

91. The phrase 'involving historic bays or historic titles', as contained in Article 298(1)(a)(i), is thus open to be construed as having two ordinary meanings: that it pertains to disputes over the *existence* of a historic bay or historic title, or that it signifies disputes that involve recognised historic bays or historic titles.

92. Surely, in terms of the first meaning as aforementioned, the present case undoubtedly *involves* a historic bay or title[77] -- as will be shown below -- which has been claimed openly, historically, and peacefully by the Russian Empire and the USSR in earlier times, and now by the Russian Federation, -- and even by Ukraine, despite its attempts to distance itself from this position in this Arbitration. The fact that, throughout their written pleadings, both Parties have disagreed as to the existence of a historic bay or title shows that they both have regarded it as one of the main issues of the present arbitration.

93. In terms of the second meaning as aforementioned, the Russian Federation will show below that the Sea of Azov, together with the Kerch Strait as its entrance, has been recognised as a historic bay. Notably, both Parties explicitly recognised the fact of historic waters comprising the Sea of Azov and the Kerch Strait under the 2003 Azov/Kerch Cooperation Treaty.

94. It follows that the Russian and Ukrainian declarations under Article 298 (1) of UNCLOS are applicable in the present case, and that the Arbitral Tribunal's jurisdiction over this case is excluded.

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[75] Preliminary Objections, ¶¶99, 102.

[76] Secretariat of the United Nations, Memorandum, Historic Bays, UN 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, ¶12 (**RU-5**; **UA-547**).

[77] Oxford Advanced Learner's Dictionary, *Entry 'involve'*: 'The ordinary meaning of 'involve' is 'if a situation, an event or an activity involves something, that thing is an important or necessary part or result of it" or "affected by it'. available at:https://www.oxfordlearnersdictionaries.com/definition/english/involve?q=involve (**RU-595**).

B. THE SEA OF AZOV AND THE KERCH STRAIT HAVE BEEN HISTORIC WATERS BY REASON OF A VALID HISTORIC TITLE

95. While the point of historic title has been argued extensively in the present proceedings by the Russian Federation,[78] as well as by Ukraine,[79] it still remains to refute the arguments of Ukraine's Reply and to highlight certain points and evidence in support of the historic title relied on by the Russian Federation.

96. In its Reply, Ukraine challenges the Russian Federation's historic title over the Sea of Azov and the Kerch Strait on four grounds. Ukraine asserts that, first, the Sea of Azov had qualified as a juridical bay under customary international law before 1958;[80] second, third States have objected to the Russian position that the Sea of Azov and the Kerch Strait are 'historic internal waters';[81] third, the Parties to the present case have allegedly never agreed to a historic title over the Sea of Azov and the Kerch Strait;[82] and fourth, Ukraine has not recognised the Sea of Azov as a historic bay.[83]

97. Before addressing these arguments, it may be useful to set out a few parameters for this discussion of historic title, chiefly derived from the leading precedent in this regard: the ICJ Chamber's judgment in *Land, Island and Maritime Frontier Dispute*, delivered in 1992,[84] concerning the Gulf of Fonseca.

98. The ICJ Chamber's analysis echoed the existing doctrines and practice, as it stated:

> An historic bay has a history which, in the words used in the 1982 Judgment of the International Court of Justice… is determinative of the 'particular régime' which applies to this 'concrete, recognized' case of 'historic waters' or 'historic bays'.[85]

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[78] Preliminary Objections, Section 3.I; Counter-Memorial, Section 2.I.

[79] Ukraine's Written Observations, ¶¶61, 94-96, 99-100; Ukraine's Rejoinder, ¶¶64-68, 96-97; Ukraine's Revised Memorial ¶¶67, 80, 93-96, 120-126.

[80] Ukraine's Reply, ¶17.

[81] *Ibid*., ¶¶22-23.

[82] *Ibid*., ¶¶24-35.

[83] *Ibid*., ¶36.

[84] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, Judgment of 11 September 1992, ICJ Reports (1992) 351 (**RUL-19**).

[85] *Ibid*., ¶387 (referring to the ICJ judgment in *Continental Shelf (Tunisia v Libya)*, 24 February 1982, ICJ Reports (1982)) 18, ¶100.

99. A historic title is a product of history, which, manifested in a form recognised by international law, creates a special legal regime in an area of the sea. In this case, the Chamber made two notable and important findings. First, it clarified that a historic title is established if two conditions are fulfilled: one being actual possession, accompanied by the intention to possess, of an area of the sea; the other, acquiescence on the part of third States.[86]

100. Second, the historic title in the Gulf of Fonseca had been established when the Central American countries concerned, that is, El Salvador, Honduras, and Nicaragua, became independent in 1821, which were initially combined in a Federal Republic of Central America and later, in 1839, split into three independent countries. That title consisted of peaceful possession of the Gulf of Fonseca by the former, single riparian State, Spain, to whose sovereignty--based on the historic title--the three new republics succeeded in 1821.[87]

101. The ICJ Chamber observed that the Central American Court of Justice had in mind:

> …the existence of a joint sovereignty arising as a juridical consequence of the succession of 1821. A State succession is one of the ways in which territorial sovereignty passes from one State to another; and there seems no reason in principle why a succession should not create a joint sovereignty where a single and undivided maritime area passes to two or more new States.[88]

102. What happened in 1821 was therefore a succession to sovereignty by the successor States. It goes without saying that, as far as the legal regime of historic title was concerned, the ICJ Chamber followed the 1917 judgment of the Central American Court of Justice.[89]

103. The Russian Federation will therefore deal with Ukraine's arguments on the basis of the ICJ Chamber's findings noted above, together with other precedents and literature.

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[86] *Ibid*., ¶385: '…the Spanish Crown thereafter claimed and exercised continuous and peaceful sovereignty over the waters of the Gulf, without serious or more than temporary contestation, until the three present riparian States gained their independence in 1821. For the greater part of its long, known history, therefore, the Gulf was a single-State bay, the water of which were under the single sway of the Spanish Crown'), *see* also *ibid*., ¶394.

[87] *Ibid.*

[88] *Ibid*., ¶399.

[89] *Ibid*., ¶404: 'The opinion of the Chamber on the particular régime of the historic waters of the Gulf parallels the opinion expressed in the 1917 Judgement of the Central American Court of Justice.'

i. The Historic Title Had Been Established by 1958

104. As explained in the Counter-Memorial, the status of the Sea of Azov and the Kerch Strait as internal waters rests on a historic title, which means that the two areas of sea may be regarded as historic waters. The two terms, both having been used in a similar manner in practice and literature,[90] are used interchangeably in this Rejoinder. The notion of a historic bay is also taken into account, but not singled out in the following narrative, simply because it signifies a form of historic water. The historic title relevant to this Arbitration had been established well before 1991 when the USSR dissolved.

105. The Russian claim to a historic title over the Sea of Azov was known to the world since, at the latest, September 1957, when the UN Secretariat released its memorandum on historic bays as part of the official record of the first UN Conference on the Law of the Sea.[91] The Sea of Azov was listed as the first example of historic bays in the document.[92]

106. The Sea of Azov was declared as part of the internal waters of the USSR in 1925, 1928 and 1935 by domestic legislation, which did not give rise to any protest from third States.[93] Ukraine does not dispute this. What should be emphasised is the fact that Act No. 431 of 1928 and Order of the Council No. 2157 of 1935 were both included in the well-known *UN Legislative Series*, *Laws and Regulations on the Regime of the High Seas*, published by the UN in 1951.[94] Both pieces of legislation treated the Sea of Azov as

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[90] *Fisheries Case (UK v Norway)*, ICJ, Judgment of 18 December 1951 (**UAL-124**), 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'). *See* Y. Blum, HISTORIC TITLE IN INTERNATIONAL LAW, (Nijhoff ,1965), p. 247 (**RUL-137**).

[91] Secretariat of the United Nations, Memorandum, Historic Bays, UN Doc. A/CONF.13/1, in Official Records of the United Nations Conference on the Law of the Sea, Vol. I (Preparatory Documents), 30 September 1957 (**RU-5**), *see* also M. Strohl, THE INTERNATIONAL LAW OF BAYS (Nijhoff, 1963), p. 267 referring to the textbook of international law published in 1957 by the Institute of Law of the Academy of Sciences of the USSR which claimed the Sea of Azov, among others, as internal waters (**RUL-138**).

[92] Secretariat of the United Nations, Memorandum, Historic Bays, UN Doc. A/CONF.13/1, in Official Records of the United Nations Conference on the Law of the Sea, Vol. I (Preparatory Documents), 30 September 1957, ¶12 (**RU-5**).

[93] Preliminary Objections, ¶¶73-74, *see* also Order of the Revolutionary Military Council of the USSR No. 641, General instructions for interaction of the USSR authorities with foreign military and merchant ships at peacetime, 22 June 1925, Article 2 (**RU-2**).

[94] *Ibid., see* also Act No. 431 concerning the use of radio equipment for foreign vessels within the territorial waters of the Union, 24 July 1928, Articles 1 and 3, UN Legislative Series, Laws and Regulations on the Regime of the High Seas, Vol. I, United Nations, 1951, p. 121 (**RU-3**); Order of the Council of People's Commissars, No. 2157, for the regulation of fishing and the conservation of fisheries resources, 25 September 1935, Article 2 and Schedule I, UN Legislative Series, Laws and Regulations on the Regime of the High Seas, Vol. I, United Nations, 1951, p. 124 (**RU-4**).

internal waters. Thus, the absence of objection from third States and the regulation of the Sea of Azov and the Kerch Strait by the Soviet Union, and later by the Russian Federation and Ukraine as internal waters constituted acquiescence in the Russian Federation's historical title to these bodies of water. This leaves no doubt that the Russian claim to historic title could at least be dated back to 1951. But the starting date of that claim can be pushed to 1856, as will be explained below.

107. When de Cussy published his works in 1856, he considered the Sea of Azov to be among a category of gulfs and straits which 'may be regarded as part of the territorial sea', with the term 'territorial sea' understood as internal waters.[95] All gulfs and straits referred to by de Cussy related to existing State practice at the time, and therefore were not discussed by him as a matter of *de lege ferenda*. Jessup also understood de Cussy's statement in this sense.[96] He listed the Sea of Azov as an example of a historic bay, among a list of areas of sea which he considered 'part of the national territory', adding that:

> It is believed that it will appear from a study of this material that no established rule of international law exists as to bays except to the effect that bays not more than six miles wide are deemed territorial waters as well as those to which a nation has established a prescriptive claim.[97]

108. Two points arise from his statement, which he supported by a lengthy analysis of many bay-like features and writings.[98] On the one hand, Jessup's monograph was published in 1927 and found that the law of bays was unsettled except for two trends.[99] There was therefore no regime for juridical bays at the time.[100] This inference is bolstered by the silence of third States that did not object to the Soviet legislations of 1925, 1928, and

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[95] Secretariat of the United Nations, Memorandum, Historic Bays, UN 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 (**RU-5**; **UA-547**), note 4, ¶¶98, 101 (correcting such as de Cussy's loose use of the term 'territorial sea'); *see* also Baron Ferdinand De Cussy, *Phases et causes célèbres du droit maritime des Nations, Vol. I, F.A. Brockhaus*, 1856 (**RUL-1**), *see* also *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, Judgment of 11 September 1992, *ICJ Reports* (1992) 351, ¶392 (**RUL-19**).

[96] P. Jessup, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION, (G. A. Jennings Co., 1927), p. 383 (**RUL-139**).

[97] *Ibid*., p. 382.

[98] *Ibid*., pp. 383-439.

[99] *Ibid*., p. 382: 'it will appear from a study of this material that *no established rule of international law exists as to bays* except to the effect that bays not more than six miles wide are deemed territorial waters as well as those to which a nation has established a prescriptive claim.' [*emphasis* added] (**RUL-139**).

[100] R. Churchill, V. Lowe, THE LAW OF THE SEA (3rd ed., Manchester University Press, 1999), p. 41 (referring to the Award in the *North Atlantic Coast Fisheries*, of 7 September 1910, in: *Reports of International Arbitral Awards*, Vol. XI, pp. 167, 196, 197, 205) (**UAL-62**).

1935, as mentioned above. It is also vindicated by the result of the 1930 Hague Codification Conference, which reached no agreement on the issue of bays, especially the definition of a bay.[101] All this directly contradicts Ukraine's argument in its Reply that 'the customary international law of juridical bays pre-dates the 1958 Convention by centuries'.[102]

109. On the other hand, Jessup specifically referred the Sea of Azov and agreed with de Cussy's early pronouncement, and he saw no problem with the Sea of Azov being considered as internal waters.[103] Between the two writers' works lay a 70-year interval, during which there had been no challenge to de Cussy's view on the legal status of the Sea of Azov.[104] Nor had there been any disruption of the continuity in practice that would have merited the attention of such an authority as Jessup. The UN Secretariat, moreover, confirmed all this in the 1957 memorandum, so that another thirty peaceful years — as far as the legal status of the Sea of Azov and the Kerch Strait was concerned — had gone by since the publication of Jessup's monograph. It is difficult not to see this century of peaceful possession of the Sea of Azov and the Kerch Strait by the single coastal State, without challenge or protest from other governments, as more than sufficient to establish a historic title. In comparison, when the Norwegian system of straight baselines was accepted by the ICJ as 'a constant and *sufficiently long* practice' [*emphasis* added], the underlying practice was one that spanned between 1869 and 1935, only some 65 years apart.[105]

110. Furthermore, by 1958, when the Convention on the Territorial Sea and the Contiguous Zone was concluded (the '1958 Geneva Convention'), there had been no protest concerning the legal status of the Sea of Azov and the Kerch Strait, the UN Secretariat's

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[101] M. Strohl, THE INTERNATIONAL LAW OF BAYS, (Nijhoff, 1963), pp. 207-211 (**RUL-138**).

[102] Ukraine's Reply, ¶18.

[103] P. Jessup, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION, (G. A. Jennings Co., 1927), p. 383 (**RUL-139**).

[104] F. Martens, CONTEMPORARY INTERNATIONAL LAW OF CIVILIZED NATIONS (4th ed., St. Petersburg, 1898), Vol. I, pp. 380-381 (**RUL-596**):'the Sea of Azov, though connected with the Black Sea and the Mediterranean Sea, is rather a closed sea than a free one: firstly, its connection with the ocean is very remote; secondly, it is not only surrounded on all sides by Russian possessions, but its entrance is protected by Russian cannons; and finally and thirdly, given its size it should be considered a bay, not a sea'.

[105] *Fisheries Case (UK v Norway)*, ICJ, Judgment of 18 December 1951, p. 138 (**UAL-124**): 'the Court is bound to hold that the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose', *see* also, *ibid*., p. 139.

memorandum on historic bays notwithstanding. It is reasonable to argue that by then at the latest, the USSR's historic title had been established.[106]

111. The USSR ratified the 1958 Geneva Convention on 22 November 1960, but three months earlier, it enacted a domestic law to draw a closing line for the Kerch Strait and the Sea of Azov, enclosing them as internal waters, with reference to historical possession.[107] This shows the complementarity between the historic title and the conventional regime of juridical bays. Furthermore, Declaration 4450 of 25 January 1985, whereby a closing line was drawn to enclose the Kerch Strait within internal waters, was added to the repertory of practice by the USSR in maintaining the historic title.[108] There is no evidence that this legislation has incurred protests or objections from other countries.

112. That the Sea of Azov fell under two regimes of international law — the 1958 Geneva Convention's rules regarding juridical bays and the customary rules relating to historic title — is entirely normal, and there has not been a conflict between them since 1960. Exactly on this point, the ICJ Chamber stated in 1992:

> 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 an 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).[109]

113. Ukraine's interpretation of this passage is erroneous.[110] The judgment confirms that the Gulf of Fonseca has retained its historic title succeeded to by the riparian States since 1821, and that the title has survived both the 1958 Geneva Convention and UNCLOS.[111]

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[106] Counter-Memorial, ¶39.

[107] Preliminary Objections, ¶¶77-78; Statute on the Protection of the State Border of the Union of SSR, approved by the Presidium of the Supreme Soviet of the USSR, 5 August 1960 (**RU-6**). Article 4(c) of the 1960 law included as USSR internal waters 'bays…and straits, historically belonging to USSR'.

[108] Declaration of the USSR 4450 containing list of geographical coordinates defining the position of the baselines, 25 January 1985 (**RU-12)**.

[109] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, Judgment of 11 September 1992, ICJ Reports (1992) 351, ¶393 (**RUL-19**).

[110] Ukraine's Reply, ¶15.

[111] Article 7 of the 1958 Geneva Convention and Article 10 of UNCLOS, both on juridical bays, do not apply to historic bays.

114. The parallelism between the Soviet title and the 1958 Geneva Convention is also proved by the fact that, even if Declaration 4450 drew a closing line across the entrance to the Sea of Azov, i.e. the Kerch Strait, the Declaration did not rely on either the 1958 Geneva Convention or the nascent UNCLOS as a legal basis.[112]

115. In sum, it is clear that a historic title does not necessarily cease to exist, even when a historic bay meets the conventional requirements of a juridical bay. This is also the case with the Sea of Azov and the Kerch Strait.

ii. <u>Third States' reaction to the status of the Sea of Azov as referred to by Ukraine</u>

116. As noted above, the ICJ Chamber regarded the reaction of third States as one of the criteria for the existence of a historic title. In its Reply, Ukraine has taken issue with the Russian Federation's view that no third States have objected to the legal status of the Sea of Azov and the Kerch Strait as historic waters.[113] In Ukraine's submission, third States as well as the European Union, have all criticised that position.[114]

117. The problem with Ukraine's argument is that the examples of criticism it relies upon all occurred in or after 2018,[115] post-dating even the commencement of the present proceedings, whereas the Russian position is set forth in an analysis of the historic title that has, *prior to* the 2003 Azov/Kerch Cooperation Treaty, existed for more than a century.[116]

118. In order to prevent historic title from arising, third States must protest the assertion of sovereignty by the coastal State. Acquiescence has therefore been described as the '*inaction* of a state which is faced with a situation constituting *a threat to or infringement of its rights*'[117] [*emphasis* added]. Indeed, in the *Fisheries Case*, the ICJ specifically referred to 'general toleration of foreign States with regard to the Norwegian practice' for

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[112] Declaration of the USSR 4450 containing list of geographical coordinates defining the position of the baselines, 25 January 1985 (**RU-12**).

[113] Counter-Memorial, ¶43; Ukraine's Reply, ¶¶22-23.

[114] Ukraine's Reply, ¶22.

[115] *Ibid*., *see* also Ukraine's Revised Memorial, ¶¶88-90.

[116] Counter-Memorial, ¶¶40-43.

[117] I. MacGibbon, The Scope of Acquiescence in International Law, *British Yearbook of International Law*, 1954, Vol. 31, p. 143 (**RUL-140**).

the delimitation of fisheries in the North Sea and the United Kingdom's failure to contest that practice 'for a period of more than sixty years' gave rise to an historic right to apply the Norwegian system.[118] In the present case, no evidence has been adduced by Ukraine of any objections from third States pre-dating 2018. It is plainly wrong for Ukraine to rely on the third States' complaints in 2018 to support the alleged 'interference with third-State navigational rights', which was obviously too late to oppose the historic title that had existed for more than a century.

119. The other problem with Ukraine's reliance on the 2018 objections is that it is based on a flawed understanding of the other criterion for a historic title, namely, the exercise of authority over the body of water in question. As discussed above, the ICJ Chamber made clear that the creation of a historic title requires that the State 'exercised continuous and peaceful sovereignty over the waters',[119] meaning that 'in the area and with respect to the area the State carried on activities which pertain to the sovereign of the area'.[120] The UN Secretariat's study lists, with reference to State practice and case law, examples 'to illustrate the kind of acts by which the authority required as a basis for the claim might be established', such as legislation, administrative measures and the like.[121] In this case, Ukraine refers to protestations against alleged interference with third-State navigational rights,[122] but it is by far not the applicable test for what is required of an assertion of sovereignty for an historic title to arise.[123]

120. In any event, Ukraine's alleged 'numerous' examples of third States allegedly protesting the status of the Sea of Azov are not helpful to its position, because the statements it has

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[118] *Fisheries Case (United Kingdom v. Norway)*, ICJ, Judgment of 18 December 1951, pp. 138-139 (**UAL-124**).

[119] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, Judgment of 11 September 1992, ICJ Reports (1992) 351, ¶385 (**RUL-19**).

[120] 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, ¶88 (**UA-591**).

[121] *Ibid*., pp. 21-22, ¶¶88-97 (**UA-591**).

[122] Ukraine's Reply, ¶88-90.

[123] 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, ¶89, as Gidel aptly noted: 'It is hard to specify categorically what kind of appropriation constitute sufficient evidence: the exclusion from these areas of foreign vessels or their subjection to rules imposed by the coastal State which exceed the normal scope of regulations made in the interests of navigation would obviously be acts affording convincing evidence of the State's intent. *It would, however, be too strict to insist that only such acts constitute evidence*' [*emphasis* added] (**UA-591**).

cited are silent on the issue of the status of this body of water.[124] The European Parliament in its resolution of 25 October 2018 on the situation in the Sea of Azov (2018/2870(RSP)) actually stated that 'the situation in the Sea of Azov was addressed by the bilateral agreement of 2003 between Ukraine and Russia, which defines these territories as internal waters of the two states'[125], thus, confirming, rather than questioning its legal status as argued by the Russian Federation.

iii. The Parties Endorsed the Historic Waters Status by the 2003 Treaty

121. Ukraine's argument in regard to the Parties' positions on the existence of the historic title is focused on the Azov/Kerch Cooperation Treaty. Importantly, there is no disagreement between the Parties that the Azov/Kerch Cooperation Treaty was, at all relevant times, a legally binding instrument between them. They disagree on the interpretation of that treaty, in particular its Articles 1 and 2.

122. Ukraine argues that the wording of the first sentence of Article 1 of the Azov/Kerch Cooperation Treaty 'records a historical fact as to their [the Sea of Azov and the Kerch Strait] past status',[126] that the treaty was 'framed in general terms', thus being 'a framework',[127] 'with limited object and purpose';[128] that the Russian Federation offered 'an abstract, semantic analysis' of the treaty, while citing 'nothing in the Vienna Convention, its *travaux préparatoires*, or any other source that supports the use of linguistic experts to determine the 'ordinary meaning' of the text';[129] and that any Russian intention to deny entry into the Kerch Strait and the Sea of Azov for the vessels of third States was not reflected in the treaty.[130]

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[124] Both the EU and Turkey only urge Russia to restore 'freedom of passage', a term not found in UNCLOS. Thus, their position on the status of the Sea of Azov and the Kerch strait cannot be derived from it, *see* European Union, Statement by the Spokesperson on the Escalating Tensions in the Azov Sea (25 November 2018) (**UA-486**), *see* also European Union, Statement by the Spokesperson on the Escalating Tensions in the Azov Sea (25 November 2018) (**UA-477**); the US asks Russia to stop harassing international shipping – again a general term, not used in UNCLOS, *see* United States Department of State, Press Statement, Russia's Harassment of International Shipping Transiting the Kerch Strait and Sea of Azov (30 August 2018) (**UA-543**).

[125] United States Department of State, Press Statement, Russia's Harassment of International Shipping Transiting the Kerch Strait and Sea of Azov (30 August 2018) (**UA-544**).

[126] Ukraine's Reply, ¶¶24, 30, 31.

[127] *Ibid*., ¶32.

[128] *Ibid*., ¶26.

[129] *Ibid*., ¶¶27-28.

[130] *Ibid*., ¶¶33-35.

123. However, it is Ukraine who refuses to engage with the plain meaning of the text of the 2003 Treaty, resorting instead to farfetched semantic gymnastics. This is a straightforward case of treaty interpretation, and the relevant principles are well settled, including those envisaged by the VCLT. According to the International Law Commission, 'the starting point of [treaty] interpretation is the meaning of the text'.[131]

124. The first sentence of Article 1 of the Azov/Kerch Cooperation Treaty reads:

> The Sea of Azov and the Kerch Strait *are historically internal waters* of the Russian Federation and Ukraine[132] [*emphasis* added].

125. The translation referred to by Ukraine is to the same effect:

> The Sea of Azov and the Kerch Strait *historically constitute internal waters* of the Russian Federation and Ukraine[133] [*emphasis* added]

126. The text of the contemporaneous Joint Statement by the President of the Russian Federation and the President of Ukraine, officially communicated to and published by the United Nations, is also similar:

> …*historically* the Sea of Azov and the Strait of Kerch *are inland waters* of Ukraine and Russia…[134] [*emphasis* added].

127. It is notable that all three quoted sentences are in the present tense and clearly refer to the present status of these water bodies, as well as to the historical origin of this status. Ukraine's attempt to interpret the word 'historically' as 'record[ing] a historical fact as to the[] past status'[135] of the sea bodies in question, despite the clear use of the *present* tense in both Russian and Ukrainian versions (and in both Parties' English translations) as well as the Joint Statement, is contrary to its plain meaning. This is easily debunked by Ukraine's own official statements on the matter, such as the official statement of the then Ukrainian President Leonid Kuchma on the occasion of signing the Treaty on behalf of Ukraine:

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[131] ILC Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, Vol. II, p. 220*, see* also: *ibid.,* '[t]he jurisprudence of the International Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law' (**RUL-141**).

[132] Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, 24 December 2003 (**RU-20-AM**).

[133] Ukraine's Reply, ¶25, referring to Ukraine's translation of the 2003 Treaty (**UA-19**).

[134] Joint Statement by the President of the Russian Federation and the President of Ukraine on the Sea of Azov and the Strait of Kerch, 24 December 2003, Law of the Sea Bulletin, 2004, Vol. 54, p. 131 (**RU-21**).

[135] Ukraine's Revised Memorial, ¶110; Ukraine's Reply, ¶25.

> I am glad that today we practically did not have any diverging interpretations. And our opinion is united: that the Kerch Strait should serve equally both Ukraine and Russia. Especially, if *the Sea of Azov – this is not the first document supporting it, but it is also [supported] by the land border treaty – constitutes internal waters of the Russian Federation and Ukraine* – then, of course, the Kerch Strait should not be a bottleneck for the normal work of all parties.[136] [*Emphasis* added].

128. It is notable that, in this official statement, President Kuchma did not use the word 'historical' but simply confirmed that the Sea of Azov was, in fact, considered by both the Russian Federation and Ukraine to be internal waters at that time, referring also to the lack of 'diverging interpretations'. He also stressed the absence of any divergence of views between Ukraine and Russia on this matter.

129. Thus, the meaning of the 2003 Treaty's text is clear and well understood by both Parties to mean that the Sea of Azov and Kerch Strait were indeed internal waters, and held that status historically. Ukraine's continuous attempts to challenge this plain meaning make no sense, are clearly self-serving for the purposes of the present case, and directly contravene Ukraine's own previous position expressed by its leaders.

130. Having been established, ordinary meaning of the text of a treaty, according to Fitzmaurice, 'will not easily be displaced'; to do so, 'clear evidence' to the contrary is required.[137] Ukraine never presented such evidence.

131. As demonstrated above, the ordinary meaning of the 2003 Treaty is sufficiently clear. However, considering that the treaty in question was concluded in Russian and Ukrainian languages, assistance of professional linguists might be engaged to facilitate the work of the Members of the Tribunal.[138] Ukraine itself has introduced an expert report by its an expert in linguistics, [redacted].[139]

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[136] Ukrainska Pravda, *How Kuchma gave up the Kerch Strait and the Sea of Azov. Transcript of the Press-Conferenc*e (24 December 2003), available at: https://www.pravda.com.ua/rus/news/2003/12/24/4376146 (**RU-564**).

[137] Fitzmaurice thus concluded on the question of ordinary meaning: 'while the natural and ordinary meaning, when leading to a reasonable result, will not easily be displaced, the concept is nevertheless not a rigid or absolute one, to be followed even in the case of clear evidence that it does not represent the real meaning': G. Fitzmaurice, The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points, *British Yearbook of International Law*, 1957, Vol. 33, p. 10 (**RUL-142**).

[138] *Ibid*., p. 9: 'The terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of *current linguistic usage*, at the time when the treaty was originally concluded.' [*Emphasis* added]

[139] Expert Report of [redacted] dated 23 March 2023 ('[redacted] Report').

132. Expert evidence on this matter is intended to emphasize three points. First, the text of the first sentence of Article 1 of the Azov/Kerch Cooperation Treaty mentions both the Russian Federation and Ukraine. It shows rather clearly that they both agreed on the status of historic internal waters for the Sea of Azov and the Kerch Strait in 2003. The treaty provided for a *condominium* for the time being, without leaving any part of the two areas of sea outside the scope of this status. If Ukraine truly felt strongly about this arrangement as something against its interest in having a territorial sea and an exclusive economic zone ('EEZ') under UNCLOS, it would have altered the wording of the first sentence of Article 1, or continued to negotiate, or walked away from the 2003 Treaty. It did none of these things in 2003. It is therefore untenable to suggest today that the treaty was 'intended to preserve each party's respective position for further negotiations' – an assertion which Ukraine has not provided.[140]

133. [redacted] explained in her first report the meanings of the adverb 'historically' used in Article 1 and concluded that it cannot *per se* indicate that the described status existed only in the past, as Ukraine argues.[141] In her second report, [redacted] maintains her conclusions in the first report that the adverb 'historically' cannot *per se* indicate that the described status existed only in the past and as the verb 'are'/'constitute' ('*являются*' in Russian and 'є' in Ukrainian) are used in the *present* tense.[142] As [redacted] explains, on the verb has the function of describing the time, while the adverb 'historically' in this case provides the context in 'help[ing] to clarify the state expressed by the verb '.[143] She uses an example: 'Historically African countries *were* colonies', which describes the situation in the past by the use of the verb in the past tense. [144] The contrary, as suggested by [redacted], leads to an absurd result that, had the verbs been used in the *past* tense, the meaning of the sentence would have been the same.

134. [redacted] provides several other examples showing that the word 'historically' ('*исторически*' in Russian) in fact indicates a connection of the present with history and historical basis, but the emphasis is on the present and when combined with a verb in the

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[140] Ukraine's Reply, ¶26.

[141] Expert Report of [redacted] dated 22 August 2022 ('First [redacted] Report'), ¶¶27-32.

[142] Second Report of [redacted] dated 7 December 2023 ('Second [redacted] Report'), ¶4(a).

[143] Second [redacted] Report, ¶61; [redacted] Report, ¶46.

[144] Second [redacted] Report, ¶61.

present tense, such as 'are'/'constitute', it speaks of the current state of affairs.[145] Dr [redacted] concludes that 'central to the interpretation of the phrase [in question] is the predicate, the main part of which, the verb, is in the present tense and cannot describe the state of affairs in the past. The word 'historically' shows the connection of the present with the past, but the emphasis is on the present'.[146]

135. Ukraine criticises [redacted] first report for providing a 'semantic analysis' of the 2003 Treaty, which is allegedly inconsistent with Article 31 of the VCLT.[147] However, [redacted] explains in her second expert report that she applied 'classical methods' of linguistic analysis that consist in establishing 'the actual meaning of each word/word combination' on the basis of 'explanatory dictionaries and taking into consideration the context'.[148] This is precisely what Article 31(1) of the VCLT requires. On the contrary, it is Ukraine's expert [redacted] who engages in a truly 'semantic analysis' by employing sophisticated and controversial methods from formal logic, namely, the 'theory of scope' and 'truth-conditional semantics approach', without even establishing the ordinary meaning of words.[149] For this reason alone, [redacted] evidence is unhelpful for the treaty interpretation purposes and should be disregarded.

136. Moreover, As [redacted] explains, [redacted] wrongly applies even the inapposite methods he has chosen. In particular, he wrongly applies the 'theory of scope' as he does so without establishing the meaning of the words used in the sentence that he believes to be the right ones,[150] while at the same time disagreeing with [redacted] meanings adopted in her first report.[151] [redacted] truth-conditional semantics approach is equally flawed. This method is highly criticised in linguistics literature as it 'fails to clarify the original meaning' and 'creates a recursive system in which a sentence turns out to be an explanation of itself'.[152] Furthermore, the use of truth-conditional semantics approach advocated by [redacted] 'actually substitutes the assessment of the Arbitral

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[145] Second [redacted] Report, ¶73.

[146] Second [redacted] Report, ¶79.

[147] Ukraine's Reply, ¶27.

[148] Second [redacted] Report, ¶7.

[149] [redacted] Report, ¶¶13-14.

[150] Second [redacted] Report, ¶26.

[151] [redacted] Report, ¶29.

[152] Second [redacted] Report, ¶31.

Tribunal' with his own 'personal assessment of the truth or falsity of the sentence under examination'.[153]

137. [redacted] also utilizes the notion of a 'deep semantic structure' of the sentence to support his conclusions.[154] As [redacted] explains, one can actually deploy deep semantic structure analysis 'when there is *more* than one sentence (one surface structure) to analyse and compare' as otherwise this method 'does not clarify the meaning of the analysed sentence in any way'.[155] [*Emphasis* added]. Moreover, the sentence in question belongs to the official formal style which 'strives for maximum clarity and unambiguity' and 'the same lexical meaning is conveyed by one variant of the sentence and lexical variation is limited'.[156] All that renders [redacted] approach inappropriate.

138. Both [redacted] and Ukraine refer to the sentence: 'The waters of the Black Sea are historically/historically constitute the internal waters of Türkiye' allegedly borrowed from a Turkish historical research paper.[157] Importantly, the sentence is not in Russian or Ukrainian, and is therefore plainly inapposite.[158] Moreover, the paper referenced by Ukraine has no such sentence as cited, meaning that Ukraine has simply invented a non-existent example to substantiate artificially its erroneous interpretation of the 2003 Treaty.[159]

139. Furthermore, the Turkish paper does not concern, as Ukraine alleges,[160] the international legal status of the Black Sea at all, but only the economic and administrative effect of the Ottoman Empire's control over the sea routes to the Black Sea, namely the Bosphorus and Dardanelles Straits. The source referred to by Ukraine states that: '[t]otally isolated from international trade at the end of the 16th century, the Black Sea *became an inland sea from the economic and administrative point of view and maintained this status until*

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[153] Second [redacted] Report, ¶33.

[154] [redacted] Report, ¶29.

[155] Second [redacted] Report, ¶20.

[156] Second [redacted] Report, ¶21.

[157] Ukraine's Reply, ¶29; [redacted] Report, ¶34.

[158] Second [redacted] Report, ¶71.

[159] N. Ismail, *The Ottoman Trade in the Black Sea in the Late 18th Century*, Synergy, Vol. 7 (2011), p. 1 (**UAL-214**).

[160] Ukraine's Reply, ¶29.

the signing of the Küçük Kaynarca Treaty in 1774'[161] [*emphasis* added]. This passage highlights several key points. First, it expressly refers to the characterisation from the 'economic and administrative point of view', rather than from the standpoint of international law. Second, it stresses the occurrence in the past, by the use of the verb 'became' in the past tense and a further qualifier 'until… 1774'. By contrast, in the instant case Article 1(1) of the 2003 Treaty uses completely different language as it refers to the situation at present (through use of the verb 'constitute'/ 'are' in the present tense) and proceeds from the standpoint of international law, being a part of an international treaty.

140. It is therefore incorrect to read the word "historically" in Article 1 of the 2003 Treaty, as Ukraine's expert [redacted] does, as meaning something in the past, that 'historically they [relevant maritime areas] have been so considered' by the Parties.[162] The present tense used by the Parties in Article 1 signifies a permanent and constant fact including both the past and the present status of the Sea of Azov and the Kerch Strait. This is consistent with the Russian Federation's submission in this case that there was a succession to historic sovereignty in 1991, when the Sea of Azov and the Kerch Strait suddenly had two coastal States, between whom the sovereignty over the two bodies of sea, based on the historic title, was undivided.

141. Ukraine's interpretation of the sentence in question is easily disproved by looking at semantically analogous sentences. Numerous examples have been introduced by Dr [redacted].[163] Two other similar sentences in Ukrainian can be illustrative:

    a. 'Austria is historically a neutral country, it is not a member of NATO'.[164] This sentence clearly describes Austria's present position of being 'a neutral country' through the use of present tense ("is") and an explanatory remark about it not being a NATO member. The position is clarified through the use of the adverb 'historically' describing the link of the present position to the past.

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[161] N. Ismail, *The Ottoman Trade in the Black Sea in the Late 18th Century*, Synergy, Vol. 7 (2011), p. 1 (**UAL-214**).

[162] Ukraine's Reply, ¶29.

[163] First [redacted] Report, ¶¶53-56; Second [redacted] Report, ¶¶72-79.

[164] NRCU, *Irina Vereshchuk: The Issue of EU Council's Sanctions Against Russia Can Be Considered Resolved* (4 September 2018), available at: http://nrcu.gov.ua/news html?newsID=81272 (**RU-813**) (in Ukrainian: 'Австрія історично є нейтральною країною, вона не входить до НАТО').

b. Another example in Ukrainian is likewise illustrative: 'Foreign Minister of the People's Republic of China Qin Gang said that Taiwan is historically an integral part of China'.[165] In this sentence, the speaker clearly refers to Taiwan's *present* official status of being China's 'integral part'. This is manifested by the use of the verb in the present tense ("is"), and the adverb 'historically' qualifies this status explaining that the sovereignty bond between China and Taiwan has developed as a matter of historical process.

142. The Russian Federation's interpretation of the Azov/Kerch Cooperation Treaty is further backed up by the circumstances of its adoption..[166] The Russian Federation and Ukraine reinforced the interpretation at the highest official level by the Joint Statement dated 24 December 2003, by which the Presidents of both States specifically 'confirm[ed] their common understanding' that '*historically* the Sea of Azov and the Strait of Kerch *are inland waters* of Ukraine and Russia' [*emphasis* added].[167] The same confirmation was also found in the Ukrainian President's unambiguous official press statement in connection with the conclusion of the 2003 Treaty.[168]

143. This reflects the common understanding between the Parties that the legal regime of the Azov Sea and Kerch Strait was regulated by the 2003 Treaty, not by UNCLOS.

144. Even the view of Ukraine, that it now alleges to have held at the time of the adoption of the 2003 Treaty, that '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

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[165] Ukrinform, *China Says Taiwan Belongs to it 'Historically' - There Will be a Response to Attempts to Gain Independence* (21 April 2023), available at: https://www.ukrinform.ua/rubric-world/3698843-kitaj-zaaviv-so-tajvan-nalezit-jomu-istoricno-na-sprobi-otrimati-nezaleznist-bude-reakcia.html (**RU-814**) (in Ukrainian: 'Міністр закордонних справ КНР Цінь Ган заявив, що Тайвань історично є невід'ємною частиною Китаю').

[166] *See* also Preliminary Objections, ¶¶ 97-98; Counter-Memorial, ¶46; Ukraine's Revised Memorial, ¶¶109-112.

[167] The Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch, 24 December 2003, *Law of the Sea Bulletin*, No. 54, p.131 (**RU-21**), *see* also Working Minutes of the Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, No. 426/2dsng, 14 August 1996, ¶4: '[t]he sides … believe that the Sea of Azov and the Kerch Strait should have the status of internal waters of the Russian Federation and Ukraine'(**RU-16**).

[168] *See* Chapter I(C).

regime',[169] was duly satisfied by the provisions of Articles 1 and 2 of the treaty.[170] It is, in turn, difficult not to see a compromise, as it were, on the part of Ukraine in acceding to the wish of the Russian Federation to maintain the legal status of the Sea of Azov and the Kerch Strait as historic internal waters in accordance with the long-held tradition rooted in history, which was well known to Ukraine.

145. The first sentence of Article 1, and the Russian recognition of Ukraine's concern for delimitation in the Sea of Azov, as reflected in the second sentence of Article 1 of the 2003 Treaty, almost constitute an exchange of 'considerations' in contract law. It was unlikely that, in agreeing to the first two sentences of Article 1, Ukraine was unaware of the implications of the word 'historically',[171] after commencing negotiations with the Russian Federation in 1995,[172] and having reached agreement in as early as 2000 as to the confirmation of the historic internal waters status of the Sea of Azov and the Kerch Strait.[173]

146. Ukraine's subsequent actions further confirmed that it did not have any issue with the 2003 Treaty. If, as Ukraine now claims, there had been any divergence of views regarding its interpretation or application, Ukraine could have invoked the dispute resolution mechanism established in the 2003 Treaty's Article 4; however, it had never done so. Ukraine was also always free to denounce the 2003 Treaty. In fact, when a bill was

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[169] Ukraine's Reply, ¶26. Ukraine's present position is in fact misleading as it did not, at the time, treat the status of the Sea of Azov and the Kerch Strait as conditioned on delimitation. *See* Letter of the President of Ukraine to the President of the Russian Federation, 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: 'Ukraine agrees to the Russian Federation's proposals on *preserving* the status of internal waters for the water areas of the Sea of Azov and the Kerch Strait' but it 'the does *not* regard the status of internal waters as rendering impossible the delimitation of the territories of the two States in the Sea of Azov and the Kerch Strait'). [*Emphasis* added] (**RU-70**).

[170] The rest of the text of Article 1 reads: 'The Sea of Azov shall be delimited by the State border in accordance with the agreement between the Parties. Settlement of questions relating to the Kerch Strait area shall be effected by agreement between the Parties.' (**RU-70**). Article 2 provides for a regime of navigation.

[171] The Russian Federation's Preliminary Objections referred to the Soviet international law doctrine since 1947, which has been unanimous in the characterisation of the Sea of Azov as internal waters: see Preliminary Objections, ¶76 and note 102.

[172] Draft Treaty between Ukraine and the Russian Federation on the Legal Status of the Sea of Azov and Navigation in its Water Area, Annex to Note Verbale of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, No. 12/42-994, 19 October 1995. The preamble of the draft treaty proclaimed 'taking into account that the Sea of Azov has been for a long time an internal sea of the USSR' (**RU-15**).

[173] Letter of the Russian President to the Ukrainian President dated 9 July 2000: 'The high-level agreement between Russia and Ukraine to maintain the special status of the Azov-Kerch water area as internal waters of Russia and Ukraine was confirmed during our conversation in January 2000.' The letter further referred to 'the historically established regime of shared use of this water area by Russia and Ukraine' (**RU-68**).

introduced to denounce the 2003 Treaty in 2015, Ukraine's Parliament chose not to proceed with that bill and eventually abandoned it in 2019.[174] Ukraine only purported to denounce the 2003 Treaty in 2023,[175] when it became obsolete in light of the Sea of Azov becoming Russian after the accession of the DPR and Zaporozhie and Kherson regions to the Russian Federation in 2022.

147. Ukraine also misunderstands the Russian argument that Article 2 of the Azov/Kerch Cooperation Treaty would contravene UNCLOS, were the Sea of Azov and the Kerch Strait not agreed between the Parties as historic internal waters.[176] It is the view of the Russian Federation that Article 2 provides for navigational rights more restrictive than what UNCLOS provides for,[177] in that passage through the Kerch Strait and within the Sea of Azov for all foreign-flagged merchantmen is limited to the purpose of heading to or coming from local ports, and that passage through the strait and within the sea for all foreign warships or government ships operated for non-commercial purposes is limited to that permitted or invited by either party to the Azov/Kerch Cooperation Treaty with, in addition, agreement of the other party.

148. In comparison, passage as a concept is defined in UNCLOS as including not only cases of access to or returning from ports, but passage through either the territorial sea or an international strait.[178] Furthermore, the exercise of the freedom of transit passage for

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[174] Verkhovnaya Rada of Ukraine, Draft Law on Denunciation of the Treaty between Ukraine and the Russian Federation on Cooperation in the Use of the Sea of Azov and the Kerch Strait, 16 July 2015, available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=56077 (**RU-597**).

[175] Embassy of Ukraine in the Kingdom of Netherlands, *Note Verbale* No. 61219/23-017-34357, 27 March 2023 (**RU-601**).

[176] Ukraine's Reply, ¶¶32-33; Counter-Memorial, ¶¶48-50.

[177] Article 2: '1. Merchant vessels and warships as well as other government vessels flying the flag of the Russian Federation and Ukraine used for non-commercial purposes shall enjoy freedom of navigation in the Sea of Azov and the Kerch Strait. 2. *Merchant vessels flying the flags of third States may enter the Sea of Azov and pass through the Kerch Strait if they are heading to a Russian or Ukrainian port or returning from it. 3. Warships and other government vessels of the third States used for non-commercial purposes can enter the Sea of Azov and pass through the Kerch Strait if they are visiting or calling for business on a port of either Party upon its invitation or permission agreed upon with the other Party*.' [*Emphasis* added].

[178] Article 18(1) provides: 'Passage means navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility.' Article 38(2) provides: 'Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to *that State*.' [*Emphasis* added].

purposes of visiting or returning from local ports only requires compliance with the host country (which has to border the strait)'s entry conditions, without any role for other coastal States. It is clear that the Azov/Kerch Cooperation Treaty does not allow for simple passage, subjecting, instead, the passage by foreign warships and government ships operated for non-commercial purposes to the agreement of both the Russian Federation and Ukraine. The 2003 Treaty has no provision for overflight, either. Hence a clear limitation on the rights of passage under UNCLOS.[179] Ukraine has failed to understand this limiting effect of Article 2, engrossed instead in a full-throttle denial of the historic internal waters status it recognised in Article 1 of the same treaty.

iv. Ukraine's Alleged Non-Recognition of a Historic Bay

149. In its Reply, Ukraine argues that it has never recognised the Sea of Azov as a historic bay.[180] As has been explained above, the historic title over the Sea of Azov and the Kerch Strait had been established by, at the latest, 1958, when there was only one coastal State, the USSR. The title has since been maintained.

150. The fact is that Ukraine has never denied the existence of this title since 1991. The Azov/Kerch Cooperation Treaty is clear evidence of this fact.[181] As explained above, in the course of negotiating the Azov/Kerch Cooperation Treaty, Ukraine went beyond showing its awareness of the issue, by confirming the Russian position that the Sea of Azov and the Kerch Strait were the historic internal waters of the two countries.[182]

151. Furthermore, Ukraine's argument that it has never recognized the Sea of Azov as a historic bay despite its declaration filed under Article 298(1)(a)(i) of UNCLOS, which refers to 'historic bays or titles', is implausible. It is said that Ukraine's declaration cannot

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[179] Article 311(3) provides: 'Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.' The Azov/Kerch Cooperation Treaty would have affected the enjoyment of other States parties to UNCLOS of their rights or obligations under the convention but for the fact that the Russian Federation and Ukraine declared that the Sea of Azov and the Kerch Strait are historic internal waters, taking out UNCLOS passage rights from under Article 2 of the treaty.

[180] Ukraine's Reply, ¶36.

[181] Preliminary Objections, ¶98.

[182] *Ibid*.

be taken 'to acknowledge a special legal status as to the Sea of Azov and Kerch Strait'.[183] However, the expression, 'special status', reflected the exact and shared understanding between the two countries in respect of the sea and the strait during their negotiations of the Azov/Kerch Cooperation Treaty discussed above.[184] The Russian Federation has already made its argument clear,[185] and it now falls upon Ukraine to offer any evidence that it has any *other* historic bay or another area of sea subject to historic title than the Sea of Azov, so that its declaration under Article 298(1)(a)(i) may have meaning in this regard. Clearly, it is unable to do so.

152. Ultimately, as will be shown in sub-section (iii) below, a claim to historic title over a body of water achieves the same purpose and effect as a claim to internal waters for the same arm of the sea on the basis of the doctrine of juridical bays. A historic title provides an independent legal basis, as distinct from the doctrine of juridical bays, for a coastal State to exercise sovereignty over this arm of the sea, to the exclusion of other States. Whether these other States recognize the arm of the sea as a historic bay is secondary to their recognition of the coastal sovereignty over it as part of internal waters. It makes no practical difference between recognition of a historic bay and recognition of historic internal waters, as both characterizations fall under the broad category of internal waters.

153. For present purposes, the status of internal waters or internal waters resting on a historic title, as argued by the Russian Federation, is sufficient to dislodge the jurisdiction of the Arbitral Tribunal over the case, as UNCLOS is inapplicable to activities carried out therein.

v. Conclusion

154. In conclusion, the Russian Federation submits that the Arbitral Tribunal lacks jurisdiction to consider any dispute involving historic bays or titles under Article 298(1)(i)(a) of UNCLOS, and that the Russian Federation not only claims such a title in this case, but its possession of that title had been known to the world long before this Arbitration was initiated.

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[183] Ukraine's Reply, ¶36.

[184] *See* also Letter of the President of the Russian Federation Vladimir Putin to the President of Ukraine Leonid Kuchma, 9 July 2001 (**RU-68)**.

[185] Counter-Memorial, ¶51.

155. Furthermore, the Arbitral Tribunal *also* lacks jurisdiction on account of the fact that UNCLOS does not regulate historic titles except in two provisions where the term 'historic titles' appears: Articles 15 and 298(1)(i)(a). Article 15 applies to a situation different from the present case.[186] According to an early Annex VII tribunal, Article 298(1)(i)(a) includes the term 'historic title' in reference to 'claims of sovereignty over maritime areas derived from historical circumstances'.[187] That is as far as UNCLOS goes with this term. It does not provide for the establishment, criteria, rights and obligations entailed by such a title. The answer to the question whether a tribunal empowered by UNCLOS to settle disputes under Part XV of the Convention can deal with any of those unregulated matters is plain to see, which is negative, unless this is done as an ancillary issue (which is not the case here) and in conformity with the provision of Article 293(1) of UNCLOS (but first jurisdiction has to be established which is absent in this case).[188] Indeed, it has been observed that one of the reasons behind the exceptions under Article 298(1)(i)(a) was a lack of agreement on the criteria for historic title over areas of sea.[189] This analysis applies equally to the term 'historic bays',[190] which appears in Articles 10 and 298(1)(i)(a) of UNCLOS.

156. If the Arbitral Tribunal considers that the terms of Article 298(1)(i)(a) require it to first determine whether historic bays or titles actually exist in this case, it would be the position of the Russian Federation that, by 1958, a valid historic title had been established in favour of the USSR over the Sea of Azov and the Kerch Strait; that the historic title has survived the 1958 Geneva Convention and UNCLOS, both of which have recognized the existence of, but left intact, the category of historic bays or titles; that, in 1991, when Ukraine became independent, the historic title was succeeded to by the Russian Federation and Ukraine, subject to further negotiations between them over recognition of the existing historic title, the issue of delimitation of historic internal waters, and bilateral rules for navigation; that, in 2003, the two countries concluded the Azov/Kerch

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[186] Article 15 of the Convention concerns delimitation of the territorial sea between States with opposite or adjacent coasts in situations other than 'where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith'.

[187] *South China Sea Arbitration (Philippines v. China)*, Award of 12 July 2016, ¶226 (**UAL-11**).

[188] 'A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.'

[189] R. Churchill, V Lowe *et al*., THE LAW OF THE SEA, (4th ed., Manchester University Press, 2022), p. 1264 (**RUL-143**).

[190] *Ibid*., p. 110.

Cooperation Treaty to affirm the status of historic internal waters in respect of the Sea of Azov and the Kerch Strait, with clear undertakings on delimitation and navigation; and that, therefore, when the present Arbitration was initiated in 2016, the historic title, undivided, undenied, and unchallenged, remained valid under international law.

157. In the light of these submissions, the Russian Federation's declaration filed under Article 298(1)(i)(a) of UNCLOS should be activated to deprive the Arbitral Tribunal of jurisdiction over the present case.

C. THE SEA OF AZOV AND THE KERCH STRAIT AS INTERNAL WATERS: CONTINUITY FROM THE PRE-1991 ERA

158. In case the Russian Federation's arguments concerning the historic title for the Sea of Azov and the Kerch Strait were not accepted by the Arbitral Tribunal, the Russian Federation submits, as an alternative ground, that the Sea of Azov and the Kerch Strait had in any event been internal waters prior to 1991, and this status has not changed subsequently. That status has been confirmed by the Azov/Kerch Cooperation Treaty, absent any bilateral agreement that would have provided otherwise. This ground is raised for the reason that, while the Parties have agreement as to the internal water status of the Sea of Azov and the Kerch Strait prior to 1991,[191] which in itself would strongly bolster the existence of the historic title as argued by the Russian Federation, they disagree as to the continuity of that status in the post-1991 era. It follows that the present section needs only address that disagreement, on the understanding that the evidence of the pre-1991 practice of the Russian Empire and the USSR unquestionably established the status of internal waters for the Sea of Azov and the Kerch Strait, whether by virtue of a historic title as argued in the preceding section or otherwise.[192]

159. Crucial for this case is the continuous display of sovereignty by the coastal State or States over the full body of the Sea of Azov and the Kerch Strait.[193] That sovereignty has been

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[191] 2020 Award, ¶290.

[192] Preliminary Objections, ¶79 ('the customary internal waters status'); Counter-Memorial, ¶54 ('general international law'). *See* also *Island of Palmas Case (Netherlands v. USA),* Award of 4 April 1928, Reports of International Arbitral Awards, Vol. II, pp. 829, 839 (**RUL-82**).

[193] *Fisheries Case (United Kingdom v. Norway)*, Judgment, ICJ Reports (1951), p. 116 at p. 133 ('The real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea…is at the basis of the determination of the rules relating to bays') (**UAL-124**).

acquired by virtue of a history of peaceful and long possession without challenge or protest by foreign governments. If, in the circumstances of the present case, this history of possession by the Russian Federation and its predecessors did not lead to a finding of a historic title, it would still be sufficient to establish the internal-water status for the Sea of Azov and the Kerch Strait, as the sole Arbitrator Huber stated in the *Island of Palmas* case that 'practice, as well as doctrine, recognizes — though under different legal formulae and with certain differences as to the conditions required — that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title'.[194] This display of sovereignty may also give rise to a local custom effective between the Parties to this Arbitration. The ICJ, when confirming the existence of a local custom between two disputant States, stated that

> there existed during the British and post-British periods a constant and uniform practice allowing free passage between Daman and the enclaves. This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation.[195]

160. It is thus entirely arguable, either that a continuous and peaceful display of sovereignty would be a good title without being considered as a historic title or any of the other titles, or that the internal-water status for the Sea of Azov and the Kerch Strait rests on a local custom, originating in a long practice of possession of a single coastal State for more than a century, and continued after 1991 between the two coastal States. The main components in the establishment of the internal-water status in this case include, as explained in section B above, early writers' opinions, national legislations, bilateral negotiations leading to the Azov/Kerch Cooperation Treaty, the treaty's terms, and diplomatic notes or negotiating records produced between the two countries before the 2003 Treaty.[196]

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[194] *Island of Palmas case (Netherlands, USA)*, Reports of International Arbitral Awards, Vol. II, Award of 4 April 1928, pp. 829, 839 (**RUL-82**).

[195] *Case concerning Right of Passage over Indian Territory (Portugal v. India),* Merits, Judgement of 12 April 1960, I.C.J. Reports 1960., p. 6, at p. 40. The Court expressly rejected an Indian objection that a local custom would have to exist between more than two States, *ibid.*, p. 39 (**RUL-144**).

[196] *Ibid*., ¶42, *see* also Counter-Memorial, ¶¶89-94. A short collection of evidence gleaned from the minutes of the negotiations between the two countries between 1996-2002: *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine No. 2378/2dsng, 30 March 1998 (**RU-62**), (**RU-63**), Minutes of the 7th Meeting of the Delegations of the Russian Federation and Ukraine to Determine the

i. The Russian Claim or Exercise of Sovereignty Over the Sea of Azov and the Kerch Strait Does Not Violate UNCLOS

161. The premise of Ukraine is that Ukraine's independence in 1991 upon the dissolution of the USSR resulted in the application of general rules of international law of the sea,[197] as reflected in UNCLOS.[198] Since the States parties to UNCLOS have 'the desire… to settle all issues relating to the law of the sea', as proclaimed in its preamble, by providing for the regimes of the high seas and the EEZ, the Convention, allegedly, prevents the Russian Federation from 'claiming sovereignty over Ukraine's exclusive economic zone in the Sea of Azov'.[199]

162. The problem with this line of argument is three-fold. First, the dissolution of the USSR in 1991 did put on the map two new countries on the coast of the Sea of Azov. Were the sea then recognized by the coastal States -- the Russian Federation and Ukraine -- as something other than historic internal waters, it might be possible for Ukraine's argument to have a point. In that hypothetical scenario, the two coastal States, by openly abandoning sovereignty succeeded from the USSR, would have signalled to the world and each other their joint wish to follow general rules of the law of the sea, as reflected in UNCLOS.

Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Areas in the Black Sea, 12 May 2000 (**RU-65**), 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 (**RU-67**), Letter of the President of the Russian Federation Vladimir Putin to the President of Ukraine Leonid Kuchma, 9 July 2001 (**RU-68**), Letter of 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 (**RU-70**), Minutes of the 13th 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, 9 October 2001 (**RU-73**), *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine No. 6437/2dsng, 8 August 2002 (**RU-75**), Minutes of the 3rd Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Maritime Spaces in the Black Sea, 27 April 1998 (**RU-309**), Minutes of the Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Continental Shelf and the Exclusive (Maritime) Economic Zone in the Black Sea, 17 October 1996 (**RU-310**) and Minutes of the Fifteenth Meeting of the Delegations of Ukraine and the Russian Federation on the Issues of Delimitation (the Position of the Ukrainian Side) and Determination of Legal Status (the Position of the Russian Side) of the Sea of Azov and the Kerch Strait (16-17 December 2002) (**UA-514**), Minutes of the Meeting of the Delegations of Ukraine and the Russian Federation to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit the Continental Shelf and the Exclusive (Maritime) Economic Zone in the Black Sea (16-17 October 1996) (**UA-517**).

[197] Ukraine's Reply, ¶37.

[198] *Ibid*., this paragraph does not explain the relations between 'general rules on jurisdiction of the international law of the sea' and UNCLOS. But the subsequent argumentation expands on two reasons, one of which is that the Russian position allegedly violates UNCLOS.

[199] *Ibid*., ¶38.

However, there had been no such abandonment on the part of either country, until the whole matter was resolved by the Azov/Kerch Cooperation Treaty. Once that treaty was in place, it spelt the end of any lingering thought, such as what is being argued by Ukraine, that UNCLOS should take over as the sole applicable law for the Sea of Azov and the Kerch Strait.

163. UNCLOS cannot substitute an existing historic regime upon the dissolution of the USSR for another reason. Ukraine has not cited any authorities for the proposition of such application of the Convention to a new geographical situation as the one that arose in the Sea of Azov and the Kerch Strait in 1991,

164. It is a matter of general knowledge that the Convention entered into force on 16 November 1994 in accordance with Article 308(1), and the coastal States only became parties to UNCLOS in 1997 (the Russian Federation) and 1999 (Ukraine). Any automatic application of rules such as those of UNCLOS simply could not happen in 1991 without the consent of either coastal State. For the period of eight years, at least, the long-standing regime of internal waters with regard to navigation and other matters surely remained in force in this area of sea as the applicable law. Given that the bilateral negotiations on cooperation in the Sea of Azov and the Kerch Strait started in 1995,[200] it is also reasonable to infer that the two countries started off on a course of action of their own choice, without regard to the upcoming ratification of UNCLOS by both of them several years later.[201]

165. In principle, State succession to territorial sovereignty is automatic.[202] This principle applies to the Russian Federation as a continuator of the former USSR, and Ukraine as a

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[200] Draft Treaty between Ukraine and the Russian Federation on the Legal Status of the Sea of Azov and Navigation in its Water Area, Annex to Note Verbale of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation, No. 12/42-994, 19 October 1995. Art 1 of that draft treaty by Ukraine already stated that '[t]he water area of the Sea of Azov shall be given the legal status of internal sea waters of Ukraine and the Russian Federation' (**RU-15**).

[201] *Ibid*. The preamble of the draft treaty did not mention UNCLOS, but did proclaim 'taking into account that the Sea of Azov has been for a long time an internal sea of the USSR' and 'international legal practice of the determination of legal status of historic expanses of water'.

[202] Article 2(1)(b) of the Vienna Convention on Succession of States in respect of Treaties, done at Vienna on 23 August 1978, entering into force on 6 November 1996, *United Nations Treaty Series*, Vol. 1946, p. 3: 'succession of States' means the replacement of one State by another in the responsibility for the international relations of territory', *see also* J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, (9th ed., OUP, 2019), p. 409: 'State succession occurs when there is a definitive replacement of one state by another in respect of sovereignty over a given territory, that is, a replacement in conformity with international law' (**RUL-145**).

successor thereto.[203] The process of succession following the dissolution of the former USSR is well documented.[204]

166. However, the sovereignty over the Sea of Azov and the Kerch Strait was different from the sovereignty over land territories, such as those of Ukraine or other former USSR republics, since the sovereignty, attached to the coast, can only be exercised by coastal States. In 1991, there was only the existing, undivided sovereignty in respect of the Sea of Azov and the Kerch Strait. Therefore Ukraine insisted on the delimitation of the Sea of Azov with the Russian Federation by a state border prompted by this undivided state of sovereignty. Such an act would not have been possible under UNCLOS. It is thus clear that the status of the Sea of Azov and the Kerch Strait as internal waters had not been altered during the period of 1991-2003.

167. Further, as has been pointed out,[205] the Sea of Azov was, since 1991 until the time of initiation of this Arbitration, undelimited bilaterally and comprised internal waters. Ukraine's reliance on Articles 89 and 58(2) of UNCLOS is therefore misplaced. By proclaiming unilaterally base points and transmitting them to the UN in 1992,[206] Ukraine's action did not entail any maritime entitlement that might have priority over the existing, undivided sovereignty, the legality of which had been long recognised in international law. In addition, UNCLOS was then not in force for Ukraine, and the maritime entitlements recognised in the Convention could not be treated as law on the international plane. The 1992 transmission of the base points to the UN Secretary-General, like the adoption of Ukrainian domestic legislation on the State border (1991) and the EEZ (1995),[207] which moreover did not refer to either the Sea of Azov or the Kerch Strait specifically, was a unilateral act of Ukraine, which was yet to be validated under international law. As the ICJ once stated,

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[203] *Ibid*., p. 413, *see also* Counter-Memorial, ¶62, *see also* Letter from the President of the Russian Soviet Federative Socialist Republic, 24 December 1991 (**RU-599**).

[204] Final Report, Economic Aspects of State Succession (under the title 'Aspects of the Law of State Succession'), International Law Association, Toronto Conference, 2006, pp. 7-11 on 'Soviet Union' (**RU-598**), s*ee* also Note of the Ministry of Foreign Affairs of the Russian Federation, 13 January 1992 N 11/Ugp (**RU-600**).

[205] Counter-Memorial, ¶62.

[206] Ukraine's Reply, ¶65*, see* also *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**), *see* also United Nations Division for Oceans and the Law of the Sea, Office of Legal Affairs, Law of the Sea Bulletin No. 36 (1998) **(UA-4**).

[207] *Ibid*., ¶¶62-63.

> Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.[208]

168. As the historic title of the USSR over the Sea of Azov and the Kerch Strait had by 1991 been established under international law, the validity of Ukraine's base points (and baselines, which have not been pronounced by Ukraine) would have to be justified in the face of that valid title. This has not been done by Ukraine in this case.

169. Relating to the 1992 transmission of the base points to the UN, Ukraine argues that 'the record shows that Russia had multiple opportunities to respond to Ukraine's baselines', presumably between 1992-2002.[209] It is not correct. In the 2002 note addressed to the Russian Ministry of Foreign Affairs, Ukraine informed the latter that:

> Pursuant to Section 2 of Part II of the United Nations Convention on the Law of the Sea of 1982, to which Ukraine and the Russian Federation are States Parties, the Ukrainian Side has approved the coordinates of baselines for measuring the breadth of the territorial sea of Ukraine in the Sea of Azov (the list of coordinates is enclosed).[210]

170. This was the time Ukraine formally informed the Russian Federation of its base points in the Sea of Azov. The quoted statement suggests that the baselines were approved in reference to UNCLOS. As has been mentioned, the Russian Ministry of Foreign Affairs responded swiftly, on 8 August 2002, to the Ukrainian note, expressing its displeasure with Ukraine's unilateral action and insisting on preserving the status quo in the Sea of Azov and the Kerch Strait.[211] In view of the ongoing negotiations of the 2003 Treaty between the countries this transmission of base points was puzzling at best.

171. Moreover, UNCLOS, as was already discussed above,[212] does not regulate the issue of historic titles, which is governed by customary international law. Ukraine, by conduct in the form of negotiations with the Russian Federation that led to the Azov/Kerch Cooperation Treaty, has long accepted customary international law rather than UNCLOS

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[208] *Fisheries Case (UK v. Norway)*, Judgment of 18 December 1951, I.C.J. Reports 1951, p. 132 (**UAL-124**).

[209] Ukraine's Reply, ¶67.

[210] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine, No. 72/22- 446-1375 (25 June 2002) (**UA-513**).

[211] *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine No. 6437/2dsng, 8 August 2002 (**RU-75**).

[212] *Ibid*., ¶51.

as the applicable law for the issue of the legal status of the Sea of Azov and the Kerch Strait.

172. Ukraine, furthermore, has never disowned the historic internal waters status of the Sea of Azov and the Kerch Strait, which survived the dissolution of the former USSR. This explains why it entered into negotiations with the Russian Federation with regard to the legal status and regime of navigation for the sea and the strait shortly *before* ratifying UNCLOS. It also calls in question its present reliance on Articles 89 and 58(2) of UNCLOS. The alleged failure of the Russian Federation to engage with these provisions[213] is due simply to the fact -- as the Russian Federation has been consistently showing by its pleadings -- that the Sea of Azov and the Kerch Strait have always been composed of internal waters, which are clearly irrelevant to those provisions. Any change in the status of the sea and the strait requires mutual agreement, in the absence of which the previous status continues, and this approach has been dominant in the process of succession unfolded after 1991.[214]

173. Thirdly, the Parties disagree as to the consequences of the lack of rules under UNCLOS for pluri-state bays. Ukraine asserts that this does not mean 'such bays somehow exist apart from and without regard to the Convention; rather, it indicates that no such specific juridical status exists'.[215] The Russian Federation sees this as indicating that such bays are simply not regulated by the Convention.[216] The overcomplicated reading of UNCLOS rules on internal waters by Ukraine, with reference to Articles 7-11 and 50,[217] reveals the hangover of a rather distorted view of the object and purpose of the Convention – that all issues of the law of the sea can be settled -- even those not regulated by it — by its dispute settlement mechanisms. However, UNCLOS is not universal and there are still matters unregulated by it, as is clearly envisaged in the preamble.[218]

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[213] Ukraine's Reply, ¶40.

[214] Final Report, Economic Aspects of State Succession (under the title 'Aspects of the Law of State Succession'), International Law Association, Toronto Conference, 2006, pp. 7-11 on 'Soviet Union' (**RU-598**).

[215] Ukraine's Reply, ¶42.

[216] Counter-Memorial, ¶66.

[217] Ukraine's Reply, ¶41.

[218] 'Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law'.

174. None of the provisions referred to by Ukraine, namely, Articles 7-11 and 50 of UNCLOS, applies to the Sea of Azov and the Kerch Strait, which constitutes a historic bay — a feature lying out of the scope of UNCLOS.

175. In addition, the provisions listed above only serve the narrow purpose of demarcating several types of internal waters from the territorial sea, but, with one exception,[219] do not provide for the following matters in internal waters: any substantive rights and obligations in respect of all issues of navigation and access, environmental protection, fisheries, customs, sanitary matters, fiscal matters, exploitation of natural resources in the sea or seabed, marine scientific research, and excavation of underwater cultural heritage. Those matters, several of which are contested in this case, are not regulated by UNCLOS in connection with internal waters.

176. In conclusion, UNCLOS does not prevent the Russian Federation from exercising sovereignty over the Sea of Azov and the Kerch Strait which, being a pluri-state bay subject to historic title, are not regulated by the convention, the provisions of Articles 7-11 and 50 notwithstanding.

ii. Criteria For Pluri-State Bays as Internal Waters

177. Ukraine asserts that, for pluri-state bays to be considered internal waters, the following three criteria or requirements must be satisfied: first their size too small for the EEZ or high seas; second, exercise of sovereignty therein does not prejudice third States; third, all littoral States 'affirmatively agreed to an internal waters status'.[220] The Russian Federation strongly disagrees with that assertion, because the alleged criteria are not proven by Ukraine as settled rules of international law, and, at any rate, they are not relevant to this Arbitration.[221]

178. As was argued in the preceding section, the matter of historic waters including pluri-state historic bays should stop to be relevant to the present case, when it becomes clear that

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[219] Article 8(2) preserves the right of innocent passage in newly enclosed internal wates converted from the territorial sea, and does not apply to the Kerch Strait that comprises internal waters as a result of a historic title, rather than of application of Article 7. This approach is also copied under Article 35(a) for international straits, which, however, does not apply to the Kerch Strait for similar reasons. But Ukraine did not mention Article 35(a) in this part of its Reply.

[220] Ukraine's Revised Memorial, ¶81.

[221] Counter-Memorial, ¶¶68-85.

such bays are not regulated by UNCLOS. But Ukraine continues to argue that the Russian Federation 'identifies no State practice, and no other legal basis, for the recognition of pluri-state internal waters where the three conditions are not met.'[222] Given that it was Ukraine that proposed the three criteria in the Revised Memorial,[223] the onus is on it to prove the existence of those conditions in international law, *onus probandi incumbit actori*.[224] All it has done, however, is to mention the cases cited by the Russian Federation,[225] and to draw out the three conditions without substantiation.

179. The Counter-Memorial provides a thorough analysis of the two authorities cited by Ukraine, and shows thereby that Ukraine has misrepresented the views of Blum and Fitzmaurice.[226] A few further remarks are, however, warranted in view of Ukraine's comments in the Reply.

180. Ukraine continues to rely on Fitzmaurice's opinion that '[i]t is not, in general, open to the coastal States of the bay… to draw a closing line and, by claiming the waters of the bay as internal waters.' This reference misses the point. Fitzmaurice wrote the comments in question in the wake of the First UN Conference on the Law of the Sea, which resulted in the adoption of the 1958 Geneva Convention, and his commentary explicitly concerned the definition of the bay as per the said convention. That Convention that notably excludes the historic bays from its scope, nor does it govern the issue of state succession resulting in pluri-state bays. Further, Fitzmaurice adopted the views of Higgins and Colombos, who specifically endorsed the notion of pluri-state bays, such as the Gulf of Fonseca.[227]

181. Professor Blum's work is of no help to Ukraine either. When read more fully, it actually supports the Russian Federation's position. The author in fact recognises that territorial

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[222] Ukraine's Reply, ¶47.

[223] Ukraine's Revised Memorial, ¶81.

[224] *Asylum Case (Colombia/Peru)*, Judgment of 20 November 1950, ICJ Reports 1950, p. 266, at p. 276: 'The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question…' (**RUL-146**). *see* also *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment of 20 April 2010, *ICJ Reports 2010,* p. 14, ¶162 (**UAL-152**).

[225] Preliminary Objections, ¶¶88, 90.

[226] Counter-Memorial, ¶¶69-71.

[227] Sir Gerald Fitzmaurice, Some Results of the Geneva Conference on the Law of the Sea: Part I—The Territorial Sea and Contiguous Zone and Related Topics, 8 Int'l & Comp. L.Q. 73 (1959), p. 82 (**UAL-57**).

changes on the coasts of a bay that result in 'splitting up' a 'single-national bay' do not bring about changes in the bay's legal status.[228]

182. As demonstrated in the Counter-Memorial, other authoritative scholars do not share Ukraine's flawed approach to pluri-state bays.[229] Caflisch notes that '[i]t is difficult to see why one should prevent two States with adjacent coasts from doing what one coastal State can do alone'.[230] *Oppenheim's International Law* is in agreement that 'it 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'.[231] Ukraine's criticism of this authority is misplaced.[232] First, Jennings and Watts saw a primary justification for not recognising a pluri-state bay as internal waters because 'there might otherwise be difficulties over access'[233] for third states – in the present case such access is granted for third state vessels. Ukraine's reference to the authors' acknowledgement that their statement is inconsistent with the previous editions of the book is beside the point, because the important point is that Jennings and Watts rejected the older view and endorsed that non-recognition of pluri-state bays would indeed be 'anomalous'.[234] Strohl also states, contrary to Ukraine's view, that 'there is no requirement of international law which prevents the riparian States from jointly claiming the bay and agreeing upon a division of its waters as inland waters.'[235]

183. In any case, the Russian Federation has explained its view on the three criteria of Ukraine.[236] Three additional remarks are warranted.

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[228] Y. Blum, HISTORIC TITLES IN INTERNATIONAL LAW (1965), p. 278 (**UAL-56**).

[229] Counter-Memorial, ¶¶57-58.

[230] L. Caflisch, Les zones maritimes sous jurisdiction nationale, leurs limites et leur délimitation, in D. Bardonnet and M. Virally (eds.), Le nouveau droit international de la mer, Pedone, 1983, pp. 37-40, p. 38 (**RUL-54**).

[231] Sir R. Jennings and Sir A. Watts (eds.), OPPENHEIM'S INTERNATIONAL LAW, Vol. I, Peace, Longman, 1992, pp. 632-633 (**RUL-18**).

[232] Ukraine's Reply, ¶43.

[233] Sir R. Jennings and Sir A. Watts (eds.), OPPENHEIM'S INTERNATIONAL LAW, Vol. I, Peace, Longman, 1992, p. 633 (**RUL-18**).

[234] *Ibid*.

[235] M. Strohl, THE INTERNATIONAL LAW OF BAYS, (Nijhoff, 1963), p. 375 (**RUL-138**).

[236] Counter-Memorial, ¶¶76-85.

184. First, it goes without saying that the size of an area of the sea cannot be made a legal criterion for a historic bay. It may be recalled that size has long been discarded as a factor in relation to historic bays.[237] The first alleged criterion does not, in short, exist in the case of historic bays.

185. Secondly, as regards the non-prejudice of access by vessels of third States to the Sea of Azov, the Russian Federation has already explained that, at the time of the dissolution of the USSR, the Sea of Azov and the Kerch Strait were internal waters, and no third States' rights of access existed, as access had been subject to prior consent of the coastal State.[238] This status of the Sea of Azov and the Kerch Strait continued after the dissolution of the USSR, and third States' vessels have continued to visit this area as before, namely, access by permission. This *status quo* was reaffirmed in Article 2(2) of the Azov/Kerch Cooperation Treaty. It follows that, even supposing the unprejudiced access by foreign ships were relevant as a criterion for pluri-state bays to remain internal waters (*quod non*), it could not be applicable to the Sea of Azov and the Kerch Strait where there has never been a right of access for ships of third States. As the internal-water status survived the independence of Ukraine in 1991, the long-standing regime of passage (subject to consent of the coastal States) and governance also remained in force for the Sea of Azov and the Kerch Strait. There was thus no right of access to prejudice in 1991 and afterwards by the continued status of internal waters for the Sea of Azov and the Kerch Strait.

186. Given that the first and second alleged criteria are inapplicable in the present case, and that the three criteria are cumulative as argued by Ukraine,[239] the inapplicability of either the first or second criterion — let alone both — necessarily entails that all three alleged criteria are not applicable to the Sea of Azov and the Kerch Strait. For sake of completeness, however, a word will be said of the last criterion.

187. On the third criterion alleging the necessity of affirmative agreement by all coastal States to maintain the internal-water status of a bay, the Russian Federation has responded that,

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[237] P.C. Jessup, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION, G. A. Jennings Co., 1927, p. 382 ('the legality of the claim is to be measured, not by the size of the area affected'), *see* also, Historic Bays: Memorandum by the Secretariat of the United Nations, UN 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), ¶7 ('without regard to their size') (**RU-5**; **UA-547**).

[238] Counter-Memorial, ¶78.

[239] Ukraine's Revised Memorial, ¶81; Ukraine's Reply, ¶59.

even if the alleged criterion were existent--which is not proved by Ukraine, it would have been met by the adoption of the Azov/Kerch Cooperation Treaty.[240] The following discussion is intended to show that the alleged criterion is derived on the basis of an erroneous reading by Ukraine of two international decisions, thus fatally undermining the validity of the alleged criterion, and that even this unsafe criterion would have been met by the facts of this case.

188. In *Land, Island and Maritime Frontier Dispute* (1992), the ICJ Chamber cited the UN Secretariat's Study on Historic Waters - in which the phrase '*acted jointly*' was used,[241] in the context in which the historic title over the Gulf of Fonseca having been assured, '[a]ll three coastal States continue to claim this to be the position, and it seems also to continue to be the subject of that "acquiescence on the part of other nations" to which the 1917 Judgement refers'.[242] The joint action observed by the UN Secretariat in 1962 was what happened *after* 1821. But the succession by the three coastal States in that case to the Spanish historic title had already taken place in 1821. There is no mention of an affirmative agreement with regard to the status of the Gulf of Fonseca in either the 1917 judgment of the Central American Court of Justice or the ICJ Chamber judgment. Succession already conferred, in 1821, joint sovereignty on the three coastal States, and further agreement is only needed if they want to jointly regulate, among others, the regime of navigation or delimitation within the Gulf, or if they want to abandon the joint sovereignty.

189. The reading of the case of the Bay of Piran by Ukraine has missed the point noted in the Russian Federation's Counter-Memorial that the tribunal in that case did not apply Article 5 of the Arbitration Agreement of 2009 to decide the legal status of the Bay of Piran.[243] The tribunal explained the rationale for its decision thus:

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[240] Counter-Memorial, ¶80.

[241] Juridical Regime of Historic Waters Including Historic Bays - Study Prepared by the Secretariat, *YBILC*, Vol, 2 (1962), UN Doc. A/CN.4/143, ¶147 (**UA-591**): 'If all the bordering States act jointly to claim historic title to a bay, it would seem that in principle what has been said above regarding a claim to historic title by a single State would apply to this group of States.'.

[242] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*, Judgment of 11 September 1992, ICJ Reports (1992) 351 (**RUL-19**).

[243] Counter-Memorial, ¶83. Article 5, entitled 'critical date', of the 2009 Agreement provides: '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'.

> In any case, the effect of the dissolution of the SFRY is a question of State succession. The Tribunal thus determines that the Bay remains internal waters within the pre-existing limits.[244]

190. The tribunal in that case did not refer to the 2009 Agreement at all in this part of the Award, which dealt with the effect of the dissolution of the Socialist Federal Republic of Yugoslavia. In fact, the provision of Article 5 of the 2009 Agreement was not so much an agreement on the status of the Bay of Piran as an instruction for the tribunal not to consider specific documents or actions. Clearly, the post-dissolution legal status of the Bay of Piran was to be decided by the tribunal, not the parties to the case.

191. In conclusion, the two cases strongly support the Russian, rather than the Ukrainian, position in this arbitration, that the existing sovereignty over a bay, on the basis of a historic title (the Gulf of Fonseca) or of the law of juridical bay (the Bay of Piran), transfers to successor States by succession at the time when territorial sovereignty is devolved upon successor States, and that any change to that sovereignty requires agreement between the States. It flows from the two cases that affirmative agreement, if ever existent as a criterion in this context as alleged by Ukraine, would be relevant to the *change* of existing sovereignty, not to the *continuation* of that sovereignty. The evidence of the Russian Federation cited in these pleadings, furthermore, decidedly supports the continuation, on the strength of an affirmative agreement between the Parties, of the sovereignty over the Sea of Azov and the Kerch Strait.

192. For instance, official documents from the period leading up to the Azov/Kerch Cooperation Treaty, mentioned above, also add weight to the Russian position, in that affirmative agreement as to the legal status of the Sea of Azov and the Kerch Strait, if ever recognised as a requirement of law, could be found in such documents. In its Reply,[245] Ukraine has failed to rebut the two pieces of evidence specifically mentioned in the Russian Counter-Memorial, namely: (i) the 2001 letter from the Ukrainian President to the Russian President by way of a *note verbale*;[246] and (ii) the draft text of a bilateral treaty on state border between the two countries, also by way of a *note verbale*, dated 16

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[244] *Arbitration between the Republic of Croatia and the Republic of Slovenia*, Final Award, 29 June 2017, ¶885 (**RUL-41**).

[245] Ukraine's Reply, ¶¶57-58.

[246] Letter of 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 (**RU-70**).

February 2004.[247] Not to repeat what has been argued,[248] the Russian Federation merely adds two points.

193. The Ukrainian President's letter mentioned the 'delimitation of the territories of the two States in the Sea of Azov and the Kerch Strait".[249] The clause in the inverted commas should be emphasized, which could not be a clearer indication that the two States both saw the sea and the strait as "territories". Such a term or associated usages such as "territorial" have been used to describe the nature of a juridical or historic bay as internal waters.[250]

194. Significantly, in the letter, the Ukrainian President expressed that

> I would like to reiterate that Ukraine agrees to the Russian Federation's proposals on *preserving* the status of internal waters for the water areas of the Sea of Azov and the Kerch Strait.[251]

195. This amounts to a clear representation of the position of Ukraine at the critical time when the two countries had been re-negotiating the legal regime for the Sea of Azov and the Kerch Strait. A similar conclusion can be drawn from the draft treaty mentioned above.

196. The significance of both documents just mentioned can be more appropriately considered next, in sub-section (c), in connection with the issue of estoppel and admission.

iii. Ukraine's Practice in the Sea of Azov Is Consistent With the Internal Waters Status

197. In its Reply, Ukraine argues that its conduct since 1991 in the Sea of Azov has not been consistent with an internal waters status.[252] This argument is, above all, vague as to purpose, the interpretation of which depends on the context in which it is made. If it is

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[247] 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 (**RU-76**).

[248] Counter-Memorial, ¶80.

[249] Letter of 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**).

[250] P. Jessup, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION, (G. A. Jennings Co., 1927), p. 382 (**RUL-139**); Y. Blum, HISTORIC TITLES IN INTERNATIONAL LAW, (Nijhoff, 1965), p. 264 (**RUL-137**).

[251] Letter of 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**).

[252] Ukraine's Reply, ¶¶60-73.

established that Ukraine has an agreement with the Russian Federation on the legal status of the Sea of Azov, and that the sea is composed of internal waters, its inconsistent behaviour in the sea would be in violation of that agreement, resulting in a clear instance of bad faith and a breach of the agreement.

198. Further to its arguments in the Counter-Memorial,[253] the Russian Federation will demonstrate that since 1991 there has been a line of consistent practice on the part of Ukraine, which gives rise to an estoppel or, at least, an admission that weakens the main part of the evidence proffered by Ukraine in these proceedings.

199. In *Obligation to Negotiate Access to the Pacific Ocean*, the ICJ recalled that

> the 'essential elements required by estoppel' are 'a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it'.[254]

200. This remains a concise statement of the rule of estoppel in international judicial practice. It is common ground that representation may be in the form of word, conduct, or silence.[255]

201. According to the ITLOS,

> …the effect of the notion of estoppel is that a State is precluded, by its conduct, from asserting that it did not agree to, or recognize, a certain situation.[256]

202. In comparison, an admission by a party to litigation may take the form of a statement of fact, or of an interpretation of a legal rule.[257] It is well established in international law that a formal statement against interest has 'particular probative value… as a form of

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[253] Counter-Memorial, ¶¶86-120.

[254] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* Judgment of 1 October 2018*,* ICJ Reports 2018*,* p. 507, ¶158 (citing *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* (Application for Permission to Intervene), Judgment, ICJ Reports 1990, p. 118, ¶63 (**RUL-147**).

[255] *Chagos Marine Protected Area (Republic of Mauritius v. United Kingdom),* Award of 18 March 2015, International Law Reports, Vol. 162, p. 249, ¶438 (**UAL-18**).

[256] *Dispute concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh and Myanmar)*, ITLOS Case No. 16, Judgment of 14 March 2012, ¶124 (**UAL-63**).

[257] D. Bowett, Estoppel before International Tribunals and Its Relation to Acquiescence, *British Yearbook of International Law*, 1957, Vol. 33, p. 176, at p. 196 (**RUL-148**).

admission',[258] and more generally that a party to proceedings cannot 'blow hot and cold'. [259] Further, an admission, especially when being 'a clear and unequivocal representation previously made' by a State to another,[260] may be adduced 'to show a lack of consistency or weakness in a party's position.'[261]

203. It is convenient, before applying the doctrines of estoppel and admission set forth above, to set out below a list of significant representations by Ukraine to the Russian Federation, without intending the list to be exhaustive, whereby Ukraine agrees to the Russian position that the Sea of Azov and the Kerch Strait are internal waters:

a. In the 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, Article 1(3) provides:

> The Parties confirm 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 (**UA-71**).

Exclusive fishing rights were provided for the fishing vessels flying the flags of the parties to the agreement. Reliance by Ukraine on Article 56, UNCLOS, to justify such rights is clearly misplaced.[262] Neither country was bound by UNCLOS in 1993, which was not yet in force anyway. Ukraine only established its general claim to an EEZ in 1995.[263]

b. In the Minutes of the Second Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, held in Kiev on 6 May 1997, it was recorded that the Ukrainian side

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[258] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Judgment of 27 June 1986, ¶64 (**UAL-25**).

[259] A. McNair, The Legality of the Occupation of the Ruhr, *British Year Book of International Law*, 1924, Vol. 5, p. 35 (**RUL-149**).

[260] *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 15 June 1962, Dissenting Opinion of Judge Spender, ICJ Reports (1962), p.101, at pp. 143-44 (**RUL-150**).

[261] D. Bowett, Estoppel before International Tribunals and Its Relation to Acquiescence, *British Yearbook of International Law*, 1957, Vol. 33, p. 176, at p. 195 (**RUL-148**).

[262] Ukraine's Reply, ¶72.

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

> …noted that the Sea of Azov and the Kerch Strait should preserve the status of internal waters of the Russian Federation and Ukraine. Delimitation of the state border between the Russian Federation and Ukraine in the water area of the Sea of Azov and the Kerch Strait, as well as the Black Sea, would allow the determination of the limits of the sovereignty of each State in the region.[264]

The term 'preserve' was meant to continue what used to be, and UNCLOS was not yet in force for Ukraine. The future State border would materialize in the Sea of Azov and the Kerch Strait 'as limits of the sovereignty of each State';

c. In a *note verbale* dated 30 March 1998, the Russian Foreign Ministry suggested to the Ukrainian Ministry of Foreign Affairs to continue negotiations

> …of the legal and practical cooperation issues between Russia and Ukraine in the Azov-Kerch region for the purpose of consolidating the understanding reached during the visit by President of Ukraine Mr. Leonid Kuchma to Moscow on 26 February – 1 March 1998, in favour of preserving the status of Russian and Ukrainian internal waters of the Azov-Kerch area;[265]

d. To his Russian counterpart, the Ukrainian President stated in a *note verbale*, transmitted to the Russian Ministry of Foreign Affairs on 13 August 2001, that

> I would like to reiterate that Ukraine agrees to the Russian Federation's proposals on preserving the status of internal waters for the water areas of the Sea of Azov and the Kerch Strait.
>
> At the same time, the Ukrainian side does not regard the status of internal waters as rendering impossible the delimitation of the territories of the two States in the Sea of Azov and the Kerch Strait, nor will the demarcation of the international border across the water surface between Ukraine and Russia lead to acquiring of the status of international waters by the Sea of Azov.[266]

Ukraine's consent to the Russian position was reiterated, and it did not see the state border of the two countries, to be drawn in the Sea of Azov and the Kerch Strait, in such light as to change the internal-water status of the Sea and the Strait;

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[264] Minutes of the Second Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, 6 May 1997 (**RU-17**).

[265] Note Verbale of the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine No. 2378/2dsng, 30 March 1998 (**RU-62**).

[266] Letter of 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 (**RU-70**).

e. Article 1 of the Azov/Kerch Cooperation Treaty provides that '[T]he Sea of Azov and the Kerch Strait are historically internal waters of the Russian Federation and Ukraine';[267]

f. In the Joint Statement by the Presidents of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch, of 24 December 2003, the two Presidents confirmed their understanding that

> …historically the Sea of Azov and the Strait of Kerch are inland waters of Ukraine and Russia, and settlement of matters relating to the said area of water is realized by agreement between the Ukraine and Russia in accordance with international law.[268]

Even leaving aside for a moment the term 'historical', the internal waters status, as recognized by both countries, stands out both in this official statement and in the Azov/Kerch Cooperation Treaty;

g. In the official press statement on 24 December 2003, immediately following the signing of the Azov/Kerch Cooperation Treaty, Ukraine's President Kuchma explicitly recognized that the Parties 'did not have any diverging interpretations', and that 'the Sea of Azov… *constitutes internal waters* of the Russian Federation and Ukraine'.[269] [*Emphasis* added].

h. The Ukrainian Parliament's public announcement dated 5 May 2004 concerning the ratification of the 2003 Treaty explains that, by the treaty, 'the Parties… have agreed that: the Azov Sea and the Kerch Strait *are internal waters* of Ukraine and the Russian Federation'.[270] [*Emphasis* added].

i. The draft treaty sent to the Russian Government by the Ukrainian Ministry of Foreign Affairs in February 2004, *after* the adoption of the Azov/Kerch

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[267] Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, 24 December 2003 (**RU-20-AM**).

[268] 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, *Law of the Sea Bulletin*, 2004, Vol. 54 (**RU-21**).

[269] Ukrainska Pravda, *How Kuchma gave up the Kerch Strait and the Sea of Azov. Transcript of the Press-Conference* (24 December 2003) (**RU-564**).

[270] Law of Ukraine 'On Ratification of the Treaty for Cooperation in Utilizing the Azov Sea and the Kerch Strait between Ukraine and the Russian Federation', 5 May 2004, available at: https://zakon rada.gov.ua/laws/anot/en/1682-15 (**RU-562**).

Cooperation Treaty, is significant,[271] in that, besides the timing, Ukraine agreed thereby to proceed *further* with negotiations over the state border between the two countries in the Sea of Azov, on the basis that the delimitation Ukraine had in mind was by a boundary drawn in the sea, 'separating the State territories (waters, seabed, subsoil and airspace) of the Contracting Parties in the Sea of Azov.'[272] Ukraine thus not only accepted the Russian position that the sea was a body of internal waters, but proposed to the Russian Federation to delimit the sea as territory. Any possible ambiguity with the provision of Article 5 of the 2003 State Border Treaty, as Ukraine seeks to demonstrate,[273] is wiped out by this transmission by *note verbale* of an official draft text.[274] Ukraine's argument that the draft text was not binding is beside the point,[275] as the draft text is one of many instances in which Ukraine's official position was communicated formally to the Russian Federation;

j. One year before the initiation of the present arbitration, the Ukrainian Ministry of Foreign Affairs sent a diplomatic note to the Russian Ministry of Foreign Affairs, on 29 July 2015, upon learning of a Russian plan to construct a fixed crossing across the Kerch Strait, stating thus:

> In this context, the Ukrainian Side wishes to point out to the Russian Side that according to the applicable bilateral agreements, the Sea of Azov and the Kerch Strait are historically defined as internal waters of Ukraine and Russia, and any issues involving this water zone are to be resolved exclusively by agreement between Ukraine and Russia in accordance with international law.[276]
>
> The 2003 treaties, including the State Border Treaty of January 2003, remained in force at that time, and any dispute in the Sea and the Strait should under those treaties be resolved exclusively by agreement between the two countries.

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[271] Counter-Memorial, ¶103.

[272] 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.2 (**RU-76**).

[273] Ukraine's Reply, ¶56.

[274] Counter-Memorial, ¶97 (explaining the meaning of the term 'positions' in Article 5 of the Azov/Kerch Cooperation Treaty).

[275] Ukraine's Reply, ¶58.

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

k. The Ukrainian Presidential Decree No. 320/2018, of 12 October 2018, upon enacting into law the National Security and Defense Council of Ukraine Decision dated 12 October 2018, required the Ukrainian Ministry of Foreign Affairs:

> …to make public in accordance with the established procedure, by notifying the Secretariat of the United Nations and the Russian Federation, the determined coordinates of the median line in the Sea of Azov, the Kerch Strait and the Black Sea, which, until a bilateral agreement is concluded, shall be the line of delimitation, i.e. the line of the state border between Ukrainian and Russian internal waters.[277]

A median line was required to be proclaimed to the world as the state border between the internal waters of the two countries, absent a bilateral treaty of delimitation.

204. For estoppel to be established in the light of the preceding list of statements, official instruments, and conduct, which have been exactly and unambiguously represented by authorized persons between Ukraine and the Russian Federation, it suffices that Ukraine has reaped benefits from such representations to the Russian Federation that it has accepted the Sea of Azov and the Kerch Strait as internal waters. Such benefits can be found in the Azov/Kerch Cooperation Treaty, for instance, which provides for special treatment, in the form of freedom of navigation, for the merchant vessels and warships of the Parties to the treaty, and in which the Russian Federation specifically recognized the wish of Ukraine to delimit the Sea of Azov and the Kerch Strait by a state border.[278] Additionally, under Article 2(3) of the Azov/Kerch Cooperation Treaty, Ukraine and the Russian Federation share between themselves bilateral control over the visits by foreign warships and government ships operated for non-commercial purposes to a local port on the Sea or the Strait, in that both countries' consent is required for such visits.

205. The 20-year peaceful life of the Azov/Kerch Cooperation Treaty speaks eloquently of its authority over the Parties and their satisfaction with its terms. The 2003 Treaty had been regulating the passage regime of the Sea of Azov and the Kerch Strait until it was

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[277] 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"'*, 12 October 2018 (**RU-80**).

[278] *See* Minutes of the Second Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, 6 May 1997 (**RU-17**), *see* also Letter of 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 (**RU-70**).

denounced in 2023. When the present arbitration was initiated in 2016, Ukraine was certainly enjoying benefits under the 2003 Treaty and would continue to do so until some seven years later. It is also interesting that the 2015 diplomatic note from the Ukrainian Ministry of Foreign Affairs relied on the 2003 treaties in an attempt to turn the Russian bridge-building project into a matter exclusively reserved for settlement between the two countries.[279]

206. In parallel to the argument made above regarding the benefits enjoyed by Ukraine from the Azov/Kerch Cooperation Treaty which recognised the Sea of Azov and the Kerch Strait as historic internal waters of the two countries, there is also the point to be made with regard to the detriment suffered by the Russian Federation from recognising the two sea areas as internal waters of the two countries.[280] The detriment to Russian interests takes the following form.

207. Since 1995, the Russian Federation and Ukraine had started negotiations over, among others, the recognition by Ukraine of the historic internal waters status for the Sea of Azov and the Kerch Strait, and the recognition by the Russian Federation of Ukraine's requests for delimitation of those sea areas by a state border and for a regime of navigation in the waters. This effort culminated in the Azov/Kerch Cooperation Treaty, which stipulated the recognition by both countries of the historic internal waters status for the sea and the strait and of Ukraine's requests. By acceding to Ukraine's requests, the Russian Federation suffered the prejudice of giving up its own stance that a delimitation of this type, albeit by a state border, should be avoided for fear that it would result in the loss of the exclusive rights so far enjoyed by the two countries.[281] The fear has turned out real enough, evidenced by the fact that in the present proceedings, Ukraine has sought to portray the Sea of Azov and the Kerch Strait as just that -- international waters, by relying on the high seas freedoms (as represented by Articles 87, 91 and 92 of UNCLOS) recognised under Article 58(2) of UNCLOS, in respect of the EEZ, and the freedom of

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[279] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine, No. 610/22-110-1132 (29 July 2015) (**UA-233**).
[280] On the requirement for a showing of detriment in order to establish an estoppel, see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria),* Preliminary Objections, Judgment, ICJ Reports 1998, p. 303, ¶57: 'It would further be necessary that, by relying on such an attitude, Nigeria had changed position to its own detriment or had suffered some prejudice.' (**RUL-26**).

[281] Letter of the President of the Russian Federation Vladimir Putin to the President of Ukraine Leonid Kuchma, 9 July 2001 (**RU-68**).

transit passage for international straits.[282] In the circumstances, this concession on the part of the Russian Federation in 2003 or around that time was of course necessary so that the Azov/Kerch Cooperation Treaty could be successfully concluded to stabilize the situation in the Sea of Azov and the Kerch Strait.

208. Were the Arbitral Tribunal to reject this argument regarding the benefits Ukraine has enjoyed from its rather inconsistent position and the detriment suffered by the Russian Federation from its concession, both recognized especially under the Azov/Kerch Cooperation Treaty, it is argued, alternatively, that the list of significant representations made by Ukraine to the Russian Federation can also support the application of the doctrine of admission set out earlier in this sub-section. Admission in this case manifests in the fact that, by repeated official representations to the Russian Federation that endorse the latter's position that the Sea of Azov and the Kerch Strait are historic internal waters of the two countries, Ukraine is likely precluded from denying the truthfulness of those representations, which include not only conduct, but treaties and official documents. In any case, such admissions weaken the contrary evidence proffered by Ukraine, if any.

iv. Conclusion

209. In conclusion, the Russian Federation makes the following observations:

a. A historic title in favour of the USSR had been established over the whole area of the Sea of Azov and the Kerch Strait by, at the latest, 1958, on the basis of a century of peaceful possession first by the Russian Empire and later by the USSR, as noted by authorities of international law and supported by a line of domestic legislations, none of which had given rise to protest from foreign governments;

b. The historic title perfected by 1958 coincided with the ratification by the USSR of the 1958 Geneva Convention in 1960, with the latter merely providing yet another justification for the internal-water status of the Sea of Azov and the Kerch Strait, but the historic title and the law of juridical bays as contained in the 1958 Geneva Convention existed in parallel;

[282] Ukraine's Notice of Arbitration and Statement of Claims, ¶¶7 (Articles 77 and 81, UNCLOS), 15 (Article 56), 22 (Articles 38 and 43), and 49 (Parts III, V, VI) *see* also Ukraine's Revised Memorial, Chapter Six, Section I.

c. When Ukraine became independent in 1991 upon the dissolution of the USSR, the sovereignty over the Sea of Azov and the Kerch Strait survived the dissolution, and was succeeded to by two coastal States, which preserved the existing regime of regulation in these areas of sea;

d. In 1995, the two coastal States started negotiations over the formal recognition of the historic internal waters status of the Sea of Azov and the Kerch Strait and of Ukraine's wish to draw a state border in the sea and the strait to delimit the territories of the two countries;

e. After reaching agreement on the two points for recognition in 1998, the two coastal States finally concluded the Azov/Kerch Cooperation Treaty of 2003 to stipulate the two points, among others, and the Heads of State of both countries issued an accompanying joint statement to the world;

f. The Azov/Kerch Cooperation Treaty had operated for almost 20 years before its repudiation in 2023, providing the legal framework for the joint use by the two coastal States of the Sea of Azov and the Kerch Strait.

210. Were the historic title of the Russian Federation found to be valid, the declarations filed by both the Russian Federation and Ukraine pursuant to Article 298(1)(i) of UNCLOS would be triggered to divest the Arbitral Tribunal of jurisdiction over this arbitration.

211. Alternatively, were the Sea of Azov and the Kerch Strait found to be long-standing internal waters, Part III of UNCLOS, which provides for the conventional regime of international straits, would become inapplicable to the present case, since the Kerch Strait does not belong to any type of international strait that may come within the ambit of Part III. In addition, the scope of the Arbitral Tribunal's jurisdiction would be likely narrowed to the provisions of UNCLOS that may relate to internal waters. But it is the submission of the Russian Federation that Articles 7-11 and 50 of UNCLOS are not applicable to the Sea of Azov and the Kerch Strait, and that, where other provisions, such as Articles 192 and 204-206, are at issue, relevant parts of this Rejoinder will respond in proper context.[283]

[283] Article 286 of UNCLOS: 'Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.'

212. In the consideration of evidence already supplied and to be offered by the Parties, the Arbitral Tribunal should bear in mind that the Azov/Kerch Cooperation Treaty, together with its negotiating history and subsequent implementation, can support a reasonable claim of estoppel or alternatively, admission, by the Russian Federation against Ukraine.

213. To further assist the deliberation of the Arbitral Tribunal, the Russian Federation hereby incorporates its previous arguments and evidence filed throughout the present proceedings in the present Rejoinder.

III. THE RUSSIAN FEDERATION DID NOT INTERFERE WITH NAVIGATIONAL RIGHTS IN THE KERCH STRAIT IN VIOLATION OF UNCLOS

214. Ukraine asserts that the Russian Federation interfered with navigational rights in the Kerch Strait by building the Kerch Strait Bridge, failing to provide documents related to the Bridge's construction, establishing traffic regulations in the Kerch Strait and temporarily suspending passage for foreign warships and government vessels in its territorial sea. These allegations are baseless. In this Chapter, the Russian Federation will refute them in turn, proving that it did not violate the Convention by building the Kerch Strait Bridge (**A**), did not breach any obligations to cooperate (**B**), and lawfully established traffic regulations in the Kerch Strait (**C**). It will also explain that Ukraine's claims in respect of suspension of navigation for certain foreign vessels are inadmissible or, alternatively, groundless (**D**).

A. THE RUSSIAN FEDERATION DID NOT VIOLATE THE CONVENTION BY BUILDING THE KERCH STRAIT BRIDGE

215. In its Reply Ukraine alleges 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',[284] thus violating Articles 38 and 44 of UNCLOS. Ukraine's position is unfounded and should be dismissed in its entirety.

216. As a preliminary matter, the Russian Federation would like to reiterate that, as it has explained in its Counter-Memorial and in Chapter II above, the Sea of Azov and the Kerch Strait constituted internal waters of the Russian Federation and Ukraine, which had been so recognised by both States, and now are internal waters under the exclusive sovereignty of the Russian Federation. Thus, the Kerch Strait is not a 'strait used for international navigation' within the meaning of Article 37 of UNCLOS and remains unregulated by it. Ukraine's claims concerning the alleged breaches of the right of transit passage must therefore be dismissed for this reason alone.

217. But even if Part III of UNCLOS were applicable to the Kerch Strait (*quod non*), Ukraine's claims cannot be upheld because, first, the Russian Federation's right to construct the Bridge predates Ukraine's claimed right of transit passage (**i**); second, ruling on the merits

[284] Ukraine's Reply, ¶97.

of Ukraine's claims would entail deciding on matters of sovereignty over Crimea (**ii**); and third, Ukraine's allegations are based on an incorrect interpretation of Articles 38 and 44 of the Convention (**iii**). The Russian Federation will also show that the Russian Federation had the right to construct the Kerch Strait Bridge (**iv**).

i. The Russian Federation's Right to Construct the Bridge Predates Ukraine's Claimed Right of Transit Passage

218. Prioritising between the coastal State's right to construct a bridge over a strait and the right of transit passage through it – even assuming this right applied (*quod non*) – is dependent on which right was there in the first place. If the construction of a bridge commenced at a certain point of time before the regime of transit passage allegedly became relevant to the strait, there would be no interference with this right as it was not in place when the construction started.

219. In advancing its claims about the alleged impediments to the right of transit passage, Ukraine fails to note that it itself recognised that this right did not exist in the Kerch Strait at the time of the Bridge's construction.

220. As explained above, in 2003 the Parties concluded the Azov/Kerch Cooperation Treaty setting forth the legal regime governing the waters of the Kerch Strait and the Sea of Azov.[285] Among other features, it covered matters of navigation. Notably, the regime envisaged by the 2003 Treaty did not provide for transit passage through the Strait.[286]

221. The construction of the Kerch Bridge commenced in 2015 when the regime of passage in the Kerch Strait and the Sea of Azov was still governed by said Treaty as well as domestic legislation of the Russian Federation.[287] Ukraine acknowledged this in its Notification of Arbitration in 2016, stating that '[a] 2003 bilateral agreement recognised both parties' rights and responsibilities in the Kerch Strait.'[288]

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[285] See above, ¶¶18, 147-148.

[286] Counter-Memorial, ¶¶282-283.

[287] See above, ¶121.

[288] Ukraine's Notification of Arbitration and the Statement of Claim, ¶20.

222. Furthermore, around 2015, Ukraine considered to denounce the 2003 Treaty, but ultimately decided against it at that time[289] and proceeded with the denunciation only in March 2023.[290] This serves as additional evidence that when Ukraine brought these proceedings against the Russian Federation, it was aware of the special regime governing the navigation in the Strait.

223. Accordingly, whatever claims Ukraine may advance now, at the time of the Bridge's construction, the right of transit passage did not apply in the Kerch Strait, of which it was fully aware. Since the Bridge's construction had already been completed long before the 2003 Treaty ceased to apply in 2023, Ukraine's claims of an alleged interference with the right of transit passage cannot now impinge upon the Bridge's construction.

ii. Consideration of Ukraine's Claim Under Articles 38 and 44 Would Entail the Discussion of Matters of Sovereignty Over Crimea, Which Is Outside of the Arbitral Tribunal's Jurisdiction

224. Even supposing that the right of transit passage under Article 38 could be applicable in the Kerch Strait (*quod non*), there is an additional problem that Ukraine must face, namely, the exercise of that right by 'Ukrainian and international vessels in the Kerch Strait.'[291] Under Article 38(2), the exercise of the right of transit passage involves a course of action that differs markedly in connotation from the term 'passage' as used in the notion of innocent passage.[292]

225. The difference is critical, in that transit passage under Article 38(2) of UNCLOS does not include 'proceeding to or from internal waters or a call at such roadstead or port facility' – without further limitation – as envisaged by Article 18(1)(b); on the contrary, the notion of transit passage under Article 38(2) allows only for 'entering, leaving or returning from a State bordering the strait.' Since Ukraine's arguments in this connection

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[289] Verkhovnaya Rada of Ukraine, Draft Law 'On Denunciation of the Treaty between Ukraine and the Russian Federation on Cooperation in the Use of the Sea of Azov and the Kerch Strait', 16 July 2015 (**RU-597**).

[290] Embassy of Ukraine in the Kingdom of Netherlands, *Note Verbale* No. 61219/23-017-34357, 27 March 2023 (**RU-601**). This denouncement was rejected by the Russian Federation. In any event, it clearly illustrates that until that time, Ukraine considered that it was bound by the Azov/Kerch Cooperation Treaty.

[291] Ukraine's Reply, ¶97.

[292] Article 18(1) provides: '1. Passage means navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility.'

focus on the access to Mariupol and Berdyansk by ships passing through the Kerch Strait,[293] the prerequisite for those arguments to be considered must be that Ukraine was a State bordering the Kerch Strait at relevant times, which it was not as a matter of fact. The question of 'a State bordering the strait' will also implicate relevant findings made by this Arbitral Tribunal in the 2020 Award, to the extent that no finding can be made in response to that question.[294]

226. For that reason, either the passage by Ukrainian and third States' ships bound for Ukrainian ports does not qualify as transit passage, thus defeating Ukraine's claims based on Articles 38 and 44, or the nature of those instances of passage cannot be addressed by the Arbitral Tribunal without exceeding its jurisdiction. In the latter scenario, if the question of whether Ukrainian and third States' ships were in exercise of the right of transit passage could not be answered, there would be no question of violations of Articles 38 and 44. In both scenarios, Ukraine's claims based on Articles 38 and 44 should fail.

iii. Ukraine's Interpretation of Articles 38 and 44 of the Convention Is Incorrect

227. Ukraine rejects the Russian Federation's interpretation of Articles 38 and 44 of the Convention, alleging that the balancing test is 'invented' and 'unsupported.'[295] It maintains that the relevant standard derived from the Convention's text is that a 'bridge… 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.'[296] It also alleges that '[t]his principle is reflected in State practice.'[297] However, Ukraine's position is supported neither by the text of the Convention (**a**) nor State practice (**b**).

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[293] For instance, Ukraine's Reply, ¶¶94, 142-143, 150, 152.

[294] 2020 Award, ¶197, holding that '…the Arbitral Tribunal cannot rule on any claims of Ukraine presented in its Notification and Statement of Claim and its Memorial which are dependent on the premise of Ukraine being sovereign over Crimea.'

[295] Ukraine's Reply, ¶104.

[296] *Ibid*., ¶100.

[297] *Ibid.*, ¶101.

a. Ukraine's Interpretation of Articles 38 and 44 of UNCLOS Is Not Supported by the Text of the Convention

228. Ukraine starts off its analysis of Articles 38 and 44 by interpreting the duty of the coastal State under Articles 38 and 44 not to 'impede' or 'hamper' transit passage. It does so with the help of dictionary definitions of the terms used in these Articles.[298]

229. This, in itself, is not sufficient because of the relative nature of these terms: for example, a short delay in navigation would by all reasonable accounts not be considered as an instance of 'hampering' or 'impeding' transit passage.[299] A self-contained analysis of these Articles is therefore not suitable to reveal what would, in fact, be considered as such.

230. Both Articles should of course be interpreted in the context of Part III of the Convention, as well as the broader context of the Convention – an exercise in which Ukraine falls short.[300]

231. Ukraine completely disregards the Russian Federation's argument about the starting point of this interpretation. Under UNCLOS the right of transit passage is to be exercised within the area of sea known as the territorial sea, over which coastal sovereignty reigns supreme,[301] or, as the Convention puts it in Article 34, titled '*Legal status of waters* forming straits used for international navigation':[302]

> 1. The regime of passage through straits used for international navigation established in this Part *shall not in other respects* affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.
>
> 2. The sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law. [*Emphasis* added]

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[298] *Ibid*., ¶¶105-107.

[299] H. Caminos, V. Cogliati-Bantz, THE LEGAL REGIME OF STRAITS: CONTEMPORARY CHALLENGES AND SOLUTIONS (Cambridge, 2014), p. 234 (**UAL-127**).

[300] Ukraine's Reply, ¶109

[301] Article 2(1) of UNCLOS states: 'The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.' Article 2(3) provides: 'The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.'

[302] Counter-Memorial, ¶230.

232. The text of Article 34 of UNCLOS thus gives effect to the coastal State's sovereignty or jurisdiction over the waters, and leaves no doubt as to its meaning and the balance it seeks to strike between the sovereignty or jurisdiction of the coastal State over the waters forming a strait and the regime of international straits established under Part III of UNCLOS.[303] One of the chief architects of Part III once reflected on the compromise that secured the adoption of Part III, by describing it thus: 'passage must not be effected in a way which would prejudice the interests of coastal States in the narrow stretches of water forming straits.'[304] If anything, the term 'balance' used in the Russian Federation's Counter-Memorial is accurate in describing the stable legal relationship between the right of transit passage and coastal States' sovereignty.[305]

233. Besides Article 34, Article 38(3) of the Convention states that '[a]ny activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.' When the coastal State considers an activity not as an exercise of the right of transit passage, it may promptly respond; whether the judgement of the coastal State *qua* sovereign is correct or otherwise is a different question. But it is beyond doubt that the coastal State exercises sovereign powers in making that judgement.

234. In addition, the right of transit passage cannot possibly shield a transiting ship engaged in threat or use of force under Article 39(1)(b) from being subjected to the rule of self-defence. Moreover, foreign ships in the exercise of the right of transit passage shall respect traffic separation schemes established by the coastal State (Article 41(7)), shall comply with relevant laws and regulations of the coastal State (Article 42(4)), and may not conduct any research or survey activities without approval of the coastal State (Article 40).

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[303] Commenting on the provision of Article 34(1), the *Virginia Commentary* states that 'this was an essential element in the balance that was reached in Part III', *see* M. Nordquist et al. (eds.), United Nations Convention on the Law of the Sea 1982. A Commentary, *Martinus Nijhoff Publishers*, 2003, Vol. II, p. 295, ¶34.1 (**RUL-81**).

[304] S. Nandan, The Provisions on Straits Used for International Navigation in the 1982 United Nations Convention on the Law of the Sea, *Singapore Journal of International & Comparative Law*, 1998, Vol. 2, Issue 2, p. 395 (**RUL-151**). Similarly, S. Nandan, D. 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. 171 (**UAL-182**).

[305] Counter-Memorial, ¶¶149-150.

235. Furthermore, Article 233 also allows the States bordering straits to take enforcement action in certain circumstances (with which Ukraine concurs),[306] and Article 234 may also impact on the right of transit passage in ice-covered areas of sea. All these provisions of the Convention support the Russian Federation's view that the regime of transit passage under UNCLOS is balanced by the sovereignty — with jurisdiction derived from that sovereignty — of the coastal State bordering an international strait. Without recognising the coastal state's sovereignty or jurisdiction or relegating them to an ancillary role, Part III of the Convention simply cannot exist and would not have been accepted by the States bordering international straits.

236. The fact is that the navigational rights in the Kerch Strait have long been balanced by other relevant rights and obligations, including the coastal State's sovereignty.[307] The coastal State's sovereignty will continue to exist even if navigation in the strait were based on the right of transit passage. It follows that balancing between the coastal State's sovereignty and the right of transit passage will inevitably arise as an issue. It is the view of the Russian Federation that the existence of the balance is well recognized in UNCLOS.

237. Ukraine also cites the preamble of the Convention, stating that its interpretation '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"'.[308] The full text of the preambular paragraph, however, reads as follows:

> Recognizing the desirability of establishing through this Convention, *with due regard for the sovereignty of all States*, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment. [*Emphasis* added].

238. The preamble clearly recognises that the establishment of a legal order for the seas and oceans is conditioned by due regard for State sovereignty. The objectives of the Convention, therefore, can only be achieved when its rules are balanced with sovereign State's rights over their territory.

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[306] Ukraine's Reply, ¶109.

[307] The Azov/Kerch Cooperation Treaty, for instance.

[308] Ukraine's Reply, ¶110.

239. Furthermore, Ukraine's reliance on the drafting history of Articles 38 and 44 of the Convention is not conclusive with regard to the balance between the coastal State's sovereignty and the right of transit passage.[309] The history, which need not be repeated, does not support an absolute right of transit passage at the expense of the sovereignty or jurisdiction of the coastal State, as argued by Ukraine ('transit passage may not be impeded, hampered, or suspended by littoral States for any reason').[310] The text, object and purpose, and context of relevant provisions of the Convention make this clear.

240. Ukraine alleges that 'nothing in the *travaux préparatoires* suggests the drafters intended Article 38 to give rise to the balancing test advanced by Russia.'[311] This is incorrect. To the contrary, the drafting history of UNCLOS amply supports the Russian Federation's position that balancing the interests of the coastal and the user States permeates Part III of the Convention.

241. As the delegates at the Third United Nations Conference noted multiple times, this balance was instrumental for future State Parties, and they sought to reach it in the final text of the Convention:

    a. 'Two fundamental statutes governed the maritime spaces, one based on the principle of sovereignty and the other on that of freedom. The formula of sovereignty and freedom would always underlie any formulation adopted. Those principles were represented by the two traditional concepts of the territorial sea and the high sea. Any formulation adopted would always mean that one of those principles would prevail over the other, which would be expressed in the final instance by its residual application. Thus, with regard to the territorial sea, whatever limitations might be established for the sovereignty of the coastal State, such as the right of innocent passage, the essence of the concept was apparent in the residual application of the principle of sovereignty.'[312] [Emphasis added]

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[309] *Ibid*., ¶¶113-124.

[310] *Ibid*., ¶110.

[311] *Ibid*., ¶123.

[312] Third United Nations Conference on the Law of the Sea, Summary records of meetings of the Second Committee 5th meeting, U.N. Doc. A/CONF.62/C.2/SR.5, 16 July 1974, p. 110, ¶22, available at: https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_2/a_conf62_c2_sr5.pdf (**RU-817**).

b. '[A]ny straits State had a legitimate right to ensure respect for its security, territorial inviolability and political independence, and for other legitimate rights such as that of preventing pollution of its coasts. His delegation therefore favoured inclusion in rules relating to passage through straits of detailed provisions for the protection of the legitimate interests of coastal States, provisions which should be strictly observed by users of the straits.'[313]

c. 'Much had been said about the need to strike a balance between the legitimate interests of the coastal States and those of the international community. What, in fact, were the interests of the international community, and how was the balance to be attained?'[314]

242. These statements show that the drafters understood the balancing test to underpin the Convention's provisions on international straits, which should therefore be an inherent part of them and be given due regard.

243. Moreover, Ukraine's allegations that the drafters considered that bridges, treated as 'works or installations', pose 'a potential concern' are misplaced.[315] The suggestion that a provision be included that would prevent States bordering straits from erecting such installations was actually dropped early on at the Third UN Conference on the Law of the Sea; Denmark, for example, noted in this respect that it had a vital necessity to be able to build bridges and tunnels across straits.[316]

244. Ukraine's observation that, during the drafting process of Article 44 of UNCLOS, a question was raised 'whether building a high bridge would amount to hampering even if navigation were not affected',[317] does not support its argument either. As Ukraine itself acknowledges, on that occasion, '[i]n reply, it was pointed out that the article was

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[313] 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, 10 December 1982, p. 127, ¶8, available at: https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_2/a_conf62_c2_sr12.pdf (**RU-818**).

[314] Third United Nations Conference on the Law of the Sea, Summary records of meetings of the Second Committee 15th meeting, U.N. Doc. A/CONF.62/C.2/SR.15, 25 July 1974, p. 142, ¶4, available at: https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_2/a_conf62_c2_sr15.pdf (**RU-819**).

[315] Ukraine's Reply, ¶120.

[316] M. Nordquist (ed.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY (Brill | Nijhoff, 2013), Art. 44, p. 387, ¶44.4, fn. 2 (**UAL-181**).

[317] Ukraine's Reply, ¶119.

designed to forbid activities which could have the incidental effect of inhibiting passage.'[318] Accordingly, since the drafters were not concerned about the situations where navigation was *not* affected, this question was not dismissed.

245. Finally, Ukraine's interpretation of Articles 38 and 44 does not comport with the principle of good faith. Adopting Ukraine's logic would essentially mean that the clearance of a bridge across a strait could potentially be influenced by a single transit of a large vessel through the strait. It would not only make the planning of any bridge construction incredibly challenging but also provide ample grounds for the sabotage of any prospective works, allowing any party to upend construction projects by sending an uncharacteristically large vessel into the strait. This would not be a reasonable or fair outcome.

246. In sum, Ukraine's interpretation of the coastal State's duty not to 'impede' or 'hamper' transit passage under Articles 38 and 44 is wrong. These duties do not mean that vessels have an unqualified or absolute right of such passage, which should prevail over the coastal State's sovereignty or jurisdiction in all cases. In considering whether a coastal State has complied with these obligations, its sovereignty should be weighed against the right of transit passage of user States. Accordingly, if an interference with transit passage is justifiable and proportionate to the coastal State's interests and duties, as recognised by UNCLOS, it cannot amount to a violation of the Convention.[319]

b. Ukraine's Interpretation of Articles 38 and 44 is Not Supported by State Practice

247. In support of its interpretation of Articles 38 and 44 Ukraine also draws examples from State practice, citing opinions of only four States and two cases. None of the instances, however, lend support to Ukraine's interpretation.

248. Ukraine relies on the parties' submissions in *Passage through the Great Belt* to claim that '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.'[320]

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[318] *Ibid*.

[319] Counter-Memorial, ¶¶150-151.

[320] Ukraine's Reply, ¶101.

249. This case does not support Ukraine's position. Both Finland and Denmark agreed that a special regime applied to the Great Belt.[321] Indeed, the strait would in any event fall under a treaty regime excluded from Part III, UNCLOS, by virtue of Article 35(c).[322] It is reasonable to presume that none of the straits recognised under that provision serves as evidence in support of a supposedly common height for all bridges over international waterways, either at present or in the future, due to divergent geographical, hydrographical and economic factors.

250. The quote of 'the highest existing ships to pass' in Ukraine's claim, as mentioned above, has been taken out of context. It was found in a paragraph of an advisory letter from the Danish Ministry of Foreign Affairs to the Danish Ministry of Public Works, dated 23 May 1936,[323] which did not necessarily reflect Denmark's position in the 1992 case.

251. In its Counter-Memorial of 1992, Denmark noted that not all existing vessels would be able to pass under the proposed bridge.[324] Its legal position was stated as follows:

> no absolute, unlimited and elastic right of passage through the Danish straits in general or through the Great Belt in particular as claimed by Finland can be deduced from any of the rules upon which the Finnish claim is based or from any other rule of international law.[325]
>
> […]
>
> The fact that the Danish straits form part of Denmark's territorial sea and have done so throughout the history of the Kingdom of Denmark makes it a right of Denmark in the exercise of its national sovereignty to regulate the passage through the straits and to construct a fixed link of vital interest to the development of the Danish society, as long as such measures do not *unduly interfere* with the international community's right of innocent passage through the straits.
>
> The construction of the high-level bridge across the Eastern Channel of the Great Belt with a main span of 1,624 metres and a vertical clearance of 65

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[321] *Passage through the Great Belt (Finland v. Denmark)*, ICJ, Counter-Memorial of the Government of the Kingdom of Denmark of May 1992, ¶¶658-660 (**UAL-14**).

[322] '*Nothing in this Part affects: … (c) the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits*.' B. Jia, THE REGIME OF STRAITS IN INTERNATIONAL LAW (Clarendon Press, 1998), pp. 120-121 (**RUL-152**).

[323] *Passage through the Great Belt (Finland v. Denmark)*, ICJ, Counter-Memorial of the Government of the Kingdom of Denmark of May 1992, ¶37 (**UAL-14**).

[324] *Ibid*., ¶186.

[325] *Passage through the Great Belt (Finland v. Denmark)*, ICJ, Counter-Memorial of the Government of the Kingdom of Denmark of May 1992, ¶660 (**UAL-14**).

> metres does not interfere with the existing traffic of ships through that strait.[326] [*Emphasis* added]

252. Denmark's position was, therefore, not what Ukraine suggests. It did not accept an absolute right of passage through a strait and even anticipated a degree of interference with the exercise of the right of innocent passage through the Great Belt. But the main point of Denmark's statement was that it would proceed with the construction of the bridge across the Belt as the sovereign of both sides of the strait and the strait itself. The right of passage could not prevent the coastal State from furthering its vital interests by building a bridge. In Denmark's view, the proposed clearance for the bridge was enough to preserve the extant shipping interest in the strait.

253. Finland, as the applicant in the 1992 proceedings, also recognised the coastal State's right to construct a bridge between its coasts separated by an international strait.[327]

254. It may be concluded that, even though the ICJ did not issue a judgment in *Passage Through the Great Belt,* the stances of Denmark and Finland do not support Ukraine's position in the present case. Rather, they both support the notion that a State's right to construct a bridge should prevail over the right of passage through a strait.

255. Furthermore, Ukraine relies on the fact that, in 1988, Italy applied to the International Maritime Organisation ('IMO') for consultations on the height of a future bridge over the Strait of Messina.[328] This case does not support Ukraine's position, either.

256. ***First***, Italy's application predated its ratification of UNCLOS,[329] and as such cannot directly serve as evidence of State practice in relation to the interpretation and application of the Convention.

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[326] *Ibid*., ¶797.

[327] *Passage through the Great Belt (Finland v. Denmark)*, ICJ, Memorial of the Government of the Republic of Finland of December 1991, ¶420 (**UAL-13**).

[328] Ukraine's Reply, ¶102 (citing Italy's note to the IMO, *see* 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**).

[329] Italy ratified UNCLOS on 13 January 1995, *see* United Nations Treaty Collection (Depositary), United Nations Convention on the Law of the Sea, available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

257. ***Second***, the regime of passage through the Strait of Messina falls under the exception provided for in Article 38(1) of UNCLOS.[330] This strait is not open to the exercise of the right of transit passage and cannot support Ukraine's argument in reliance on Articles 38 and 44. It is in any case noteworthy that Italy has since 1985 enacted special regulations for the Messina Strait, banning vessels over 50,000 tons or more that carry noxious cargoes.[331] This shows, at minimum, that one State bordering an international strait has prohibited the passage of large ships through it. In the present case, there has never been similar national legislation prohibiting the passage by vessels through the Kerch Strait.

258. ***Third***, the hydrographical conditions of the Strait of Messina are drastically different from those of the Kerch Strait. In particular, the Strait of Messina is over 250 m deep,[332] but the Kerch Strait is only 8 m deep, which drastically limits the size of the ships that are able to pass through.[333]

259. Furthermore, the bridge over the Strait of Messina has never been constructed, even though over 30 years have passed since Italy's application to the IMO. According to Ukraine's own sources, the construction of such a bridge has proved economically unviable.[334] Its future remains uncertain.[335] Accordingly, the height of a bridge never built is irrelevant to this case.

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[330] Article 38(1) reads as follows: 'In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.' *See* also United Nations General Assembly, Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Vol. III, Official Records: Twenty-Eighth Session, Supplement No. 21, U.N. Doc. No. A/9021, 1973, pp. 70-71 (citing Italy's draft article on straits, U.N. Doc. No. A/AC.138/SC.II/L.30 and Corr.l), available at: https://digitallibrary.un.org/record/725188?ln=en (**RU-812**).

[331] Ministry of Infrastructures and Transport, Italian Coast Guard Headquarters, Messina VTS, User's Manual, Edition No. 007, March 2015, p. 1, available at: https://www.guardiacostiera.gov.it/mezzi-e-tecnologie/Documents/manualiVTS/manualeutentemessina_inglese.pdf (**RU-605**).

[332] World Atlas, *Strait of Messina* (3 March 2021), available at: https://www.worldatlas.com/straits/strait-of-messina.html (**RU-606**).

[333] First [redacted] Report, ¶8.

[334] D. Masoni, M. Roddy, Sicily Bridge Project Sinks in Italy Budget Mire, *GlobalPost*, 26 February 2013 (**UA-807**).

[335] Courthouse News Service, *A Bridge to Sicily: Castle in the Air or Solution to Italy's 'Southern Question'?* (8 January 2022), available at: https://www.courthousenews.com/a-bridge-to-sicily-castle-in-the-air-or-solution-to-italys-southern-question/ (**RU-607**).

260. Finally, Ukraine relies on an author's 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.'[336] This statement is at most a reflection of the position of the US, thus being irrelevant to the interpretation or application of UNCLOS, because the US is not party to the Convention.

261. In sum, Ukraine has failed to appreciate the context of Part III of UNCLOS and misinterprets Articles 38 and 44 in respect of the duty not to impede, hamper, or suspend the exercise of the right of transit passage. The limited evidence it cites of bridge-building by other States lends no support for Ukraine's position either.

iv. The Russian Federation Had a Right to Build the Kerch Strait Bridge

262. As explained above, the Convention does provide for finding a balance between the sovereignty and jurisdiction of a coastal State, on the one hand, and right of transit passage, on the other. It is submitted that, applying this test, the Russian Federation had a right to construct the Kerch Strait Bridge.

263. On the one hand, there are the Russian Federation's rights and duties as a sovereign to exercise jurisdiction over its territory. Furthermore, a States has a variety of obligations towards its citizens, including to respect and protecting their rights.[337] Such obligations attain even more important in times of crises.[338] In this case, not only was the Russian Federation entitled to construct a bridge over a waterway under its sovereignty, but as will be explained below, it had a pressing need to safeguard the basic rights of people in Crimea in the circumstances caused, *i.a.*, by Ukraine's adverse actions.

264. On the other hand, there is Ukraine's stated interest in larger vessels reaching the ports of Berdyansk and Mariupol. Notably, Ukraine does not show that any of its own vessels were prevented from entering the Strait. As will be further explained below, its allegations concern an exceedingly small group of *foreign* vessels that did not play any appreciable role in trade in the Sea of Azov. Even if cessation of port calls by such vessels were

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[336] Ukraine's Reply, ¶103.

[337] O. De Schutter, INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS, COMMENTARY (CUP, 2012), p. 461 (**RUL-153**). N. Jayawickrama, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE (2nd ed., CUP, 2017), p. 42 (**RUL-154**).

[338] D. Cubie, THE INTERNATIONAL LEGAL PROTECTION OF PERSONS IN HUMANITARIAN CRISES: EXPLORING THE ACQUIS HUMANITAIRE (Hart Publishing, 2017), p. 151 (**RUL-155**).

caused by the Kerch Strait Bridge (which Ukraine has so far been unable to prove), this effect was negligible for the cargo turnover in the ports of Berdyansk or Mariupol.

265. Furthermore, it is common practice in maritime industry to adopt vessel designs to the parameters of a particular waterway, should there be any demand for them. This was the case, for example, with Panamaxes and Suezmaxes built with the specific requirements of Panama and Suez Canals in mind, respectively. If there is ever a demand for larger vessels to traverse the Kerch Strait, a vessel of respective parameters would promptly be designed.[339] There has never been any demand for it, however, because cargo turnover through the Kerch Strait has been efficiently handled by existing ships capable of sailing under the Bridge.[340]

266. Finally, before each Party's interest is examined in detail, it is submitted that the particular circumstances of the Kerch Strait should be considered as part of the context of the said interests of the Parties.

267. ***First***, it should be noted that Ukraine's claims in respect of navigation in the Kerch Strait relate, in fact, not to the Strait itself, but to a narrow artificial canal dredged within it, the Kerch-Yenikale Canal (KYC).

268. In its natural state, the Kerch Strait itself is hardly a navigable waterway. To enable passage of larger ships, a 5.8 m deep canal had to be dredged in the 19th century. Additional dredging was carried out in the Soviet times to deepen the canal until it reached the maximum permitted draft of 8 m. No additional work has been carried out since then.[341] This canal is the only way whereby larger ships can pass through the Kerch Strait to the Sea of Azov; the natural depth of the Kerch Strait does not allow that.

269. Artificial waterways are generally recognised as not governed by UNCLOS. In the words of one author, '[t]he Convention is applicable to straits subject to the regime of transit passage and of innocent passage, but it excludes man-made canals, such as the Suez.'[342]

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[339] *See* Second [redacted] Report, ¶132.

[340] See below, ¶361.

[341] First [redacted] Report, ¶¶22-23.

[342] V. Becker-Weinberg, *'The Belt and Road Initiative': Enhancing Maritime Cooperation in the Mediterranean and Red Seas* in K. Zou (ed.), THE BELT AND ROAD INITIATIVE AND THE LAW OF THE SEA (Brill | Nijhoff, 2020), p. 149 (**RUL-156**).

The KYC is not dissimilar to the Panama or the Suez canals because of the way it was created.

270. ***Second***, as explained above, at the time when this Arbitration was initiated, the regime of passage through the Kerch Strait was governed by the Azov/Kerch Cooperation Treaty, which did not envisage the right of transit passage through the Strait. It is also submitted that priority should not be given to a right that did not even exist in the Strait at the time the Arbitration between the Parties commenced.

271. This background, as the Russian Federation submits, should factor into the assessment of competing interests in the present case.

272. As the Russian Federation showed in the Counter-Memorial,[343] the Kerch Bridge's design that was ultimately implemented was the only viable one. Even if the Bridge interfered with navigation in the Kerch Strait (which Ukraine did not prove satisfactorily), this interference was proportionate and justified in light of the necessity to construct the Bridge. These points will be addressed in detail below.

(1) Ukraine Has Failed to Disprove the Dire Economic and Humanitarian Necessity for Constructing the Kerch Bridge

273. In the Counter-Memorial, the Russian Federation has explained in depth that the Kerch Bridge's construction was based on an acute necessity to safeguard the well-being and safety of the people of Crimea.[344] This necessity was caused in no small part by Ukraine's actions.[345] Without addressing this issue in substance, Ukraine merely replies that 'whether the Bridge was a "necessity" is not the relevant question before this Tribunal.'[346]

274. This is, however, incorrect. As demonstrated above,[347] the right of transit passage was not the only right at stake when a bridge is built. A State not only has sovereignty over its territory; but also a duty to protect its citizens' rights and ensure their well-being, as

[343] Counter-Memorial, ¶¶161-167.

[344] Counter-Memorial, ¶¶156-158.

[345] *Ibid*., ¶155.

[346] Ukraine's Reply, ¶131.

[347] Rejoinder, ¶¶263-264.

well as to foster development. The right of transit passage cannot be separated from other rights and interests that a State must take into account when considering the construction of a bridge, such as economic and humanitarian necessity, which is highly relevant for the case of the Kerch Bridge.

275. As the Russian Federation has shown in the Counter-Memorial, the plans to construct a bridge over the Kerch Strait were mulled over for more than a century.[348] They were fueled by the immense economic and social benefit that such project was perceived to bring. The construction of the Kerch Bridge was therefore a question of 'when' rather than 'if.' When in December 2013 the Russian Federation and Ukraine signed an agreement to start the bridge construction project, it seemed that this question finally had an answer.[349]

276. Ukraine argues that its prior support of the project should be disregarded because 'it 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 standard',[350] but this misses the point. Ukraine's continuous support of the project to build a bridge over the Strait shows that it, too, had always (at least until the institution of these proceedings) considered this project to be necessary. As will be explained below, Ukraine's allegations as to the Bridge's design are unfounded.

277. However, soon after the 2013 Agreement was signed, the construction of the Kerch Bridge was not only desirable, but urgently required. In the spring of 2014 Ukraine demonstrated that it was willing to disregard the most basic needs of the people of Crimea for political gain, in an attempt to punish them for their free choice of joining the Russian Federation. In the Counter-Memorial, the Russian Federation has provided a timeline of Ukraine's actions that put at risk the basic needs of the Crimean population.[351] In April 2014 Ukraine permanently cut off Crimea's main source of freshwater water supply.[352]

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[348] Counter-Memorial, ¶153.

[349] *Ibid*. *See* also Agreement Between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on Joint Steps to Organize the Construction of a Transport Crossing Across the Kerch Strait, 17 December 2013 (**UA-96-AM**).

[350] Ukraine's Reply, ¶133.

[351] Counter-Memorial, ¶155.

[352] *Ibid*., ¶155(b); RIA, *Ukraine Shuts off Canal That Gives Crimea 85% of its Water* (26 April 2014) (**RU-330**).

278. Later, in December 2014, it terminated all bus and railway communications with Crimea.[353] It was only a matter of time until Ukraine took further, and more drastic, steps.

279. Crimea's geographical location made it vulnerable to fluctuations in export of goods and services from Ukraine. In 2015 extremist and radical political organisations – with Ukraine's tacit, and later, explicit approval – took advantage of this and instigated a near-total blockade of the peninsula.[354] They blocked all three checkpoints connecting Crimea with mainland Ukraine, which essentially halted all exports from Ukraine, creating, in their own words, a 'humanitarian disaster.'[355] They blew up power lines and actively prevented maintenance crews from conducting repairs,[356] which left Crimea with mere 30% of the required electricity supply, which prompted a state of emergency on the peninsula.[357]

280. The OHCHR described the ensuing crisis as follows:

> For about three weeks, the interruption of energy deliveries to Crimea caused widespread disruptions, affecting daily life on the peninsula, notably food conservation, public transportation and economic activity. The Crimean de facto authorities redirected available energy resources to the most critical social infrastructure, such as hospitals and schools. The human rights impact of the power outage has been the most acute for people with limited mobility and low income.[358]

281. The instigators readily acknowledged that this was indeed the intended effect of their actions. One of them boasted that their actions created a 'small Armageddon for the

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[353] Counter-Memorial, ¶155(d); Interfax, *Termination of Railway Communication with Ukraine from 29 December Announced in Crimea* (27 December 2014) (**RU-332**).

[354] RIA Crimea, *'Right Sector' 'Reported That 'Azov' Had Joined the Blockade of Crimea* (1 October 2015), available at: https://crimea.ria.ru/20151001/1101141850 html (**RU-608**).

[355] Gordon*, Islyamov: If Members of Parliament Do Not Vote Tomorrow to Cut Electricity Supply to Crimea, We Will Block Them* (7 December 2015), available at: https://gordonua.com/news/crimea/Islyamov-Esli-zavtra-deputaty-ne-progolosuyut-za-prekrashchenie-podachi-elektroenergii-v-Krym-my-budem-ih-blokirovat-109792.html (**RU-609**).

[356] RIA, *Participants of the Blockade of Crimea Stated the Conditions for Admission of Power Engineers to Power Lines* (23 November 2015), available at: https://ria.ru/20151123/1327039751 html (**RU-610).**

[357] RIA Crimea, *Ministry of Emergency Situations: Crimea Is Supplied With Light by 30 %* (22 November 2015), available at: https://crimea.ria.ru/20151122/1101643601 html (**RU-611**).

[358] OHCHR, Report on the human rights situation in Ukraine: 16 November 2015 to 15 February 2016, 3 March 2016, ¶200, available at: https://www.ohchr.org/sites/default/files/Documents/Countries/UA/Ukraine_13th_HRMMU_Report_3March2016.pdf **(RU-612**).

Crimean authorities', as a result of which 'hospitals, kindergartens and all that other stuff are suffering.'[359]

282. The actions described above were fully backed by the Ukrainian government. Petr Poroshenko, Ukraine's then-incumbent president, publicly admitted to regularly meeting the instigators to offer support and coordinate their effort to maintain the blockade.[360] In a contemporary interview a Ukrainian MP described the state of affairs as follows:

> Everyone understands perfectly well that the authorities have been de facto supporting the food blockade, which began two months ago. And not only the food blockade. An allegedly civil blockade has been made, which is fully supported by the Ukrainian authorities. This is part of the hybrid war.[361]

283. In late 2015 the blockade was formally installed by a government decree.[362]

284. It became apparent that this problem would require a definitive resolution. Until there was another way to move goods, services and energy into Crimea, the population would always be at risk of another 'small Armageddon' at the hands of Ukraine: deprivation of produce, power and other basic needs. This made construction of a bridge over the Kerch Strait a dire humanitarian necessity.

285. Furthermore, the Kerch Bridge also had a significant positive impact on the living standards of the Peninsula's residents and made it possible to overcome the negative consequences of the blockade:

> The construction of the bridge gave a powerful impetus to the development of the entire transport infrastructure of the peninsula, which is one of the foundations of its new economy. The transport crossing is the most important element of our region's economic security. For almost five years, communication with the mainland has largely depended on the vagaries of nature. From 20 to 30 days a year the ferry crossing did not work due to bad

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[359] Gordon, *Islyamov: If Members of Parliament Do Not Vote Tomorrow to Cut Electricity Supply to Crimea, We Will Block Them* (7 December 2015), available at: https://gordonua.com/news/crimea/Islyamov-Esli-zavtra-deputaty-ne-progolosuyut-za-prekrashchenie-podachi-elektroenergii-v-Krym-my-budem-ih-blokirovat-109792.html (**RU-609**).

[360] Moskovskiy Komsomolets, *Poroshenko Admits He Is Coordinating a Blockade of Crimea* (14 January 2016), available at: https://www mk.ru/politics/2016/01/14/poroshenko-priznalsya-chto-koordiniruet-blokadu-kryma html (**RU-613**).

[361] EurAsia Daily, *MP of the 'Petro Poroshenko Block': Official Kiev Fully Supports the Blockade of Crimea* (24 November 2015), available at: https://eadaily.com/ru/news/2015/11/24/deputat-bpp-oficialnyy-kiev-polnostyu-podderzhivaet-blokadu-kryma (**RU-614**).

[362] Ruling of the Cabinet of Ministers of Ukraine No. 1035 "On the Restriction of Supply of Certain Goods (Works, Services) from the Temporarily Occupied Territory to Other Territory of Ukraine and/or Other Territory of Ukraine to the Temporarily Occupied Territory", 16 December 2015 (**RU-337**).

> weather. This created a certain amount of tension, including with regard to the supply of fuel, medicines and food.[363]

286. Between 2018 and 2020, more than 9.5 million vehicles, including one million lorries, crossed the Kerch Strait Bridge. This is double the number of vehicles that have crossed the Kerch Strait by ferry since 2015. The new logistics network has allowed trucking companies to save around RUB 5 bln.[364]

287. The direct railway connection via the Kerch Strait Bridge allows for daily passage of 12 freight train pairs.[365] This has significantly increased the cargo turnover in Crimea and created favourable conditions for developing competition in Crimea and reducing prices for commodities.[366]

288. Accordingly, as demonstrated above, not only did the Kerch Strait Bridge provide an effective remedy against future supply crises, but also brought a significant benefit to the Peninsula's economy. This shows that the Russian Federation was justified in undertaking the construction.

289. Ukraine's statement that 'any economic or humanitarian interest in connecting the Crimean Peninsula to Russia could have been satisfied by constructing a bridge with a higher clearance'[367] misses the mark. Ukraine is quick to downplay the real threats to the population of the Crimea that the Kerch Bridge prevented; yet it is slow to demonstrate how its interests were actually harmed by the Bridge's construction.

290. As the Russian Federation has shown in the Counter-Memorial[368] and as it will additionally demonstrate below,[369] the Kerch Strait Bridge's clearance accommodates

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[363] Krymskaya Pravda, *Aksyonov: The Construction of the Crimean Bridge Has Given a Powerful Impetus to the Development of the Peninsula's Infrastructure* (15 May 2019), available at: https://c-pravda ru/news/2019-05-15/aksenov-stroitelstvo-krymskogo-mosta-pridalo-moshhnyjj-impuls-razvitiyu-infrastruktury-poluostrova (**RU-615**).

[364] Federal Road Agency, *Crimean Bridge: Two Years of Operation in Normal Mode* (5 May 2020), available at: https://rosavtodor.gov.ru/about/upravlenie-fda/upravlenie-stroitelstva-avtomobilnykh-dorog/transportnyy-perekhod-cherez-kerchenskiy-proliv/novosti/327721 (**RU-616**).

[365] TASS, *Aksyonov Said That the Crimean Bridge Will Allow Transporting up to 13 Million Tonnes of Cargo per Year* (30 June 2020), available at: https://tass.ru/ekonomika/8847689 (**RU-617**).

[366] *Ibid.*

[367] Ukraine's Reply, ¶131.

[368] Counter-Memorial, ¶¶169-186.

[369] *See* below, Section III(A)(iv)(4); ¶¶1060-1062.

virtually all vessels that have historically transited the Kerch Strait. Ukraine has failed to prove any justification for accommodating rare, exceptional cases, or to show any detriment to the exports or imports via the ports of Mariupol and Berdyansk.

(2) The Russian Federation has demonstrated the rationality of the Kerch Strait Bridge's design

291. Stating that 'Russia cannot invoke subjective and self-judging 'cost vs. benefit' analysis,[370] Ukraine attacks the design documentation and feasibility studies underlying the Kerch Bridge's construction and argues that the Bridge's clearance of 33 m is insufficient. Its arguments, however, miss the point.

292. At the outset, Ukraine misunderstands the nature of the 'cost vs benefit' approach applied by the Russian Federation. Its purpose is not, as Ukraine puts it, 'to decide whether to comply or not with…obligation under UNCLOS.'[371] Rather, such approach is taken in the course of large construction projects to evaluate the interests of all parties potentially affected by the project. It helps arrive at an informed decision about the parameters of the project and find the optimal way to satisfy these interests to the largest extent feasible.[372]

293. The design documents presented by the Russian Federation[373] reflect that over 70 options were examined, and due to a plethora of challenging circumstances surrounding the Strait (weather conditions, seismic activity etc.), only one design was deemed viable.[374] They analysed, *i.a.*, the historical traffic through the Strait with a view to determining the Bridge's clearance. The conclusion was that the number of vessels that could potentially be affected by a 33 m clearance was so small that it could not affect the project.[375]

294. Furthermore, Ukraine's attempts to attack the Kerch Bridge's design documentation lack any basis.

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[370] Ukraine's Reply, ¶135.

[371] *Ibid*.

[372] First [redacted] Report, ¶45.

[373] [redacted]

[374] Counter-Memorial, ¶162.

[375] *Ibid*., ¶174.

295. ***First***, Ukraine complains that the design documents have not been produced in full.[376] The Russian Federation, however, produced in course of this arbitration all parts relevant to its position.[377] The Russian Federation has thus discharged its burden of proof. Other sections mentioned by Ukraine are irrelevant to this case and the Russian Federation does not need to produce them. Furthermore, as explained below,[378] the Russian Federation is not obliged to share any documentation which may undermine essential interests of its security. Considering Ukraine's repeated threats and attempts to destroy the Bridge, the Russian Federation is justified in not producing extensively documents related to its design and construction.

296. ***Second***, Ukraine complains about the alleged lack of 'supporting documentation' for the design documents, stating that the 'study includes conclusory statements without support or underlying calculations' and that there is no evidence that the Russian Federation 'analysed navigation practice through the Strait to establish the clearance of the Bridge.'[379] These allegations are self-contradictory and should be disregarded.

297. Evidence shows that the Russian Federation actually studied the practice of navigation through the Kerch Strait.[380] In fact, at a place a few paragraphs later in its Reply Ukraine takes issue precisely with the result of such a study.[381] Furthermore, the design documents show the conclusions and how they were reached,[382] which would allow Ukraine to try and disprove them – which it still appears unable to do. The Russian Federation has submitted ample evidence in support of its case, leaving it for Ukraine to satisfy its own *onus* and disprove Russia's evidence. This Arbitration should not be used as a fishing expedition.

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[376] Ukraine's Reply, ¶¶136-137.

[377] Second [redacted] Report, ¶94.

[378] *See* below, Section III(B)(iv).

[379] Ukraine's Reply, ¶136.

[380] [redacted]

[381] Ukraine's Reply, ¶138. *See* also below, ¶300.

[382] Second [redacted] Report, ¶94.

298. Accordingly, Ukraine's suggestion that 'Russia's argument should be disregarded, as Russia has not put forward the evidence necessary to support it'[383] should be dismissed as unfounded.

299. ***Third***, Ukraine notes that the USSR's project of 1947 (which it dubs a 'historical' proposal) to build a bridge over the Kerch Strait which envisaged a clearance of 40 m.[384] This is a piece of historical background and should be considered as such. Among other projects listed as part of this background are the 1903-1917 and the 1944 designs.[385] The Feasibility Study thus summarises previous projects for the construction of a bridge over the Kerch Strait, each of which was a product of its own time and particular circumstances. Suffice it to note that the 1947 project was designed to span a different part of the Kerch Strait,[386] which renders Ukraine's point even less relevant.

300. ***Fourth***, Ukraine takes issue with the Russian Federation's study of historical traffic through the Strait (despite previously arguing that it was not carried out), alleging that the analysis 'of Ukrainian bound traffic using only two vessels' is 'inadequate.'[387] Ukraine's understanding of the study is incorrect as it was not in fact based on two vessels. As evident from the study, various parameters, such as the types, sizes, deadweights, cargo types, and drafts were considered.[388] As [redacted] has pointed out, these parameters were relevant both to smaller and mid-size vessels bound for Berdyansk and Mariupol, and for other Azov Sea ports as well. Then, two largest vessels that called at Mariupol were identified and analysed to complete the selection.[389]

301. ***Fifth***, Ukraine also notes that the Soyuzmorniiproekt study acknowledges that largest vessels that had historically visited the ports of the Sea of Azov may have had an air draft of 38-41 m and could require a 39.5-42.5 m vertical clearance. It proceeds to describe this observation as 'the bridge clearance specifications recommended by its own studies.'[390]

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[383] Ukraine's Reply, ¶137.

[384] *Ibid*., ¶136.

[385] [redacted]

[386] *Ibid*.

[387] Ukraine's Reply, ¶138.

[388] Second [redacted] Report, ¶96.

[389] *Ibid*.

[390] Ukraine's Reply, ¶139.

302. This is in fact contrary to the conclusion of the report: that such vessels visited Mariupol and Berdyansk only rarely and that there was no discernible economic rationale behind such visits.[391] To accommodate such visits, it would be necessary to make exceedingly expensive and drastic modifications to the Kerch Bridge's design, including the following:

a. to ensure vessels with the air draft of 38-41 m to be able to pass under it, a section of the Bridge would have to be designed as a movable span; [392]

b. the construction of such a movable span would require constructing a new additional canal adjacent to the KYC; [393]

c. passage under the section with a movable span would in any event be limited by natural limitations of the Strait. [394]

303. The resulting project would in any event be unable to ensure the necessary railway capacity.[395] It was therefore simply not feasible to attempt such significant modifications to accommodate seldom visits by vessels that did not play any appreciable role in the transporting cargo volumes of the Kerch Strait.[396]

304. Ukraine is also wrong in its conclusion that had the Bridge been built at the clearance of 39.5-42.5 m, it would have been possible for vessels with a height of 50.5 m to enter the Strait.[397] As [redacted] explains, if the top span of the Bridge had been constructed at 39.5 – 42.5m, the maximum safe passing height would be 40.5 m. Taking into account the draft limitation of 8 m, the maximum KtM would be 48.5 m.[398] In any event, these

[391] [redacted]

[392] *Ibid.*, pp. 37-38, ¶5.5.2.

[393] *Ibid.*, p. 38, ¶5.5.2.

[394] *Ibid.*, p. 9, p. 38, ¶5.5.2.

[395] Counter-Memorial, ¶167.

[396] Second [redacted] Report, ¶141.

[397] Ukraine's Reply, ¶139.

[398] Second [redacted] Report, ¶97.

figures bear no relation to Ukraine's position that the Bridge's clearance should be 60-70 m.[399]

305. Ukraine then proceeds to criticise [redacted] analysis of the Bridge's clearance. Again, it fails to disprove the validity of that analysis.

306. [redacted]

307. ***Second,*** Ukraine fails to disprove [redacted] conclusions that the low number of vessels over 40,000t DWT calling at Mariupol and Berdyansk did not justify taking them into account for determining the Bridge's clearance.

308. Ukraine continues to argue that 'the sheer number of vessel calls in excess of 40,000 DWT prior to Bridge construction suggests that the economics of these vessels allowed their continual use to Ukrainian ports in the Sea of Azov.'[403] As the Russian Federation has demonstrated in the Counter-Memorial,[404] this 'sheer number' of calls by vessels in excess of 40,000t DWT was, in fact, negligible. This was *precisely* because such voyages were economically unjustified.[405]

309. Even though [redacted] alleges that 'the industry practice of partial loading and discharge is well established,'[406] nothing in his report indicates that such practice was

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[399] *Ibid*., ¶98. *See* also Ukraine's Revised Memorial, ¶35.

[400] Ukraine's Reply, ¶141.

[401] Expert Report of [redacted] dated 5 December 2023.

[402] *See* below, ¶315.

[403] Ukraine's Reply, ¶142.

[404] Counter-Memorial, ¶180.

[405] [redacted] Report, ¶56.

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

actually 'well established' in the ports of the Azov Sea in respect of vessels over 40,000t DWT. In fact, they made up an exceedingly small portion of the overall vessel traffic and did not call the ports of Mariupol or Berdyansk regularly.[407]

310. [redacted] summarises historic calls (from 2007 to 2017) by such vessels as follows:

a. In the 40,000t to 50,000t DWT category there were 217 vessel calls, which equates to just 0.41 calls per week;

b. In the 50,000t to 60,000t DWT category there were 235 vessel calls, which equates to just 0.45 calls per week;

c. In the 60,000t DWT and above category, only 59 vessels called, which equates to just 0.11 calls per week.[408]

311. He concludes that the traffic of larger vessels was so infrequent and small in numbers that it could not justify taking these vessels into account when determining the Bridge's clearance.[409] Furthermore, the [redacted] Report analyses the role of such vessels in the overall cargo turnover to/from Mariupol and Berdyansk and arrives at the following conclusions:

a. Up to 95% of the total cargo amount was transported to and from Mariupol and Berdyansk by vessels under 40,000t DWT (including vessels under 10,000t DWT), and

b. Vessels over 40,000 DWT do not play any appreciable role in overall cargo turnover of Berdyansk and Mariupol. [410]

312. It is therefore clear that there was no established practice of using vessels over 40,000t DWT to carry cargo through the Kerch Strait. This is due to the geographical conditions of the Strait, these vessels crossed it severely underloaded, which is not an economically viable undertaking.

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[407] Second [redacted] Report, ¶¶99, 140.

[408] Second [redacted] Report, ¶145.

[409] Second [redacted] Report, ¶141.

[410] [redacted], ¶82; *See* also *Ibid.*, ¶¶17, 25, 80, 94, 133.

313. As explained in the [redacted] Report, market actors generally make rational economic decisions to maximise their profit.[411] Accordingly, they will choose a more cost-efficient option over a more expensive one.

314. [redacted]

315. The [redacted] Report proceeds to analyse the historic data of the amount of cargo carried through the Kerch Strait. The Report concludes that on average, the amount of cargo carried through the Strait was around 8,130t (from Mariupol and Berdyansk) and 564t (to Mariupol and Berdyansk).[414] Only 0.2% vessels carried more than 30,000t cargo each.[415] Accordingly, with the relevant amount of cargo being below 30,000t, [redacted] conclude that the most efficient way to carry this cargo were to use vessels of under 35,000t DWT.[416] The scheme suggested by Ukraine, on the other hand, where vessels over 40,000t DWT carry only very light loads through the Strait (because they are prevented from taking onboard more cargo by the low depth of the Kerch-Yenikale Canal) is not economically viable.

316. Accordingly, 'the practice of partial loading and discharge' of vessels over 40,000t DWT was not established precisely because of economic unsustainability in the case of the Kerch Strait.

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[411] *Ibid*., ¶27.

[412] *Ibid*., ¶¶40-45.

[413] *Ibid*..

[414] The vessels calling ports of the Azov Sea predominantly carried ballast, which explains this low figure.

[415] [redacted] Report, ¶48.

[416] *Ibid*., ¶49.

317. This is why Ukraine's allegations of 'continuous use' of vessels over 40,000t DWT in the Kerch Strait should be dismissed. Not only was the 'sheer number' of such vessels in fact very small, but there was no 'continuous use' of such vessels because such voyages could not be economically justified. The number of such voyages was consequently so low that it could not justify taking these vessels into account when determining the Bridge's clearance.[417] As highlighted by [redacted], 'had it been economically viable, such visits would constitute a significant portion of total amount of visits.'[418]

318. ***Third***, Ukraine's allegation that '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'[419] simply contradicts the reality.

319. As explained above, the number of larger vessels was not merely 'small', but according to the analysis carried out by [redacted], historically vessels over 40,000 DWT were responsible for less than 2.5% of the total number of vessel calls to Mariupol and Berdyansk.[420]

320. Ukraine has not disputed this figure. Instead, its expert, [redacted], targets a more general group of vessels over 20,000t DWT and suggests that their 'potential DWT uplift' should be considered.[421] He argues that this 'potential uplift' be capped at 30,000t, which he believes to be a 'conservative' assumption.[422] This approach does not make sense for a variety of reasons:

    a. Ukraine does not contest that the overwhelming majority of vessels over 20,000t DWT were not prevented from transiting the Strait. In fact, the only category potentially affected were vessels over 40,000t DWT.[423] This deprives Ukraine's case of much of practicality, as there is no need to consider 'potential' uplift of this category;

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[417] Second [redacted] Report, ¶141.

[418] Ibid., ¶102.

[419] Ukraine's Reply, ¶152.

[420] Second [redacted] Report, ¶55.

[421] Second [redacted] Report, ¶9.22.

[422] *Ibid*.

[423] Ukraine's Reply, ¶152.

b. Ukraine fails to consider that in any event, the extent to which a vessel could be loaded, would still be limited by the 8 m draft restriction;[424]

c. Actual VTS data indicates that an average cargo lift for a vessel between 20,000t and 30,000t DWT is about 17,000t, and this category of vessels is the second largest in the data set;[425]

d. As addressed above, historically only 0.2% of all vessels that have ever transited the Strait each carried over 30,000t of cargo. This figure is therefore not representative of the average amount of cargo carried by vessels of this category.[426]

321. Finally, and most importantly, it does not make sense to consider assumptions and projections when there is real-world historical data on the vessels' uplift.[427]

322. The [redacted] Report also provides a detailed analysis of the share of cargo carried by vessels over 40,000t DWT to and from Berdyansk and Mariupol. It concludes that these vessels in fact were responsible for a minor share of the overall cargo uplift, for up to 95% of that cargo uplift has been carried by vessels of less than 40,000t DWT.

[424] Second [redacted] Report, ¶147.

[425] *Ibid*.

[426] *See* above ¶315.

[427] Second [redacted] Report, ¶147.

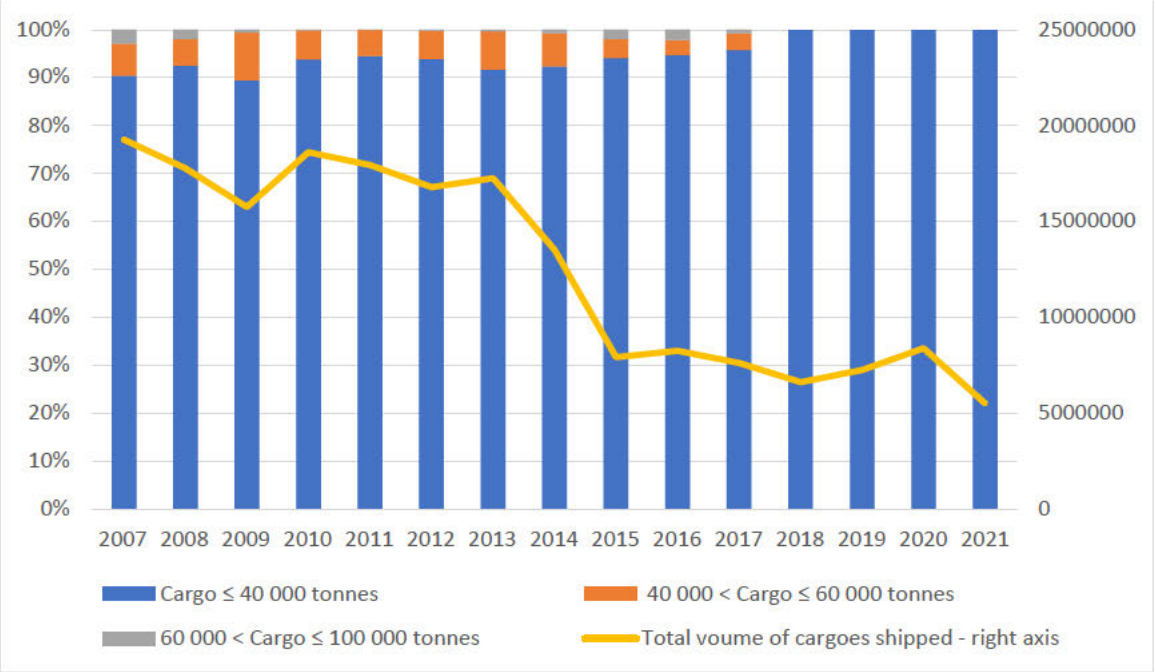

***Figure 1. Fluctuations of the share of vessels over 40,000 DWT in export of cargoes from Mariupol and Berdyansk*[428]**

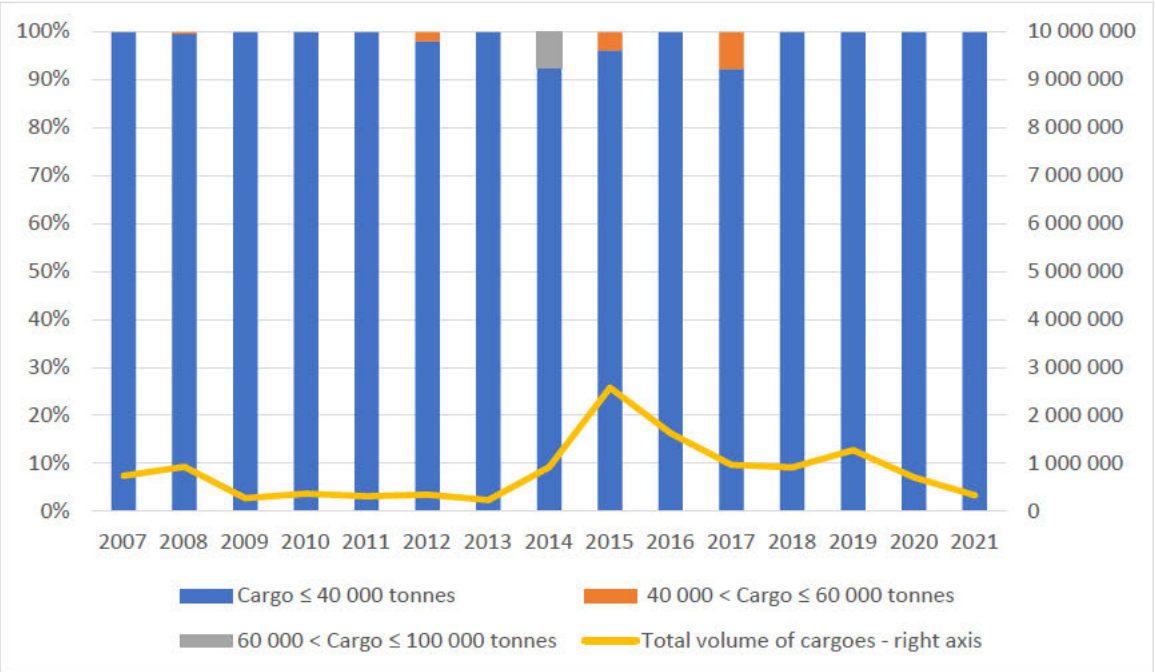

***Figure 2. Fluctuations of the share of vessels over 40,000 DWT in import of cargoes to Mariupol and Berdyansk*[429]**

[428] Avdasheva and Yusupova Report, ¶82.

[429] *Ibid.*

323. Furthermore, the Bridge's construction did not influence the overall cargo turnover of Mariupol and Berdyansk, or amounts of particular types of cargo imported to/exported from these ports, with, as will be explained below, the turnover of some types of cargo showing growth post-construction.[430]

324. Accordingly, [redacted] hypothetical assessment should be disregarded in favour of the analysis conducted by [redacted] that is based on the actual historical data, which shows that vessels over 40,000t DWT rarely entered the Strait and never played any appreciable role in Mariupol and Berdyansk's cargo turnover.

325. ***Fourth***, Ukraine seeks to downplay the significance of the Strait's depth, stating that it does not matter so long as 'large ocean-going vessels, including vessels in the Panamax class, were able to and did call at these ports before the Bridge construction.'[431] Once again, Ukraine seeks to obscure the obvious connection between the depth of the Strait, and the size of ships within corresponding draft limitations.

326. As previously explained,[432] the parameters of the KYC -- its challenging outline and shallowness -- as well as the low depths of the Mariupol and Berdyansk ports together with their respective approach canals) mostly prevented larger vessels from accessing the Strait.[433] Such vessels' size and draft restrictions made them incompatible with the Strait. Historic traffic studies show that those few larger vessels that did call at Ukrainian ports, were severely underloaded to achieve the required draft. This was a major factor during the process of the determination of the Bridge's clearance because it showed that it was not justified to accommodate those vessels.

327. ***In sum***, Ukraine in its Reply attempts to exaggerate and distort the plain facts of the case that the larger vessels hardly ever visited the Kerch Strait due to the latter's geographical limitations, and that their voyages carried no economic benefit. This is why it was not necessary to take such vessels into consideration when determining the Bridge's clearance.

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[430] *Ibid*., ¶78. *See* also below, ¶360.

[431] Ukraine's Reply, ¶143.

[432] First [redacted] Report, ¶8.

[433] Counter-Memorial, ¶173; Second [redacted] Report, ¶127.

(3) Ukraine Fails to Defend Its Selection of Comparable Bridges

328. Ukraine maintains that a bridge over the Kerch Strait should have a clearance of 60-70 m.[434] This 'estimate' is based on a selection of bridges which, as the Russian Federation has explained in the Counter-Memorial,[435] are not suitable for the purposes of the present case.

329. In the Revised Memorial Ukraine alleged that there exists an 'extensive practice in both straits and internal waterways used by international ocean-going vessels [that] 'strongly suggests that the clearance under a bridge spanning [such] a waterway ... could be expected to be in a range of approximately 60 to 70 metres.' [436] It also compiled a list of bridges apparently reflective of such practice but did not explain the criteria for compilation.

330. In the Counter-Memorial, the Russian Federation pointed out the lack of any criteria for Ukraine's list of bridges.[437] None of the waterways mentioned by Ukraine were remotely similar to the Kerch Strait in terms of their geographical features, which essentially rendered these examples irrelevant. The Russian Federation's selection showed that every bridge's design resulted from the consideration of a range of factors such as, e.g., the geographical position, meteorological conditions, depth of the waterway, and the intensity of trade and traffic in the waterway.[438] For this reason, there was no commonly accepted bridge clearance in existence.

331. In the Reply Ukraine argues 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.[439]

332. That argument, however, fails on several levels.

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[434] Ukraine's Reply, ¶145.

[435] Counter-Memorial, ¶184.

[436] Ukraine's Revised Memorial, ¶35.

[437] Counter-Memorial, ¶184.

[438] *Ibid.*, ¶¶184-185; First [redacted] Report, ¶69.

[439] Ukraine's Reply, ¶145.

333. ***First***, 'busy' is a relative term. As explained in the First [redacted] Report,[440] the Kerch Strait is nowhere near as 'busy' as the Bosphorus Strait or the Panama Canal owing to its location far from established shipping routes.[441] Furthermore, Mariupol and Berdyansk, jointly, take up only 5.7% share of the overall cargo turnover of Ukraine.[442]

334. ***Second***, the traffic through the Kerch Strait was for the most part comprised of smaller vessels. The overwhelming majority of the traffic through the Strait is headed to/from the shallower ports of the Sea of Azov, with the traffic to/from Berdyansk and Mariupol making up as little as 13.3% of the total turnover.[443] Even out of this amount, the most frequently category of vessels used for Berdyansk and Mariupol is the one below 20,000t DWT.[444] Ukraine does not allege that this category has been affected by the Bridge.

335. ***Third***, to meet its own case, Ukraine would have to demonstrate that vessels with an air draft of around 60-70 m have previously transited the Strait but it has failed to do so in its written pleadings. To be specific,[445] it has failed to provide a single example of such a height that has previously transited the Strait.[446] This failure alone should end this argument.

336. Ukraine disagrees with the Russian Federation's selection of bridges on the ground that [redacted] 'analyses no bridges located in international straits connecting two areas of exclusive economic zones or territorial sea.'[447] It appears that, according to this logic, the height of the bridge should be dependent upon the legal status of the surrounding bodies of water.

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[440] First [redacted] Report, ¶8.

[441] *Ibid*., ¶17; Second [redacted] Report, ¶¶54, 58.

[442] Second [redacted] Report, ¶¶49-50; [redacted] Report, ¶21.

[443] [redacted] Second [redacted] Report, ¶95.

[444] First [redacted] Report, ¶51.

[445] First [redacted] Report, ¶4.15.

[446] The Soyuzmorniiproekt report estimates that the largest ship to have ever visited Mariupol or Berdyansk had an air draft of around 38-41 m. *See* [redacted]

[447] Ukraine's Reply, ¶146.

337. This is obviously incorrect. If large vessels do not enter the waterway, regardless of its status, because it is too shallow, there would be no need to build a tall bridge that would accommodate such ships.

338. In fact, Ukraine appears to understand that its position – that solely bridges across 'international straits' should be considered – is unworkable. It has also previously provided a number of comparable bridges that span 'channels that provide access to working ports for ocean-going vessels.'[448] Ukraine's selection of ports, however, is inapposite because, as explained, neither Mariupol nor Berdyansk are deep sea ports.[449]

339. The Russian Federation reiterates that the design of each bridge should be determined on a case-by-case basis, taking into account geographic and regional features, including depth of the waterway, vessel traffic and weather conditions.[450] The Russian Federation's list therefore features bridges situated similarly to the Kerch Strait Bridge in terms of geography (especially depth) and turnover of nearby ports.[451] It shows that such bridges can be of different heights and do not necessarily conform to the rigid 60-70 m standard proposed by Ukraine.

340. Ukraine also alleges that several bridges referred to by the Russian Federation should not be considered because they have been built over artificial canals.[452] It is hard to follow Ukraine's logic, considering that the Kerch-Yenikale Canal – the main navigable canal in the Kerch Strait – was created artificially.[453] Furthermore, the Panama and Suez Canals – which Ukraine considers as good examples[454] – are manmade waterways as well.

341. Likewise, Ukraine alleges that several bridges – such as those located in the Kiel Canal – should be disregarded because they 'can be avoided entirely via a short, alternative route in the relevant waters.'[455] The routes that Ukraine suggests, however, are not in fact suitable alternatives. For example, a navigational route that goes through the Danish

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[448] Ukraine's Reply, ¶145.

[449] First [redacted] Report, ¶73.

[450] Second [redacted] Report, ¶112.

[451] First [redacted] Report, ¶¶74-75, Table 5.

[452] Ukraine's Reply, ¶146.

[453] First [redacted] Report, ¶22; Second [redacted] Report, ¶86.

[454] Revised Memorial, ¶139.

[455] Ukraine's Reply, ¶146.

Straits is not an adequate alternative to the passage through the Kiel Canal, as the former adds over 200 nautical miles to the voyage. [456] The same applies to the bridges located over the Delaware Canal. There, an alternative route would take around 150 extra nautical miles.[457]

342. Furthermore, Ukraine alleges that some of the bridges selected by the Russian Federation 'sit fully within a single State.'[458] This is irrelevant so long as there are significant port facilities within these waterways that could compare with Mariupol and Berdyansk. This is the case, for example, with:

a. the Crescent City Connection Bridge, which is located over a waterway leading into one of the largest export ports of grain from the US, and where most of the terminals are located north to the bridge;[459]

b. the Sidney Sherman Bridge and the Benjamin Franklin Bridge, which, contrary to Ukraine's contentions that they 'pose no barrier for ocean-going vessels to navigate to their destination ports'[460] are in fact located in front of multiple port facilities;[461]

c. The bridges over St Lawrence River and the the St Lawrence Seaway, which connects the Great Lakes and such large ports as Montreal and Toronto to the Atlantic Ocean and has five times larger turnover than Mariupol and Berdyansk combined. [462]

343. Notably, Ukraine inexplicably alleges that the example of the St Lawrence Seaway should be disregarded because 'the maximum vessel height of ships transiting the St. Lawrence Seaway is limited by the Seaway's Practice and Procedure, which 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.'[463] The height restriction, however, makes this example all the more relevant

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[456] Second [redacted] Report, ¶115(b).

[457] Ibid., ¶115(c).

[458] Ukraine's Reply, ¶147.

[459] Second [redacted] Report, ¶115(d).

[460] Ukraine's Reply, ¶148.

[461] Second [redacted] Report, ¶¶115(e)-(f).

[462] Ibid., ¶116.

[463] Ukraine's Reply, ¶147.

to this arbitration, in that it is the bridge's clearance that takes precedence over the height of ships that go under.[464] Yet the St Lawrence Seaway's cargo turnover is five times bigger than that of Mariupol and Berdyansk combined, with no signs of impediment.[465]

344. Ukraine also alleges that the bridges listed by the Russian Federation for the most part have higher clearances than the Kerch Strait Bridge. It fails to note that the underlying waterways are generally deeper as well.[466] In any event, there are other examples of bridges that have clearances comparable to that of the Kerch Strait Bridge, and that are placed in comparable locations.[467]

345. Finally, Ukraine disagrees with the Russian Federation's contention that a waterway's depth is a major factor influencing the bridge's clearance, stating that '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 40,000t DWT would not have dropped to zero after construction of the Bridge.'[468]

346. Even if Ukraine managed to convincingly demonstrate a causal link between the construction of the Bridge and the cessation of port calls from vessels over 40,000t DWT (which it has failed to do),[469] its argument would still be incorrect.

347. The correlation between the depth of a waterway and the bridge's clearance is direct: a deeper waterway would generally warrant a higher bridge.[470] The Russian Federation's selection of bridges also confirms the correlation. In case of the KYC, its depth caused larger vessels over 40,000t DWT to be mostly absent from the historic traffic pattern. The Bridge's design and clearance is a reflection of that fact, since the irregular and rare voyages of larger vessels did not justify taking them into account during the feasibility study.[471]

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[464] Second [redacted] Report, ¶116.

[465] Ibid., ¶52.

[466] First [redacted] Report, ¶¶74-75, Table 5.

[467] Second [redacted] Report, ¶119.

[468] Ukraine's Reply, ¶150.

[469] *See* below, ¶¶351-358.

[470] Second [redacted] Report, ¶¶113, 122.

[471] Second [redacted] Report, ¶141.

348. Ukraine's draws an example of es the Danish Øresund, which has a draft limitation of 7.7. m, while the Øresund Bridge has a clearance of 55 m.[472] The problem with this example is that a significant portion of traffic in that waterway historically involved ships with higher freeboards but shallower drafts – such as Ro-Ro vessels and ferries.[473] This is not the case with the KYC.[474].

349. In sum, Ukraine has failed to prove that there exists a universal practice of building bridges with a clearance of 60-70 m. The clearance, based on examples suggested by the Parties, should be determined by objective circumstances, especially the depth of a waterway. As the Russian Federation has shown, bridges in similar circumstances to those of the Kerch Strait Bridge are significantly lower than Ukraine's 'catch-all estimate' of 60-70 m in clearance. In any case, Ukraine has failed to prove that any vessels of such height ever transited the Strait.

(4) Ukraine Has Failed to Prove Any Appreciable Degree of Interference With Navigation in the Strait

350. In its Reply, Ukraine argues that the Bridge's interference with navigation was not minimal.

351. <<[redacted]>>

352. <<[redacted]

[472] Ukraine's Reply, ¶150.

[473] Second [redacted] Report, ¶¶115(a), 123. *See* also First [redacted] Report, ¶71.

[474] First [redacted] Report, ¶71.

[475] [redacted]

[476]

[477]

[redacted]>>

353. <<[redacted] >>

354. <<[redacted] >>

355. <<[redacted].>>

356. <<[redacted]>>

357. <<[redacted]

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478 [redacted]

479 [redacted]

480 [redacted].

481 [redacted]

482 [redacted].

483 [redacted]

484 [redacted]

[redacted].>>

358. <<[redacted].>>

359. Ukraine's suggestion that even a small number of larger vessels may account for 'a meaningful share of cargo shipping'[487] has been addressed above.[488] Moreover, if Ukraine's allegations were correct, and the installation of the Bridge's central span had any significant influence on the cargo turnover of Mariupol and Berdyansk, the share of these ports in Ukraine's overall export volume would have changed significantly after this date.

360. Nonetheless, when the [redacted] Report examines the fluctuations in this share, it finds no such correlation. After the Bridge's central span was installed, this share in respect of several types of cargo actually increased, while in other cases it remained stable:[489]

a. The ports' share in several types of cargo (grain, sunflower oils, coal) started showing a downward trend as early as in 2011; after the central span's construction, it remained mostly unchanged;[490]

b. In particular, after 2015, Mariupol and Berdyansk's share in export of grain fluctuated but remained generally low, whereas their share in export of sunflower oil grew slightly;[491]

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[485] [redacted].

[486] [redacted].

[487] Ukraine's Reply, ¶152.

[488] *See* above, ¶¶318-324.

[489] [redacted] Report, ¶24.

[490] Ibid., ¶¶73,76.

[491] *Ibid*.

c. From 2016 to 2021 Berdyansk and Mariupol's share in Ukraine's export of steel grew from 11% to 45%, reaching its peak level after construction has been completed;[492]

d. By 2018, Mariupol and Berdyansk's share in export of wheat and steel products rebounded to the 2010 levels, with their share in export of wheat continuing to grow in 2019 and 2020. [493]

361. Where downward trends are observed, they started before the Bridge's construction.[494] Accordingly, the installation of the Bridge's central span did not have any negative impact on the share of Mariupol and Berdyansk in the overall export volume of Ukraine. [495]

362. In sum, Ukraine has failed to demonstrate that the Bridge's influence on navigation in the Kerch Strait was anything but minimal, if existent at all.

363. ***Second***, Ukraine repeats the suggestion that the Bridge may negatively impact the transit of specialised vessels.[496] In particular, it restates that '[a] requirement to cut into and detach parts of the JDRs at sea so as to enable their passage through the Kerch Strait cannot be reconciled with the notion of unimpeded passage.'[497]

364. Ukraine fails to consider that the practice of transporting specialist vessels modified or partially disassembled is remarkably common.[498] In case of JDRs, for instance, it is done so as to enable leg structures to withstand winds and high waves and to increase the stability of the vessel at sea.[499]

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[492] *Ibid.*, ¶¶70-71; 74.

[493] *Ibid.*, ¶75.

[494] *Ibid.*, ¶77.

[495] [redacted] Report, ¶78.

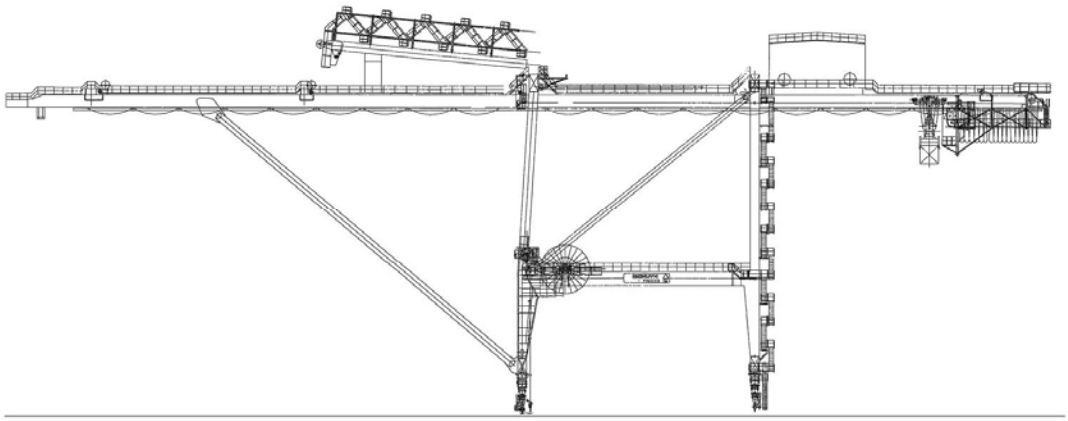
[496] Ukraine's Reply, ¶153.

[497] *Ibid*.

[498] Second [redacted] Report, ¶¶104-105; [redacted] Statement, ¶¶25-26; First [redacted] Report, ¶122.

[499] Y. Agagyseinov, E. Vishnevskaya et al., JACK-UP DRILLING RIGS, (Nedra, 1979), p. 30 (**RU-618**); DrillingFormulas.Com, *Basic Knowledge of a Jack Up Rig Transit Mode* (1 October 2018), available at: https://www.drillingformulas.com/basic-knowledge-of-a-jack-up-rig-transit-mode/ (**RU-735**).

365. Other specialist vessels also routinely undergo alterations to pass under bridges.[500] For example, in 2015, as part of a relocation project in Charleston, South Carolina, USA, quay cranes were partially disassembled during their transportation on a barge under a highway bridge.[501]



[500] Second [redacted] Report, ¶¶103, 108-109.

[501] Marine Technical Services, Inc., *Under Bridge Crane Relocation*, available at: https://www.marinetechserv.com/portfolio/under-bridge-crane-relocation/ (**RU-619**); Marine Technical Services, Inc., *Project Highlights: Crane Relocation, Charleston South Carolina*, available at: https://www.marinetechserv.com/wp-content/uploads/2015/07/Crane-Relocation-Charleston.jpg (**RU-620**).

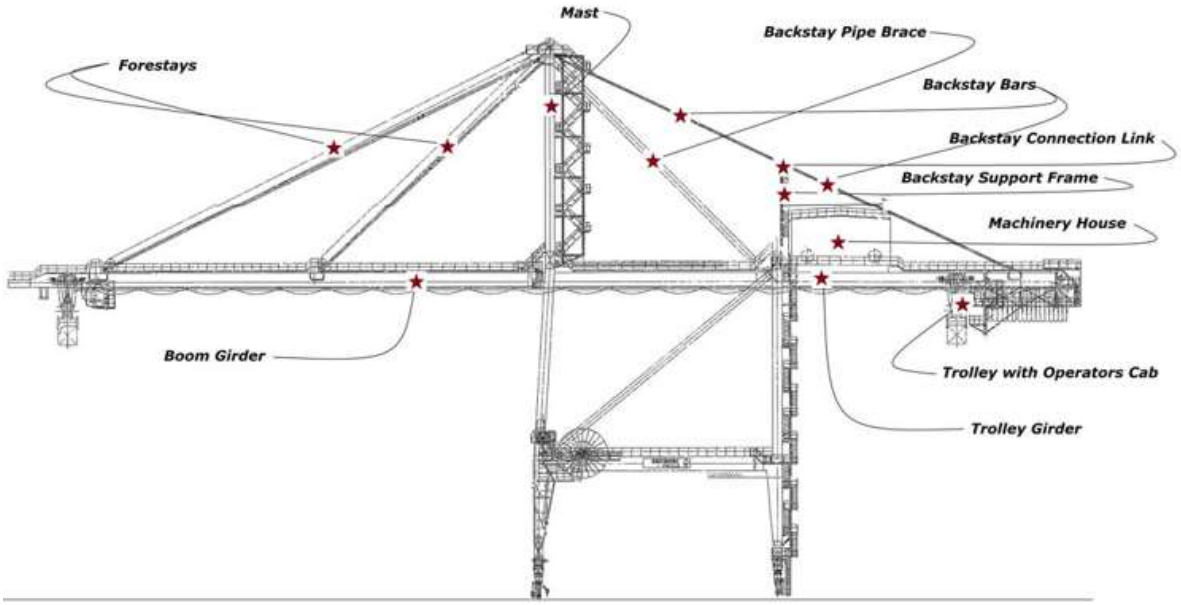


Figure 3. Under Bridge Crane Relocation Project by MTS, Inc.

366. Some sea cranes can simply be ballasted down while simultaneously lowering their booms. For instance, in 2014, a large sea crane passed under the Tappan Zee bridge in New Jersey, USA. To be able to cross the bridge with the clearance of 139 ft (roughly 42 m) the barge carrying the crane was filled with water, and its boom was set at about 45-degree angle.[502]

367. Moreover, even the tallest bridges in the world are unable to freely accommodate mobile offshore drilling units. For example, the bridges over the Bosphorus Strait require that MODUs be disassembled prior to transportation.[503] As [redacted] previously indicated, the very same JDRs referred to by Ukraine (MODUs Crimea-1 and Crimea-2) were disassembled to pass under the bridges over the Bosphorus.[504]

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[502] The New York Times, *West Coast Weightlifter Arrives at Tappan Zee Site* (6 October 2014), available at: https://www.nytimes.com/2014/10/07/nyregion/giant-floating-crane-reaches-tappan-zee-site.html (**RU-621**).

[503] First [redacted] Report, Appendix 1. Some examples of this practice include the passage of the following MODUs: the Noble Globetrotter II, the Scarabeo 9 and the GSP Deep Driller. See: Noble, To Get to the Other Side (15 March 2020), available at: https://www noblecorp.com/investors/news/news-details/2020/To-Get-to-the-Other-Side/default.aspx (**RU-732**); Daily News, Bosphorus Traffic Paused as Giant Drilling Rig Passes (29 August 2019), available at: https://www hurriyetdailynews.com/bosphorus-traffic-paused-as-giant-drilling-rig-passes-146160 (**RU-733**); GCaptain, *Drilling Derrick Removal in Progress on Transocean's DD2* (18 August 2014), available at: https://gcaptain.com/drilling-derrick-removal-progress-transoceans-dd2/ (**RU-734**).

[504] Second [redacted] Report, ¶¶107, 110; First [redacted] Report, ¶122.

368. This has two implications. First, this supports the Russian Federation's position that specific accommodation is typically not provided for outlier vessels when designing bridges, and this is not considered to be an interference with their navigational rights.

369. It could also be argued that drilling rigs may not necessarily be regarded as 'ships'[505] at all, raising a question whether they would enjoy the right of transit passage as an ordinary ship would. [506] Be it as it may, modifying them to enable passage under bridges is a common practice, which Ukraine fails to disprove.

370. Ukraine's allegation that because Rosneft addressed the possibility that jack-up drilling rigs could be transported to the Sea of Azov, the Russian Federation was 'on notice that the proposed clearance of the Bridge would hinder the passage of JDRs',[507] is also incorrect.

371. The Feasibility Study considered what would be required of the design of the bridge to be able to accommodate unaltered JDRs. It concluded that it would entail significant safety risks and costs and would severely decrease the Bridge's transport capacity. [508] The Study did not consider modifications that could be made to the JDRs to allow their passage. Given the lack of examples, the matter was not considered any further.[509] Ukraine has also failed to prove that the questions of JDRs in the Azov Sea or the Kerch Strait was a real one, because there were no reasons to use them there.[510]

372. Consequently, Ukraine's conclusion that the Bridge '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'[511] is utterly detached from reality. It fails to prove any influence of the Bridge's construction

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[505] V. Lowe, *Ships* in N. Boschiero, T. Scovazzi et al. (eds.), INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF TULLIO TREVES (Asser Press, 2013), p. 293 (**RUL-157**).

[506] *Passage through the Great Belt (Finland v. Denmark)*, ICJ, Counter-Memorial of the Government of the Kingdom of Denmark of May 1992, ¶607 (**UAL-14**).

[507] Ukraine's Reply, ¶153.

[508] [redacted]

[509] *Ibid*.

[510] [redacted] Statement, ¶10; State Unitary Enterprise of the Republic of Crimea 'Chernomorneftegaz', Letter No. 12- 7888, 8 December 2023 (**RU-807**). *See* also First [redacted] Report, ¶119; Second [redacted] Report, ¶103.

[511] Ukraine's Reply, ¶154.

on the navigation in the Strait, or that 'large ocean-going vessels' were ever commonly used in the Kerch Strait. It also fails to prove that specialised vessels would be unable to pass under the Bridge, or whether they would ever be required to traverse the Strait.

373. In sum, as the Russian Federation has demonstrated above. Ukraine's hypothetical concerns should not be favoured over the very real necessity for the Russian Federation to construct the Bridge and the economic security that the Bridge would bring to the people of Crimea. The Kerch Strait Bridge was designed taking into account the objective circumstances, such as the Strait's depth and its historical traffic. Ukraine has failed to prove that it caused any interference with navigation, or that the Bridge's clearance should have been designed so as to accommodate larger vessels. Even if there were any interference, it was minimal, and justified and proportional to the benefit that the Bridge brought. For reasons outlined above, the Russian Federation respectfully submits that Ukraine's arguments in respect of the Bridge allegedly impeding navigation through the Strait under Articles 38 and 44 of the Convention should be dismissed as unfounded.

B. THE RUSSIAN FEDERATION DID NOT BREACH ITS OBLIGATIONS UNDER ARTICLES 43 AND 44 OF UNCLOS

374. In the Reply, Ukraine claims that the Russian Federation breached Articles 43 and 44 of the Convention by failing to '"by agreement cooperate" with user States, including Ukraine, concerning navigational safety in the Kerch Strait, such as through sharing information relating to dangers to navigation."[512] This alleged breach, according to Ukraine, took place through a refusal by the Russian Federation to entertain Ukraine's request for 'all information' concerning the Kerch Bridge's construction.

375. Before addressing Ukraine's arguments, the Russian Federation reiterates that, as the Sea of Azov and the Kerch Strait are historic internal waters, Part III of UNCLOS, where Articles 43 and 44 are located, does not apply to them.[513] The arguments below are in the alternative.

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[512] *Ibid*., ¶155.

[513] Counter-Memorial, Chapter Three, Section II(A). *See* Rejoinder, Chapter II.

376. As the Russian Federation has shown in its Counter-Memorial,[514] neither Article 43 nor 44 of the Convention provide a legal basis for Ukraine's claims. It has also highlighted that the request for documents in question was sent some 15 months after the Bridge's construction began, and after Ukraine instituted the present proceedings, rendering the request untimely for purposes of Ukraine's claims and indicating that it was a fishing expedition for the unfolding proceedings. [515] However, Articles 43 and 44, interpreted properly, did not oblige the Russian Federation to provide the documents in question (**i**), that Ukraine failed to make out its case on the facts (**ii**) and itself eliminated any possibility for cooperation (**iii**). In any event, the Russian Federation's refusal to provide documents was justified on the ground of essential security interests (**iv**).

377. Furthermore, Ukraine first advanced this claim in its Revised Memorial – it was absent both from the Notification of Arbitration and its original Memorial. Ukraine's attempts to conceal it among claims of interference with navigation should be disregarded; neither the factual allegations nor legal basis of Ukraine's argument have been advanced prior to the Revised Memorial. Therefore, it is a new claim that Ukraine impermissibly introduced in violation of the Arbitral Tribunal's directions[516] and should be dismissed on the grounds of inadmissibility.

i. <u>Ukraine's Interpretation of Articles 43 and 44 of the Convention Is Incorrect</u>

378. Ukraine maintains that Articles 43 and 44 'require that Russia "by agreement cooperate" with…Ukraine, concerning navigational safety in the Kerch Strait, such as through the sharing of information relating to dangers to navigation.'

379. In its Revised Memorial, it argued that 'Russia followed a rushed process that dispensed with customary precautions and emphasized speed over safety and environmental protection', [517] which was 'compounded by the geological and climatic challenges of the construction site.'[518] According to Ukraine, this brought about the following:

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[514] Counter-Memorial, ¶¶199-200.

[515] Counter-Memorial, ¶¶205; 496.

[516] Article 13(5) of the Rules of Procedure.

[517] Ukraine's Revised Memorial, ¶151.

[518] *Ibid.*, ¶153.

a. '[T]he possibility of deterioration or even collapse [of the Bridge] which poses an obvious threat to the safety of navigation through the Strait';

b. Environmental changes that would bring about sedimentation that could 'restrict the size of vessels able to pass through the Strait';

c. Increase the likelihood of the build-up of sea ice, which may impact navigation.[519]

380. This allegedly prompted Ukraine in July 2017 to demand from the Russian Federation all documentation related to the Bridge's construction.[520]

381. Not only are Ukraine's contentions untrue; its understanding of the scope and duties prescribed by Article 43 and 44 is flawed as well.

382. First, it states that '…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.'[521]

383. This interpretation is incorrect. Ukraine completely ignores the ordinary meaning of the wording used in Article 43 (in contrast with its approach to interpretation of Article 44).[522] Specifically, the term 'should' employed in it leaves little room for doubt that, while cooperation is desirable, Article 43 does not impose any positive obligation on the States Parties to do that.[523] The drafting history shows that the proposal to adopt the mandatory term 'shall' instead of 'should' was rejected.[524]

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[519] *Ibid.*

[520] *Ibid.,* ¶154.

[521] Ukraine's Reply, ¶155.

[522] Ibid., ¶158.

[523] *See* B. Jia, *Straits Used for International Navigation: Article 43*, in A. Proelss (ed.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Nomos, 2017), p. 321: 'Art. 43 is hortatory in wording' (**RUL-86**). *See also* B. Kempton, Ship Routing Measures in International Straits, *Ocean Yearbook Online*, 2000, Vol. 14, Issue 1, p. 241: 'the effectiveness of this article [43] is mitigated by the use of the word 'should', which renders such cooperation to be voluntary, rather than compulsory, in nature' (**RUL-158**); M. Kawano, Transit passage through the Malacca and Singapore Straits, *Questions of International Law*, 2020, Vol. 76, p. 40 (**RUL-159**); S. Lee, J. Woo Kim, *UNCLOS and the Obligation to Cooperate: International Legal Framework for Semi-Enclosed Seas Cooperation*, in K. Zou (ed.), MARITIME COOPERATION IN SEMI-ENCLOSED SEAS (Brill | Nijhoff, 2019), p. 19 (**RUL-160**).

[524] M. Nordquist (ed.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY (Brill | Nijhoff, 2003), Vol. II, pp. 382-383, ¶43.3 (**RUL-162**).

384. The only authority cited by Ukraine to argue otherwise is an article written by Professor Oxman.[525] That article, however, does not provide any explanation as to why the ordinary meaning of the provision should be departed from.[526] To support his view that there is no clear difference between the terms 'should' and 'shall', Professor Oxman refers to Article 123 of UNCLOS, which employs the word 'should' in relation to cooperation within enclosed or semi-enclosed seas. Further, a more recent commentary on the Convention, commenting on this Article, clearly disagrees with that view and endorses the Russian Federation's interpretation that Article 43 (and Article 123, as will be discussed below) does not create 'a clear-cut legal obligation'.[527]

385. Furthermore, Ukraine also omits key words from the text of Article 43, thereby twisting its meaning. This article was conceived as a 'cost-sharing provision' to address a perceived imbalance between the interests of coastal States that bear the expenses to provide navigational aids in their straits, on the one hand, and of user States that benefit from those aids, on the other.[528] As noted by Ukraine's own cited authority, 'user States are the major beneficiaries of safe passage through the straits, and the burdens and risks borne by the States bordering the straits far exceed the benefits they derive from passage of ships through the straits.'[529] Accordingly, mechanisms were put in place to allow a coastal State to receive compensation for its effort to maintain safe navigation in a strait.

386. Consequently, and contrary to what Ukraine suggests,[530] the areas of cooperation envisaged by Article 43 of UNCLOS do not cover all navigational matters. Furthermore, the scope of such cooperation is clearly limited to '*necessary* navigational and safety aids.' [*Emphasis* added]. These aids may include various types of equipment designed to assist vessels in navigation, such as GPS/GLONASS receiver equipment, marine

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[525] Ukraine's Reply, ¶162 *citing* B.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.*,1998, Vol. 2, Issue 2, pp. 408 ff (**UAL-134**).

[526] *Ibid*., pp. 409-410.

[527] I. Winkelmann, *Article 123* in Alexander Proelss (ed.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA - A COMMENTARY (2017), p. 887: 'The genesis of Art. 123 indicates that the provision was not intended to create a clear-cut legal obligation of regional cooperation' (**UAL-197**).

[528] R. 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), p. 238 (**UAL-133**).

[529] *Ibid*., p. 240.

[530] Ukraine's Reply, ¶¶160-161.

radiomagnetic compasses, track control systems, AIS and lighthouses.[531] For example, the International Association of Marine Aids to Navigation and Lighthouse Authorities (IALA) defines navigational aids as '[a] device, system or service, external to vessels, designed and operated to enhance safe and efficient navigation of individual vessels and vessel traffic.'[532]

387. The drafting history of the Convention also shows that the scope of Article 43 was not intended to go any further than that: notably, Morocco's proposal that this Article should also cover 'any other device calculated to safeguard the exercise of the right of transit passage' was rejected.[533]

388. Clearly, bridge design documentation is not a navigational or safety aid, nor a device, system or service used to enhance safety of navigation, so it cannot come within the scope of Article 43. Consequently, there are no grounds to read into Article 43, as Ukraine purports to do, an extensive obligation for a coastal State to satisfy user States' requests for production of documents related to the construction of a bridge.

389. The Russian Federation provides and maintains various navigational aids in the Kerch Strait, such as vessel traffic control services, vessel towage, sign posts, buoys, and pilotage,[534] for the benefit of all user States, including Ukrainian and Ukrainian-bound vessels; it does not have an obligation to cooperate in this respect with other States, and much less in respect of anything that would go beyond navigational aids.

390. ***Second***, Article 44 of UNCLOS provides, in its relevant part, that:

> States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge.

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[531] International Maritime Organization, IMO and the Safety of Navigation, January 1998, p. 18, available at: https://wwwcdn.imo.org/localresources/en/OurWork/Safety/Documents/SAFETYOFNAVIGATION21998final.pdf (**RUL-238**).

[532] IALA Constitution, Edition 8.0, June 2023, Article 1, available at: https://www.iala-aism.org/content/uploads/2023/07/Basic-Documents-Ed8.0-June-2023.pdf (**RU-622**);

[533] M. Nordquist (ed.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY (Brill | Nijhoff, 2003), Vol. II, pp. 382-383, ¶43.6 (**RUL-162**).

[534] Ministry of Transport of the Russian Federation, Order No. 313 'On Approval of the Mandatory Regulations in the Kerch Strait', 21 October 2015, Articles 21, 29, 35, 50. (**RU-724**).

391. In its Reply, Ukraine tries to read this provision in such a broad manner that it would be able to shoehorn document production obligations into it. This must be rejected because, under the Convention the danger cannot be imaginary, and the duty to give appropriate publicity cannot be equated to an obligation to submit design documentation.

392. As regards the term 'danger', Ukraine does not address the crucial point raised by the Russian Federation in the Counter-Memorial: that to warrant publicity, a danger must be real and material.[535] Indeed, even Ukraine's own authority suggests that 'Article 44 refers to (*material*) dangers to navigation or overflight'.[536] [*Emphasis* added].

393. 'Danger to navigation' is not defined in the Convention. As the Russian Federation explained in its Counter-Memorial, the duty of a coastal State to notify about such dangers was upheld by the ICJ in the *Corfu Channel* case,[537] where the Court held that this duty involved giving notice of real and imminent dangers. In its Reply Ukraine briefly states that 'the duty to notify articulated in the [*Corfu Channel*] case is not limited to its particular facts.'[538] This duty, however, cannot go so far as to erase the difference between a bridge and a minefield. The former is not *per se* dangerous to ships in navigation, but the latter clearly is because, in the words of the ICJ in *Corfu Channel,* it exposes vessels to the 'imminent danger'.[539]

394. For this reason, the concept of 'danger' under Article 44 cannot include any and all hypothetical situations. Ukraine's interpretation, which suggests the contrary, would lead to an absurd result that navigational warnings issued by States bordering straits would have to include any possible contingency that may or may not occur. Navigational warnings replete with numerous contingencies and possibilities would only entail confusion and be useless to the users of a strait.

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[535] Counter-Memorial, ¶¶199-201.

[536] H. Caminos, V, Cogliati-Bantz, THE LEGAL REGIME OF STRAITS: CONTEMPORARY CHALLENGES AND SOLUTIONS (Cambridge, 2014), p. 233 (**UAL-127**).

[537] Counter-Memorial, ¶200, citing *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment of 9 April 1949, I.C.J. Reports 1949, p. 22 (**RUL-88**).

[538] Ukraine's Reply, ¶163.

[539] *The Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment of 9 April 1949, I.C.J. Reports 1949, p. 22 (**RUL-88**).

395. Instead of addressing this point, Ukraine resorts to arguing, with reference to one scholarly writing, that 'a bridge could certainly constitute a danger to navigation.'[540] This reference, however, is not only rather abstract, but also taken out of context. The authors treat a bridge as an example of how dangers to navigation may be man-made as well as natural, thus discussing this issue with regard to the *source* of danger. It appears that the commentary rather concerns situations where a man-made installation is constructed and is not yet mapped, so the State needs to notify users of the strait accordingly so that no collisions occur. This is inapposite to the circumstances of the present case. This interpretation is confirmed by the tone that the authors use: it is suggestive ('*could* certainly constitute'), rather than affirmative of the possibility of a bridge posing a danger to navigation in all circumstances. It is also telling that the authors refer to the *Corfu Channel* case,[541] which, as explained above, concerned real and imminent dangers.[542]

396. Furthermore, Ukraine fails to address the notion of 'appropriate publicity' that the dangers to navigation should be afforded by the coastal State as per Article 44. It is true that the Convention lacks a definition of 'publicity'. In its ordinary meaning, 'publicity' is termed as a 'public notice or attention given to someone or something'.[543] The term 'appropriate', in turn, is termed as 'specially fitted or suitable'[544] and refers to the way that information can effectively reach its end users, including States, authorities and entities that are expected to be guided by this information.[545] Neither of these definitions implies importing into Article 44 a duty to provide documents on request of a user State.

397. The real application of this provision is readily evidenced by State practice.[546] A study by the Secretariat of IMO specifically lists navigational warnings under SOLAS Chapter

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[540] Ukraine's Reply, ¶163.

[541] H. Caminos, V. Cogliati-Bantz, THE LEGAL REGIME OF STRAITS: CONTEMPORARY CHALLENGES AND SOLUTIONS (Cambridge, 2014), p. 233 (**UAL-127**).

[542] *See* above, ¶393.

[543] Oxford English Dictionary, *Entry 'Publicity'*, available at: https://www.oed.com/search/dictionary/?scope=Entries&q=publicity (**RU-624**).

[544] Oxford English Dictionary, *Entry 'Appropriate'*, available at: https://www.oed.com/search/dictionary/?scope=Entries&q=appropriate (**RU-625**).

[545] M. Nordquist (ed.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY (Brill | Nijhoff, 2003), Vol. II, pp. 388-389, ¶44.8(b) (**RUL-162**).

[546] S. Lee, J. Woo Kim, *UNCLOS and the Obligation to Cooperate: International Legal Framework for Semi-Enclosed Seas Cooperation*, in K. Zou (ed.), MARITIME COOPERATION IN SEMI-ENCLOSED SEAS (Brill | Nijhoff, 2019), p. 24 (**RUL-160**).

V(4) as a means of achieving 'publicity in respect of dangers to navigation' under Article 44.[547]

398. In any event, the 'appropriate publicity' requirement is premised on the conditions that fall upon the States bordering straits to decide, taking into account the circumstances of each case. This is confirmed by the Russian Federation's exchange with the IMO.[548] As explained in the Counter-Memorial, the Russian Federation sought clarification from it in July 2015 as to whether it was under an obligation to provide it with information on forthcoming construction activities, and received a reply in the negative.[549]

399. Ukraine attempts to dismiss this exchange by alleging that 'the IMO observed that the SOLAS is not the governing instrument in this area.'[550] However, in its reply letter, the IMO Director of Maritime Safety Division clearly stated that the 'requirements related to safety of navigation are contained in SOLAS Chapter V.'[551] It was further clarified that, under the SOLAS, the Russian Federation would only be required to issue navigational warnings when construction indeed started to pose any danger to navigation.[552] This was an exhaustive answer to the Russian Federation's query.

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[547] *See* International Maritime Organization, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization: Study by the Secretariat of IMO, Doc. LEG/MISC.7, 19 January 2012, p. 99, available at: https://no0ilcanarias.files.wordpress.com/2012/11/implications-of-unclos-for-imo.pdf (**RUL-163**). In its relevant instrument, the IMO lists NAVAREA warnings in respect of the 'casualties to lights, fog signals and buoys affecting main shipping lanes', 'presence of dangerous wrecks in or near main shipping lanes', 'drifting mines' and the like, *see* International Maritime Organization, Resolution No. A.706(17) 'World-Wide Navigational Warning Service', 6 November 1991, available at: https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.706(17).pdf (**RUL-164**).

[548] '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. Accordingly, the purpose of the 'publicity' is likely to be served by some IMO involvement.' *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**).

[549] Counter-Memorial, ¶214; Permanent Representative of the Mission of the Russian Federation, Letter No. 003/156 to the International Maritime Organization Y. Melenas to the Director of Maritime Safety Division to the International Maritime Organization A. Winbow, 24 July 2015 (**RU-358**); Director of Maritime Safety Division to the International Maritime Organization A. Winbow, Letter to the Permanent Representative of the Mission of the Russian Federation to the International Maritime Organization Y. Melenas, 29 July 2015 (**RU-359**).

[550] Ukraine's Reply, ¶165.

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

[552] *Ibid*.

400. In the present case, it is undisputed that warnings were issued for short periods of extensive construction activities; [553] nothing else, however, was required from the Russian Federation to comply with its obligations under Article 44.

401. Accordingly, the two articles cannot be merged so as to create a new obligation 'to cooperate in respect of sharing information about the dangers to navigation', contrary to what Ukraine asserts. The authorities cited by Ukraine in support of its sweeping interpretation do not come even close to supporting its assertions.

ii. Ukraine Has Failed to Make Out Its Case Concerning the Russian Federation's Alleged Failure to Cooperate

402. Even if Ukraine's interpretation of Articles 43 and 44 were correct (*quod non*), its claims are unfounded on the facts and must accordingly be dismissed.

403. At the outset, it should be mentioned that in its Reply, Ukraine appears to have abandoned the allegation originally expressed in the Revised Memorial concerning 'the possibility of deterioration or even collapse'[554] of the Kerch Bridge. The Russian Federation notes the obvious: the Kerch Bridge still stands, notwithstanding repeated military attacks launched by Ukraine. Ukraine also remains unable to prove the existence of any danger that the Bridge allegedly poses. As explained above,[555] such danger must be real, not hypothetical.

404. In this regard, Ukraine now refers to '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-Yenikale Canal, and ice build-up due to the Kerch Strait Bridge'. It also calls them '*potential* impacts of the Bridge construction.'[556] [*Emphases* added].

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[553] *See* Novorossiysk Coastal Warning 426/17 Maps 38138 38182 in Compilation of Selected Novorossiysk Coastal Warnings for July-September 2017 (**RU-356**).

[554] Ukraine's Revised Memorial, ¶153.

[555] *See* above, ¶¶393, 541.

[556] Ukraine's Reply, ¶166.

405. Ukraine thus recognises that the alleged effects of the Kerch Bridge, which it portrays as dangers to navigation, are nothing but hypothetical. In fact, even Ukraine's expert [redacted] has not identified any 'danger to navigation' emanating from those effects of the Kerch Bridge and only refers to them as having 'an adverse effect on navigation' by 'prevent[ing] vessels from making use of the full 8 metre depth of the KYC' and 'restrict[ing] the size of vessels able to pass through the Strait', and as negatively affecting 'vessel usage' and increasing 'traffic congestion'.[557]

406. Accordingly, both Ukraine and [redacted] have only considered these possible effects of, or potential impediments to, navigation. Nowhere do they identify any actual dangers to navigation, i.e. '[l]iability or exposure to harm or injury', as Ukraine itself defines those.[558]

407. Naturally, if the Russian Federation were aware of any danger that the Kerch Bridge is posing to navigation, it would duly warn the user States. In fact, as has been demonstrated in the Counter-Memorial, during the construction works, it did promptly issue the relevant navigational warnings.[559] Russia also informed all interested parties about the completion of the Kerch Strait Bridge, as well as the dimensions of the arch span.[560] There was simply no activity in that process that would require cooperation from other user States. For these reasons, Ukraine's allegation that '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'[561] makes no sense. If no dangers materialised, there was simply nothing to make public.

408. In any event, Ukraine's contentions are simply unsupported by evidence. As the Russian Federation demonstrates throughout this Rejoinder, the Kerch Bridge was carefully designed and constructed and there is no risk of its collapse or increased risk of ice-

[557] First [redacted] Report, ¶4.3.

[558] Ukraine's Reply, ¶158, referring to Oxford English Dictionary, 'danger, n., and adj.' (online ed.) (**UAL-186**).

[559] *See* Counter-Memorial, ¶211.

[560] *See* Counter-Memorial, ¶212.

[561] Ukraine's Reply, ¶166.

buildup or sedimentation.[562] The possibilities identified by Ukraine have still not materialised.[563]

409. Consequently, Ukraine's allegations should be dismissed because it failed to demonstrate the existence of an obligation that it accuses the Russian Federation of breaching; it also failed to provide any factual support to its contentions.

iii. Ukraine's Own Conduct Rendered Any Possibility of Cooperation Between the Russian Federation and Ukraine Infeasible

410. Ukraine alleges that 'Russia cannot simply assume that any efforts to cooperate with Ukraine would have been futile.'[564] This is, however, not a 'simple assumption.' Ukraine's conduct, together with the timing and context of its request for information in 2017, had made it abundantly clear that Ukraine never intended to genuinely cooperate with the Russian Federation.

411. Ukraine states that cooperation pursues two goals: '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.'[565] But Ukraine has never pursued either of these objectives.

412. As Article 43 makes it clear,[566] cooperation involves action from both sides. If Ukraine had any interest in it, it could have so indicated at any time. Instead, it repeatedly denounced the construction of the Bridge as 'illegal' and insisted that the construction should not proceed.[567] Its officials publicly called for other States to pressure the Russian Federation into stopping the construction and vowed to 'use all tools to put the aggressor

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[562] See Chapter VI below.

[563] Second [redacted] Report, ¶169.

[564] Ukraine's Reply, ¶168.

[565] *Ibid*., ¶162.

[566] Article 43 of UNCLOS states: 'User States *and* States bordering a strait should by agreement cooperate…' [*Emphasis* added].

[567] *See*, *e.g.*, RIA, *They Suggested a New 'Way' to Stop the Construction of the Kerch Strait* (29 November 2017), available at: https://ria.ru/20171129/1509859949 html (**RU-626**).

in its place.'[568] It introduced sanctions against the companies involved in the project.[569] It consistently opposed the Russian Federation's attempts at environmental cooperation and information sharing.[570]

413. Even the *note verbale* of 12 July 2017, which is the cornerstone of Ukraine's position in this connection, does not refer to the need for any kind of cooperation.[571] Most notably, it does not even mention 'safety of navigation', but rather refers to 'any associated threats to the marine environment, and any associated interference with navigation through the Kerch Strait.'[572] Nor was any reference to such cooperation made during the bilateral consultations under the Convention that took place prior to these proceedings.[573]

414. All this shows that Ukraine was never genuinely interested in cooperating with Russia, and that its claim was hastily constructed only after the commencement of this Arbitration. As the Russian Federation has pointed out in its Counter-Memorial,[574] the *note verbale* of 12 July 2017 was also sent only after the Arbitral Tribunal had established a deadline for Ukraine to submit its Memorial. The note did not explain how the Kerch Bridge documentation would serve as a basis for cooperation and how it would be relevant to ensure the safety of navigation in the Kerch Strait, or indeed try to suggest any cooperative steps that it might have taken.

415. With regard to the late dispatch of the note of 12 July 2017, Ukraine argues that 'that fact does not relieve Russia of its duty to cooperate.'[575] This argument defies belief, because it is equivalent to a demand that the Russian Federation must still proceed with possible cooperation under Article 43 of UNCLOS, even after fruitless attempts at consultations, and after the Parties had already been engaged in adversarial proceedings, since Ukraine

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[568] Ministry of Infrastructure of Ukraine, *Illegal Construction of the Kerch Bridge Must Be Stopped Immediately, - Volodymyr Omelyan* (28 November 2017), available at: https://mtu.gov.ua/news/29330 html (**RU-627**).

[569] Today, *Cabinet of Ministers Proposes NSDC to Impose Sanctions Against 19 Companies for Construction of Kerch Bridge* (29 August 2018), available at: https://www.segodnya.ua/ua/regions/krym/kabmin-predlagaet-snbo-vvesti-sankcii-protiv-19-kompaniy-za-stroitelstvo-kerchenskogo-mosta-1166581 html (**RU-628**).

[570] See Chapter VI(B)(v).

[571] Ministry of Foreign Affairs of Ukraine, *Note Verbale* No. 72/22-663-1651, 12 July 2017 (**UA-211**).

[572] *Ibid.*

[573] *See* Transcript of the Russian-Ukrainian Consultations on the United Nations Convention on the Law of the Sea, Minsk, 11 August 2016 (**RU-41**).

[574] Counter-Memorial, ¶496.

[575] Ukraine's Reply, ¶168.

could all of a sudden decide to agree to cooperation in such activities (of the Bridge's construction) that it had actively branded as 'illegal' in the context of the dispute.

416. Accordingly, Ukraine should not be allowed to hold up its *note verbale* of 12 July 2017 as a request for cooperation. The circumstances outlined here clearly show that Ukraine had never been genuinely interested in such cooperation. On the contrary, in the light of Ukraine's attitude to the Bridge's construction, bilateral cooperation was neither feasible nor necessary.

417. Moreover, in light of the recent developments, the Sea of Azov and the Kerch Strait now constitute internal waters of the Russian Federation only, and any cooperation with Ukraine has become unnecessary.

iv. In Any Event, the Russian Federation Should Be Excused For Not Providing the Kerch Bridge Project Documentation on the Ground of Essential Security Interests

418. Ukraine alleges that the Russian Federation cannot withhold project documentation for the Kerch Bridge on security grounds since there is 'no security exception' in Articles 43 and 44 of the Convention.[576] As explained above, neither of these Articles contains an obligation to share such documentation in the first place, which is why they do not include such an exception. There would be no breach of the Convention even if the documents requested by Ukraine through its note of 12 July 2017 were withheld.

419. Furthermore, even assuming that, under Article 43 of UNCLOS, there was such a duty to provide documents by States bordering straits to the user States (*quod non*), the Russian Federation is entitled to withhold said documents based on Article 302 of the Convention, which provides that

> nothing in this Convention shall be deemed to require a State Party, in the fulfilment of its obligations under this Convention, to supply information the disclosure of which is contrary to the essential interests of its security.

420. Contrary to Ukraine's arguments, the Russian Federation has had substantial reasons to withhold these documents based on security considerations. Ukraine's suggestion that

[576] *Ibid*., ¶167.

'Russia cannot rely on its current security concerns to excuse its past failure to provide information to Ukraine',[577] is nonsensical.

421. It is as early as the summer of 2014 that Ukraine's government declared plans to seek membership with NATO,[578] a military alliance hostile to the Russian Federation. Ukraine soon went on to engage in regular joint military exercises with NATO members.[579] In such circumstances, providing Ukraine with documentation on such an important infrastructure object as the Kerch Bridge, which is material to the well-being of millions of Crimean inhabitants,[580] would create a risk of this information being shared with NATO member States.

422. Ukraine itself did not shy away from voicing explicit threats to destroy the Bridge shortly after its construction was announced.[581] Just a few weeks prior to sending the Russian Federation its request for information, Ukraine adopted legislative reforms making NATO membership its official goal in international relations.[582]

423. Because the project documentation naturally contains sensitive information about the Kerch Bridge's structure, its availability to Ukraine would significantly expose the Bridge to risks of attacks. In the present case, the production of the Bridge documentation to Ukraine would be contrary to 'the essential interests of its security' under Article 302 of the Convention.

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[577] *Ibid*.

[578] BBC News, *Ukraine to Seek NATO Membership, Says PM Yatsenyuk* (29 August 2014), available at: https://www.bbc.com/news/world-europe-28978699 (**RU-629**).

[579] Ukraine Under Attack, *Poroshenko Approved Plan For multinational Exercises Involving Armed Forces' Units in 2015* (30 March 2015), available at: https://web.archive.org/web/20150416091053/http://ukraineunderattack.org/en/poroshenko-approved-plan-for-multinational-exercises-involving-armed-forces-units-in-2015.html (**RU-630**).

[580] *See* above, ¶284.

[581] *See* above, ¶31.

[582] NATO, Joint Press Conference With NATO Secretary General Jens Stoltenberg and the President of Ukraine, Petro Poroshenko (10 July 2017), available at: https://www nato.int/cps/en/natohq/opinions_145865.htm (**RU-631**).

424. In this respect, a parallel exists with the 1999 incident of a NATO airstrikes at various bridges in Yugoslavia, including at a railway bridge in Serbia with a civilian train crossing it, with bombs hitting different ends of the bridge killing at least ten civilians.[583]

425. In fact, the Russian Federation's concerns were regrettably already confirmed to be well-founded. As explained above, the Bridge has been repeatedly subjected to attacks and, even though it withstood them, these attacks came at a loss of civilian lives.[584] In a recent interview, the Ukrainian Security Service stated that the attacks were facilitated by stolen pieces of the Bridge's documentation:

> Design documentation for a tank, a missile or an aircraft is, in and of itself, a secret, not to mention such a strategic target as the Crimean bridge. Here we found everything we needed to understand how we were going destroy it...[585]

426. Against this backdrop, the Russian Federation was more than justified to be alert to the threats of Ukraine to attack the Kerch Strait Bridge. The fact that Ukraine has resorted to the implementation of its threats several times over the recent years proves that the Russian Federation's security concerns since 2014 have been well-founded. Later events merely confirmed that. Considering Ukraine's recent threats targeting the Bridge again,[586] they continue to be pressing.

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[583] The New York Times, *CRISIS IN THE BALKANS: THE DANUBE; NATO Bombing of Bridges in Yugoslavia Disrupts Trade on Europe-Asia Link* (8 April 1999), available at: https://www.nytimes.com/1999/04/08/world/crisis-balkans-danube-nato-bombing-bridges-yugoslavia-disrupts-trade-europe-asia.html (**RU-632**); Washington Post, *NATO Missile Hits Train, Kills at Least 10* (13 April 1999), available at: https://www.washingtonpost.com/wp-srv/inatl/longterm/balkans/stories/belgrade041399.htm (**RU-633**).

[584] *See* above Chapter I(D)(iv).

[585] YouTube, 1+1 TV Channel, *Crimean Bridge Encore. The Security Service of Ukraine. Special Operations of Victory. Film 1* (24 November 2023), available at: https://www.youtube.com/watch?v=boFFJRuxhPA&t=9s (**RU-634**).

[586] Vedomosti, *The Head of the Security Service of Ukraine Threatened to Destroy the Crimean Bridge* (25 November 2023), available at: https://www.vedomosti ru/politics/news/2023/11/25/1007679-glava-sbu (**RU-635**).

C. TRAFFIC REGULATIONS IMPLEMENTED IN THE KERCH STRAIT DO NOT VIOLATE ARTICLES 38 AND 44 OF UNCLOS

427. Ukraine alleges that 'Russia discriminatorily enforced its pilotage requirement, as well as the use of one-way traffic, to further target Ukrainian vessels for delays.'[587]

428. As explained in the Counter-Memorial, and as will be further demonstrated below, Ukraine's position is unfounded. Three preliminary observations are in order.

429. ***First***, Ukraine continues to lump together its claims in respect of traffic regulations, on one hand, and inspections, on the other hand, apparently so for lack of a sound case on either issue. The Russian Federation will address these issues separately: the present Chapter will cover traffic regulations, while Chapter IV below will address inspections of vessels.

430. ***Second***, Ukraine's case rests upon the wrong premise that the Kerch Strait is an international strait within the meaning of Article 37 of UNCLOS, and vessels traversing the strait therefore enjoy the right of transit passage. As explained above, the Kerch Strait and the Sea of Azov constitute internal waters,[588] and the Kerch Strait therefore does not fall under Article 37.

431. ***Third,*** as extensively explained in the Counter-Memorial,[589] UNCLOS has never applied to navigation in the Kerch Strait and the Sea of Azov. Rather, it was the Azov/Kerch Cooperation Treaty that governed navigation in these water areas, importantly, at all relevant times, including before and on 16 September 2016, *i.e.* prior to the commencement of the present proceedings. In particular, the 2003 Treaty provided for a special restrictive regime of passage through the Kerch Strait and constituted *lex specialis* to UNCLOS. The traffic regulations, as part of navigation in the Kerch Strait, therefore, fall outside of the Arbitral Tribunal's jurisdiction.

432. But even assuming that the right of transit passage applies to the Kerch Strait, the regulations introduced by the Russian Federation are not in breach of the Convention.

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[587] Ukraine's Reply, ¶171.

[588] *See* above, Chapter II.

[589] Counter-Memorial, ¶¶282-285.

433. In its Reply, Ukraine maintains 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[590]

434. As explained in the Counter-Memorial[591] and in Section III(A) above, the right of transit passage is not absolute.[592] Articles 41 and 42 of UNCLOS explicitly provide for a coastal State's right to adopt laws and regulations relating to, *inter alia*, safety of navigation and regulation of maritime traffic.[593] The vessels passing through the strait, in turn, must abide by these laws and regulations.[594]

435. It is notable that Ukraine acknowledges that power of a coastal State several times throughout its pleadings:

> Ukraine's claim is not that these measures [various vessel traffic management systems, including traffic separation schemes] are *per se* violations of UNCLOS . . .[595]
>
> [T]he mere existence of a compulsory pilotage system is not the source of Ukraine's complaint.[596]
>
> [W]hile the adoption of vessel traffic management systems may not *per se* be objectionable . . . [597]

436. This comes as no surprise, given that the Russian Federation's traffic regulations in the Kerch Strait are almost identical to those that had been applied by Ukraine itself prior to Crimea's reunification with the Russian Federation in 2014. In fact, Ukraine implemented the system of compulsory pilotage for almost all foreign vessels, and traffic through certain areas of the KYC was *de-facto* one-way due to the canal's geographical features.[598]

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[590] Ukraine's Reply, ¶171. In its Reply, Ukraine appears to have dropped its claims considering the permit-based system ('VTS') that it originally advanced in the Revised Memorial. For the avoidance of doubt, the Russian Federation maintains its objections against Ukraine's allegations in this respect.

[591] Counter-Memorial, ¶¶229-233.

[592] T. Scovazzi, Management Regimes and Responsibility for International Straits, *Marine Policy*, 1995, Vol. 19, Issue 2, p. 146 (**RUL-89**).

[593] UNCLOS, Article 42(1)(a).

[594] *Ibid*., Articles 41(7), 42(4).

[595] Ukraine's Reply, ¶177.

[596] *Ibid*., ¶178.

[597] *Ibid*., ¶179.

[598] [redacted] Statement, ¶¶12, 17.

437. The following sections will address Ukraine's specific arguments concerning compulsory pilotage exemptions (**i**) and one-way traffic (**ii**) and demonstrate that these were reasonable safety measures that did not delay Ukraine-bound vessels traversing the Kerch Strait in a discriminatory manner (**iii**).

i. Compulsory Pilotage

438. In its Reply, Ukraine accepts that the adoption of compulsory pilotage schemes by a coastal State is consistent with the UNCLOS; its complaints, rather, relate to the features of the pilotage scheme introduced by the Russian Federation:

> 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.[599] [*Emphasis* added]

439. Ukraine's claims in this respect are, therefore, limited to how exemptions from compulsory pilotage are granted. Its allegations of discrimination are unfounded and should be rejected.

440. Article 42(2) of UNCLOS outlines a coastal State's rights in the following manner: '[s]uch laws and regulations shall not discriminate in form or in fact *among* foreign ships…' [*Emphasis* added]. The term 'among' is defined as 'to each one in a group of three or more people or things.'[600] It is commonly used as an alternative to the term 'between' when the situation described concerns more than two objects.[601] Various commentators concur that Article 42(2) should be read to the same effect: that said Article precludes discrimination *as between* foreign States.[602] Accordingly, nothing in the text of Article 42 precludes a coastal State from favouring its own vessels, so long as it does

[599] Ukraine's Reply, ¶178.

[600] Cambridge Dictionary, *Entry* '*Among'*, available at: https://dictionary.cambridge.org/dictionary/english/among (**RU-636**).

[601] The Britannica Dictionary, *The Difference Between Among and Between*, available at: https://www.britannica.com/dictionary/eb/qa/The-difference-between-among-and-between#:~:text=The%20most%20common%20use%20for,in%20the%20phrase%20in%20between (**RU-637**); Merriam-Webster Dictionary, *Entry* '*Among'* (27 November 2023), available at: https://www merriam-webster.com/dictionary/among (**RU-638**).

[602] S. Nandan, D. 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. 192 (**UAL-182**); K. Rowny, The Right of Passage through Straits Used for International Navigation and the United Nations Convention on the Law of the Sea, *Polish Yearbook of International Law*, 1987, Vol. 16, p. 80 (**RUL-165**).

not grant privileges to select foreign States. As demonstrated below, a similar anti-discriminatory provision in Article 25(3) is to be interpreted in the same way.[603]

441. Ukraine's claims regarding the allegedly 'discriminatory' compulsory pilotage exemptions thus lack any legal basis. For reasons outlined below, Ukraine is also wrong in alleging the absence of a 'principled justification'[604] for such regime.

442. The regulations implemented by the Russian Federation indeed allow for exemptions from compulsory pilotage regime for certain categories of Russian-flagged vessels,[605] whereas no foreign ship may claim an exemption. In fact, this exemption is granted not to ships, but rather to vessel captains; and the system is designed to carefully ensure safety in the region by admitting only those captains whose knowledge may be verified.

443. The process of receiving an exemption is application-based. The criteria for eligible applicants are as follows:

a. They must hold Russian citizenship;

b. They must have no less than 3 years of captain experience;

c. They must have made no fewer than 12 passages through the pilotage area for 12 preceding months.[606]

444. To receive the exemption certificate, the candidate must pass an exam before a special commission. The syllabus includes over 200 questions covering 8 topics, such as sailing in icy conditions, buoy layout in the relevant area, and speed limits.[607] Resolutions confirming the successful candidates' exemptions are made publicly available.[608] The

[603] *See* below, ¶¶487-490.

[604] Ukraine's Reply, ¶178.

[605] Counter-Memorial, ¶242.

[606] Ministry of Transport of the Russian Federation, Order No. 313 'On Approval of the Mandatory Regulations in the Kerch Strait', 21 October 2015, Sec. 32 (**RU-203**).

[607] Captain of the Kerch seaport, Order No. SS-62-r 'List of questions for testing the captains of vessels applying for the right to sail without a pilot in the areas of mandatory pilotage, taking into account the peculiarities of navigation in the areas of mandatory pilotage in the Kerch seaport and its approaches, developed in accordance with the list of questions agreed with the Federal Agency of Sea and River Transport', 12 September 2023, Annex 1, available at: https://bsamp ru/images/989-64ed88918a2beef9ffc02e09d42c7c14.pdf (**RU-731**).

[608] Branch of the Federal State Budgetary Institution 'Administration of Black Sea Ports' in the city of Kerch, *Sea Port Kerch - Orders on Granting the Right to Sail Without a Pilot* (2023), available at: http://www.bsamp.ru/section-view-attestationorders-kerch (**RU-639**).

certificate is valid for two years. A captain can use the exemption only if they are currently onboard a Russian-flagged vessel less than 145 m long, with a draft of less than 4.5 m.[609]

445. This system is designed to ensure that only those captains whose knowledge of the relevant area can be reliably attested are eligible for an exemption. In this way, it is a reasonable safety measure, considering the challenging geographical conditions of the Kerch Strait. [610]

446. In contrast, Ukraine's compulsory pilotage requirements in relation to the passage through the Kerch Strat, that were in place before 2014, generally made pilotage compulsory for foreign vessels. Exemptions were made for CIS-flagged ships not exceeding certain parameters. [611] These exemptions were granted automatically; no applications or exams were necessary. It is unlikely that this regulation was grounded in safety concerns: since not all CIS States have access to Black Sea or Sea of Azov, while some have no access to sea at all, it would be unreasonable to suggest that captains from these States were necessarily more experienced in navigating in this area. Furthermore, the exemptions were granted to vessels, not to captains, meaning that the exemptions were based on criteria other than experience or merits of the crew.

447. For this reason, the pilotage scheme introduced by the Russian Federation clearly much better fits [redacted] proposition that '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.'[612]

448. Furthermore, neither Ukraine nor [redacted] provide any authorities that would support the allegations of 'illegality' of the Russian Federation's pilotage regime. To the contrary, similar regimes have been implemented across the world.

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[609] Ministry of Transport of the Russian Federation, Order No. 313 'On Approval of the Mandatory Regulations in the Kerch Strait', 21 October 2015, Article 32 (**RU-724**).

[610] Second [redacted] Report, ¶77.

[611] [redacted] Statement, ¶12. *See* also Second [redacted] Report, ¶2.11.

[612] Second [redacted] Report, ¶2.12.

449. The Russian Federation has previously provided an example of similar regulations in force in Japan.[613] Ukraine attempts to contest the relevance of this example by drawing a highly artificial distinction between 'coastal' and 'harbour' pilotage,[614] failing to take into account that compulsory pilotage regime applies in various areas near the coast of Japan, including bays and straits.[615] In any event, Captain [redacted] mentions multiple other examples of similar regulations enforced in various jurisdictions:

a. In Queensland (Australia), with wide compulsory pilotage areas a pilotage exemption may generally be granted only to Australian registered ships. As regards foreign-flag ships, only dredging plants operating in specially designated areas may be exempted from compulsory pilotage;

b. In Western Australia, where compulsory pilotage requirements are in effect, a person may apply for a pilotage exemption certificate only if they are entitled to reside permanently in Australia or are a New Zealand citizen who is entitled to reside and work in Australia.

c. In Fiji, the compulsory pilotage regulations, which cover the Somosomo Strait, apply only to foreign-flag ships, whereas Fiji-flag ships with local masters are exempt.

d. In Chile, legislation provides for compulsory pilotage for 'any Chilean or foreign vessel navigating in the internal waters of the Republic, through the Strait of Magellan or carrying out any manoeuvre in the ports of the Republic of Chile'. At the same time, the relevant regulation states that this requirement does not apply to commercial ships that fly the Chilean flag.

e. In Canada, where only a holder of a pilotage license or a pilotage certificate may have the conduct of a ship in a compulsory pilotage area, only Canadian citizens and permanent residents are eligible to hold a pilotage certificate.

f. In Ireland, where a ship may be navigated in a compulsory pilotage area either by a license holder or by a pilotage exemption certificate holder, such certificates may

[613] First [redacted] Report, ¶37, referring to Standard Club, Pilotage Bulletin, May 2016, p. 14 (**RU-221**).

[614] Second [redacted] Report, ¶4.8.

[615] Second [redacted] Report, ¶79.

generally be granted only to Irish citizens or nationals of a Member State of the European Communities.

g. In the Philippines, where only duly accredited persons may navigate in the compulsory pilotage areas without a pilot onboard, only a Filipino citizen may apply for such accreditation.[616]

450. Therefore, Ukraine's claims regarding the pilotage regime in the Kerch Strait introduced by the Russian Federation are misplaced and should be dismissed.

ii. <u>One-way Traffic</u>

451. Ukraine does not object to the adoption of one-way traffic in some areas of the KYC *per se*. It asserts, however, that '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' and that the Russian Federation 'discriminatorily enforced it' to cause delays to Ukrainian vessels.[617] These allegations cannot be upheld.

452. It is beyond dispute that the navigation scheme implemented for all vessels traversing the Kerch Strait provides for one-way traffic regime in a certain area of the KYC for vessels exceeding 20 metres in length.[618]

453. It is, however, unclear how a one-way traffic scheme – which applies to all vessels passing through the Strait that exceed a certain size – could discriminate against Ukrainian vessels or vessels travelling to or from Ukrainian ports specifically. Ukraine does not provide any explanation in this respect. There are no flag- or nationality- based exemptions from this regime, which is enforced on all ships transiting the Strait, including Russian ships. Consequently, even assuming that vessels faced some delays in passing through the Kerch Strait due to the existing one-way traffic regime (*quod non*), these alleged delays would not differ depending on the vessel's flag or port of destination.

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[616] Second [redacted] Report, ¶¶80-81.

[617] Ukraine's Reply, ¶171.

[618] Ministry of Transport of the Russian Federation, Order No. 313 'On Approval of the Mandatory Regulations in the Kerch Strait', 21 October 2015, Article 47 (**RU-724**).

454. Additionally, Ukraine misstates the reasons for the implementation of one-way traffic, stating that it was caused 'by the low clearance of the Kerch Strait Bridge.'[619] Considering that the clearance is essentially the height of the bridge, Ukraine's suggestion that it could necessitate the implementation of one-way traffic makes no sense.

455. As [redacted] explains, it is the geographical and meteorological features of the Kerch Strait that are the main reasons for the adoption of stricter measures aimed at ensuring the safety of navigation in the Kerch Strait, including the implementation of one-way traffic system.[620] [redacted] concurs that a one-way system is 'a sensible control measure given the limiting depth and width of channel' because it 'would allow to avoid accidents which might in turn lead to the temporary closure of the channel.'[621]

456. Furthermore, [redacted] asserts that 'the previous Ukrainian requirements did not constitute a permanent one-way traffic system.'[622] This assertion, however, is simply wrong.

457. Ukraine and [redacted] do not contest that Ukraine's navigation regime in the Kerch Strait also provided for default one-way traffic for various vessels. It could also be implemented *ad hoc* depending on meteorological and navigational conditions, technical characteristics of vessels present in the strait, and the number of vessels waiting to enter it.[623] In other words, it switched between one-way and two-way schemes depending on the circumstances.

458. Furthermore, as [redacted] explains, the Ukrainian authorities strived to ensure one-way traffic in the area in the Bridge's vicinity. The KYC consists of four elbows with sharp turns between them.[624] The most challenging one is the turn between the Burunskoe and Yenikalskoe elbow.[625] It is located at the entrance of what now is 'the underbridge area' from the side of the Black Sea. Regulations in force in Ukraine provided that if two

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[619] Ukraine's Reply, ¶179.

[620] [redacted] Statement, ¶¶8, 13.

[621] Second [redacted] Report, ¶65.

[622] Second [redacted] Report, ¶4.14.

[623] Ministry of Transport of Ukraine, Order No. 721 'On Approving the Rules of Navigation in the Kerch-Yenikale Canal and Approach Canals Thereto', 9 October 2002, Article 3.4 (**RU-725**).

[624] First [redacted] Report, ¶19.

[625] [redacted] Statement, ¶13.

vessels approached this area from opposing directions, they could not pass at once: one vessel has to give way to the other to avoid a dangerous situation.[626] Traffic control services were trying to direct traffic in a way to avoid such situations altogether.[627] There was, accordingly, a de-facto one-way traffic scheme already in place in this area, which attests to the necessity of properly adopting one-way traffic for safety of navigation in that area.

459. Now that this area is in the vicinity of the bridge, this calls for additional safety measures, as recognised by international practice: similar regulations are routinely implemented by States in challenging areas. This is the case, for instance, with the Panama Canal, where traffic underneath the Confederation Bridge is also mostly one-way.[628]

460. Captain [redacted] also lists the following examples of similar regulations:

a. Turkish Straits (The Strait of Istanbul, Canakkale and Marmara): when the visibility in any region of the Turkish Straits drops to 1 mile and below, the maritime traffic is kept moving in one way and closed in the opposite direction, and when the visibility is less than half a mile or below, the vessel traffic is closed in both directions.

b. Haicang Channel, leading to Xiamen Gang, China is a 250m wide channel, and has a depth of 14m. Vessels of up to 50,000 tons can pass the Channel at high water but vessels of 100,000 tons are restricted to one-way transits.

c. Heyshang Dao General Cargo Terminal, located in Dalian Wan, China has an approach canal to the terminal which is approximately 4 miles long, 150m in width, with depths of 13.4m and only allows only one-way navigation.

d. The port of Skulte, Latvia has an approach canal that originates from about 1.18 nautical miles from the port entrance. The channel is 800m long, 72m wide and allows vessels with a maximum draft of 7m, but the traffic is one-way.[629]

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[626] Ministry of Transport of Ukraine, Order No. 721 'On Approving the Rules of Navigation in the Kerch-Yenikale Canal and Approach Canals Thereto', 9 October 2002, Article 3.13 (**RU-725**).

[627] [redacted] Statement, ¶13.

[628] Second [redacted] Report, ¶69.

[629] Second [redacted] Report, ¶72.

461. Finally, it is telling that Ukraine attempts to discount the relevance of examples of one-way traffic regulations mentioned in the First [redacted] Report because 'these are canals, which are artificial waterways, not straits.'[630] [redacted] even opines as follows:

> 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.[631]

462. The regulations that Ukraine complains about, however, apply within the KYC, the artificially created Kerch-Yenikale Canal within the Kerch Strait. This confirms that safety measures introduced in that area by the Russian Federation are fully justified.

463. Accordingly, the one-way traffic regime implemented by the Russian Federation in a segment of the Kerch Strait is a reasonable safety measure, which does not have any discriminatory character. Ukraine's allegations in this respect should therefore be dismissed.

iii. <u>No Delays</u>

464. As explained above, the regulations introduced by the Russian Federation are reasonable and in compliance with the provisions of the Convention. Ukraine's position that these measures led to delays for vessels travelling to or from Ukrainian ports is unsubstantiated.

465. Ukraine bases its position on a witness statement of [redacted], who purportedly analysed AIS data to determine the number of hours of 'delay' which Ukrainian vessels experienced. This 'study' does not constitute good evidence for the following reasons.

466. [redacted] is vague about his sources, cursorily stating that his unit 'identified vessel stops by tracking AIS data.'[632] He does not explain how that data was sourced. He merely proceeds to state that there were 'delays'[633] without explaining the baseline for calculating such 'delay' (*i.e.* what would the standard time for crossing the Strait be).

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[630] Ukraine's Reply, ¶181.

[631] Second [redacted] Report, ¶5.3.

[632] [redacted] Statement, ¶7.

[633] *Ibid*., ¶¶, 10-11.

467. Furthermore, [redacted] does not explain how the one-way traffic regime and the absence of exemptions from compulsory pilotage account for, or contribute to, these alleged delays.

468. In fact, as [redacted] explains, the time for crossing the Kerch Strait is highly dependent on circumstances such as weather conditions and seasonal intensity of the traffic. [redacted] notes that adverse weather conditions in the Strait make it impossible to traverse the Strait safely even for the experienced pilots,[634] not to mention those vessel masters who do not regularly travel through the Strait.

469. Delays are common when vessels cross waterways, and can generally be caused, depending on the parameters of a particular area, by navigation hazards, under keel clearances, traffic density, environmental conditions, etc.[635] Amongst the most prevalent factors that cause delays to vessels crossing the Strait are also failures to notify the traffic control services. Should a vessel fail to notify the VTS of its approach to the Strait, it will have to delay its passage, as the port's captain prioritises the vessels that comply with the established procedure when making a timetable. [636] [redacted] also explains that vessel masters frequently choose not to traverse the Strait, even when they have notified the VTS of their intention to do so. In such cases, a vessel master proceeds to the anchorage area, for example, to wait for orders, allow the crew to rest, or do repair work.[637]

470. [redacted] also lists, among other factors causing delays, various technical failures of vessels.[638] It is telling, however, that none of the factors mentioned above depend on either the vessels' port of destination or the vessel's flag. Accordingly, Ukraine's allegations that one-way traffic or compulsory pilotage were the source of delays for Ukrainian vessels traversing the Strait are completely unfounded and for this reason should be disregarded.

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[634] [redacted] Statement, ¶17.

[635] Second [redacted] Report, ¶88.

[636] [redacted] Statement, ¶18.

[637] Ibid., ¶¶7, 17-19.

[638] Ibid., ¶19.

471. ***In sum***, the Russian Federation's traffic regulations applicable to traversing the Kerch Strait complained of by Ukraine constitute reasonable safety measures and are compliant with the Convention. They are not discriminatory against Ukrainian-bound vessels or vessels flying the flag of other States and do not cause them to delay in their transit.

D. UKRAINE'S CLAIM CONCERNING THE SUSPENSION OF NAVIGATION FOR FOREIGN WARSHIPS AND GOVERNMENT SHIPS IS UNMERITORIOUS

472. In its Reply, Ukraine maintains its claim that the Russian Federation violated Articles 38 and 44 of UNCLOS by temporarily closing certain areas of the Black Sea to the passage by foreign military and other government vessels,[639] while accepting that the closure only lasted for 'six months from April 2021 through the end of October 2021.'[640]

473. As the Russian Federation has explained in its Counter-Memorial,[641] resolution of this claim would require the Arbitral Tribunal to decide, whether expressly or implicitly, on the sovereignty over Crimea, which falls outside the Arbitral Tribunal's jurisdiction, as envisaged by the 2020 Award.[642] In its Reply, Ukraine has done little to rebut this assertion of the Russian Federation, and for this reason it does not warrant repetition here. However, the Russian Federation would like to elaborate three other points.

474. ***First***, Ukraine's claim concerning the closure is manifestly inadmissible as a new claim submitted in disregard of Article 13(5) of the Rules of Procedure.

475. Ukraine's claim concerning the closure of certain areas of the Black Sea appeared for the first time in Ukraine's Revised Memorial, submitted on 20 May 2021, after the Arbitral Tribunal had delivered its 2020 Award, in which it specifically directed Ukraine to 'file a revised version of its Memorial, which shall take full account of the scope of, and limits to, the Arbitral Tribunal's jurisdiction as determined in the present Award'.[643]

476. Upon the filing of the Revised Memorial by Ukraine, the claim alleging a violation by Russia of Articles 38 and 44 of UNCLOS was either a new claim, or an amendment of an

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[639] Ukraine's Reply, ¶¶182-186.

[640] *Ibid*., ¶182. *See* also Ukraine's Revised Memorial, ¶164.

[641] Counter-Memorial, ¶¶249-254.

[642] 2020 Award, ¶197.

[643] *Ibid*., ¶492.

existing claim,[644] thus effectively a new claim, too. In either scenario, Ukraine should have sought leave from the Arbitral Tribunal before inserting that new claim in the Revised Memorial. But nowhere in the record of these proceedings is there an application from Ukraine to seek such leave under Article 13(5) of the Rules of Procedure. Therefore, this claim based on the incident of the closure of the strait is faulty procedurally, and should be struck off this case.

477. Further, were the claim considered to accord with the provision of Article 13(5) under the preceding point, it should still be dismissed for relying essentially on a fact that 'falls outside the scope of the dispute submitted in the Notification and Statement of Claim'.[645] When Ukraine initiated this arbitration on 14 September 2016, its Notification was supposed to comply with the requirement of Article 1 of Annex VII of UNCLOS, providing that '[t]he notification shall be accompanied by a statement of the claim and *the grounds on which it is based*.' [*Emphasis* added]. So the underlying facts were to be included therein.[646]

478. The 2020 Award, however, effected a material change to the Claimant's case by limiting the Arbitral Tribunal's jurisdiction to the claims other than those which 'necessarily require [the Arbitral Tribunal] to decide, directly or implicitly, on the sovereignty of either Party over Crimea'.[647] The original facts underlying Ukraine's case were to be revised, primarily by way of deletion of various claims that had been brought in contravention of the Arbitral Tribunal's decision on its jurisdiction. However, such revision should not have any effect on the temporal scope of the case. In short, as discussed above, the factual basis of the case remained temporally unchanged at the time when the 2020 Award was delivered in this case.[648]

479. However, when Ukraine submitted its Revised Memorial, the incident of temporary closure of the Russian Federation's territorial sea area in the Black Sea showed up in the

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[644] Notification of Arbitration and Statement of Claim, ¶50(f).

[645] Rules of Procedure, Article 13(5).

[646] C. Burke, *Annex VII Art. 1* in A. Proelss (ed.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Beck, Hart, Nomos, 2017), p. 2467, ¶8 (**RUL-166**).

[647] 2020 Award, ¶492.

[648] *See* Rejoinder, Chapter I(D)(iii) for the Russian Federation's comprehensive submissions in relation to the temporal jurisdiction of the Arbitral Tribunal.

document, even though it was not mentioned at all in the Notification of Arbitration and the Statement of Claim. On a closer look, the suspension lasted for six months[649] and was limited within the year of 2021.[650] As it stands, the incident falls outside the temporal scope of the dispute as set out in Ukraine's Notification and Statement of Claims. The gap in time between the Notification, submitted in 2016, and the suspension, implemented in 2021, is so wide (*i.e.* 5 years) as to compel Ukraine to seek leave from the Arbitral Tribunal to include it in its case, but it has failed to do so. For that reason also, the claim is inadmissible under Article 13(5) of the Rules of Procedure.

480. ***Second***, it should be recalled that the Kerch Strait as the entrance to the Sea of Azov is composed of internal waters. Part III of UNCLOS, as has been argued by the Russian Federation elsewhere,[651] does not apply to a strait linking internal waters and a part of the EEZ or high seas. The consequence is that Ukraine's claim concerning the closure of the Kerch Strait in violation of violation of Articles 38 and 44 lies outside the jurisdiction of the Arbitral Tribunal, as it involves a strait that falls outside the scope of Part III of UNCLOS.

481. ***Third***, in its Reply, Ukraine continues to mischaracterise the underlying factual background so as to insist on the application of the regime of transit passage under Articles 38 and 44 of UNCLOS and to dismiss the right of the Russian Federation to temporarily suspend innocent passage under Article 25(3) of the Convention.

482. As the Russian Federation has explained in the Counter-Memorial,[652] the area where the navigation of foreign warships and government vessels was suspended in 2021 lay in the Russian Federation's *territorial* sea, rather than in the Kerch Strait. In other words, the Notice to Mariners No. 1883(T), as illustrated by Ukraine's own map,[653] concerned an area extending over the territorial sea belts measured respectively from the coast of Crimea and from that of the Taman Peninsula.

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[649] Counter-Memorial, ¶267.

[650] Reply, ¶182.

[651] Counter-Memorial, Chapter Two, Section II; Rejoinder, ¶216.

[652] Counter-Memorial, Chapter Three, Section IV(B).

[653] Reply, p. 75, Map 1. The Notice is otherwise included in these proceedings as Ministry of Defence of the Russian Federation official website, Notices to Mariners, Edition No 18/2021 (**RU-363**).

483. As explained by the Russian Federation in its Counter-Memorial, the closure was in full compliance with the requirements of Article 25(3) of UNCLOS, in that it was temporary, essential for the protection of its security and did not discriminate among foreign ships.[654] Ukraine's allegations as to the Russian Federation's non-compliance with the requirements of Article 25(3) of UNCLOS are hopeless.

484. ***First***, Ukraine wrongly asserts that the measure of closure cannot qualify as a 'temporary' one under Article 25(3) as it entailed a 'closure of portions of the Black Sea near the Kerch Strait for 24 hours a day, 7 days a week, for six months.'[655] Ukraine does not cite any authority for this sweeping allegation.

485. In line with the ordinary meaning of the term 'temporary' as 'lasting for a limited time' and 'not permanent',[656] the Russian Federation has already explained that the Convention does not in any way specify what is considered a temporary suspension.[657] Scholarly literature supports this interpretation,[658] with some stating that a temporary suspension could last for even a considerable time, as long as it is not permanent.[659] Other authors suggest that a suspension of the right of innocent passage can occur over a period of months, but not years or decades.[660]

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[654] Counter-Memorial, Chapter Three, Section (IV)(B).

[655] Ukraine's Reply, ¶185.

[656] Oxford English Dictionary, *Entry 'Temporary'*, available at:

https://www.oed.com/search/dictionary/?scope=Entries&q=temporary (**RU-623**).

[657] Counter-Memorial, ¶266.

[658] R. A. Barnes, 'Straits Used for International Navigation: Article 25' in A. Proelss (eds.), United Nations Convention on the Law of the Sea: A Commentary, München: Nomos Verlagsgesellschaft, 2017, p. 226, ¶14 (**RUL-94**).

[659] *Ibid*.: '…there is no definition of "temporary" suspension and no limit on its duration is provided in the text. In practice this period of time should be coterminous with the related security threat.' According to another view, 'one interpretation is that a temporary suspension could be for any period of time and even indefinitely, as long as it is not permanent.' *See* M. Kashubsky, Offshore petroleum security: Analysis of offshore security threats, target attractiveness, and the international legal framework for the protection and security of offshore petroleum installations, Doctor of Philosophy thesis, Faculty of Law, University of Wollongong, 2011, p. 215 (**RUL-167**). *See* also *ibid.*, fn. 129: '…where internal civil disturbance is taking place, it may be possible to justify suspension of innocent passage for a considerable period of time in order to ensure the safety of foreign ships within those waters.' D. R. Rothwell, *UNCLOS Navigational Regimes and their Significance for the South China Sea* in S. Wu *et al.* (eds.), CONTEMPORARY ISSUES IN THE SOUTH CHINA SEA (Routledge, 2015), p. 156, fn. 28: 'In the case of where internal civil disturbance is taking place, it may be possible to justify suspension of innocent passage for a considerable period of time in order to ensure the safety of foreign vessels within those waters.' (**RUL-168**).

[660] K. Wani, Development of the Law of the Sea and the Legal Status of International Straits in Time of International Armed Conflict, *Japanese Yearbook of International Law*, 2018, Vol. 61, p. 49: 'It is generally

486. Given that the suspension of innocent passage in the Black Sea as complained of by Ukraine only lasted for six months, it fully complied with the requirement of temporariness under Article 25(3) of UNCLOS.

487. ***Second***, Ukraine's contention as to the discriminatory nature of the measure of closure, because it 'applie[d] only to warships and other State vessels and therefore discriminate[d] in fact among *types* of foreign ships',[661] is equally misconceived.

488. The requirement of there being no 'discrimination in form or in fact among foreign ships' under Article 25(3) implies that a suspension of innocent passage must affect all foreign states equally, or that it affects all foreign States on equal terms.

489. This interpretation is supported by the drafting history of this provision. The phrase 'without discrimination' seems to have been first proposed by Greece at the First United Nations Conference on the Law of the Sea,[662] accompanied by an explanation that it 'was anxious to prevent any discrimination between vessels of different nationalities',[663] and proposed an additional phrase 'among foreign ships' after the word 'discrimination.'[664] The resultant provision of Article 16(3) of the 1958 Geneva Convention survived subsequent discussions at the Third United Nations Conference on the Law of the Sea and Article 25(3) of UNCLOS.[665]

490. Ukraine's flawed interpretation of 'discrimination' under Article 25(3) is also disputed in literature. For example, Talmon states that 'Article 25(3) UNCLOS prohibits

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understood that "temporary" suspension is a matter of days, weeks, or months rather than years or decades' (**RUL-169**). H. Yang, JURISDICTION OF THE COASTAL STATE OVER FOREIGN MERCHANT SHIPS IN INTERNAL WATERS AND THE TERRITORIAL SEA (Springer, 2006), p. 221: 'In the first place, suspension may only be temporary. For general understanding, it would be more a matter of days, weeks or months than years or decades, not to speak of the permanent closure of a certain portion of the territorial sea' (**RUL-170**). Ngantcha notes that Professor Treves once observed the existence of a practice that would amount to permanent closure of the territorial sea by closing 'alternative portions' of the territorial sea, *see* F. Ngantcha, THE RIGHT OF INNOCENT PASSAGE AND THE EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA (Pinter Publishers, 1990), p. 166 (**RUL-171**).

[661] Ukraine's Reply, ¶185.

[662] United Nations Conference on the Law of the Sea, Summary Records of the 26th to 30th Meetings of the First Committee, U.N. Doc. A/CONF.13/C.1/SR.26-30, 24 February to 27 April 1958, p. 79, ¶6, available at: https://legal.un.org/diplomaticconferences/1958_los/docs/english/vol_3/sr_26_30.pdf (**RU-640**).

[663] *Ibid*. p. 80, ¶23.

[664] United Nations Conference on the Law of the Sea, Summary Records of the 31st to 35th Meetings of the First Committee. U.N. Doc. A/CONF.13/C.1/SR.31-35, 24 February to 27 April 1958, p. 93, ¶4, available at: https://legal.un.org/diplomaticconferences/1958_los/docs/english/vol_3/sr_31_35.pdf (**RU-641**).

[665] D. O'Connell, THE INTERNATIONAL LAW OF THE SEA, (Clarendon Press, 1982), Vol. I, pp. 297-298 (**RUL-172**).

discrimination between States, not between types of ships. In particular, it does not require equal treatment of foreign government and commercial vessels.'[666] Subedi similarly observes that 'the suspension must not apply to only a specific state's ships', and that it would be discriminatory 'if the restrictions are placed only to the ships of the target state.'[667] Turns concurs that the measure restricting 'the innocent passage of foreign warships and other government ships has been temporarily suspended through territorial sea' constitutes 'a measure explicitly permitted under Article 25(3) of UNCLOS.'[668]

491. In this case, the closure affected all foreign military and government vessels equally, and there was no discrimination 'among' such foreign vessels as is prohibited by UNCLOS. Ukraine's assertion that this measure discriminated among 'types of foreign ships' is therefore incorrect.

492. Ukraine's interpretation is also nonsensical in that it is at odds with the legitimate purpose for suspending innocent passage as envisaged by Article 25(3), that 'such suspension is essential for the protection of [the coastal State's] security'.[669] Adopting Ukraine's logic, a coastal State would have to suspend innocent passage for *all* foreign vessels to comply with the non-discrimination requirement.

493. ***Third***, Ukraine's assertion regarding the alleged non-compliance by the Russian Federation with the publication duty under Article 25(3)[670] does not stand to criticism.

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[666] S. Talmon, *Germany Mistakenly Considers Russia's Restrictions on Navigation of Warships in the Black Sea to Be 'Very Problematic' and, in Part, 'Contrary to International Law'* (4 May 2021), available at: https://gpil.jura.uni-bonn.de/2021/05/germany-mistakenly-considers-russias-restrictions-on-navigation-of-warships-in-the-black-sea-to-be-very-problematic-and-in-part-contrary-to-international-law/ (**RUL-173**).

[667] A. B. Bal, *Maritime Lawfare: The Impact of Unilateral Sanctions on Law and Practice on Navigation and Seaborne Trade* in S. Subedi (ed.), UNILATERAL SANCTIONS IN INTERNATIONAL LAW (Hart Publishing, 2021), p. 259 (**RUL-174**). *See* also M. Maduro, Passage through International Straits: The Prospects Emerging from the Third United Nations Conference on the Law of the Sea, *Journal of Maritime Law and Commerce*, 1980, Vol. 12, Issue 1, p. 76: 'the suspension of passage rights for all foreign warships' (**RUL-175**).

[668] D. Turns, The HMS Defender Incident: Innocent Passage versus Belligerent Rights in the Black Sea, *ASIL Insights*, 2021, Vol 25, Issue 16, p. 2 (**RUL-176**).

[669] F. Ngantcha, THE RIGHT OF INNOCENT PASSAGE AND THE EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA (Pinter Publishers, 1990), p. 165, where he states, in light of 'contemporary trends', that, subject to qualifications, 'the determination of how essential the suspension is, and of what does constitute the security of the coastal State, is left to that State' (**RUL-171**).

[670] Ukraine's Reply, ¶185.

494. Article 25(3) of UNCLOS allows for temporary suspension of innocent passage to take effect 'after [it] having been duly published', but the exact form of such 'publication' remains unspecified, apart from the requirement for it to be done in an appropriate manner as suggested by the word 'duly.'[671] One of the well recognised channels of communication between the coastal State and potential users of its maritime zones is through the Notices to Mariners.[672]

495. Nowhere does Article 25(3) require, as Ukraine purports to argue, that the Russian Federation ought to 'publicly indicate *why* it was closing off portions of the Black Sea'.[673] Ukraine has not adduced any authority for this misinterpretation of the provision.

496. It is beyond dispute in the instant case that the Ministry of Defence of the Russian Federation issued the relevant Notices to Mariners, which, included as an exhibit by Ukraine,[674] announced that 'temporary from 24 April 21 00 until 31 October 21 00 [2021] the right of peaceful passage though the territorial sea of the Russian Federation is postponed for foreign military ships and other state ships in the areas...' This was a valid and proper means of communication pursuant to Article 25(3) of the Convention. Further, Ukraine has also referred to a series of coastal warnings issued by the Russian Federation to notify the interested parties of the closure.[675]

497. Consequently, contrary to Ukraine's allegations, the Russian Federation complied with the requirements for the suspension of the specified area in the Black Sea in April to October 2021, that suspension being temporary, non-discriminatory and having been duly published.

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[671] *See* J. Solski, *New Draft Law on the Russian Arctic Straits – Putin' Money Where the Mouth is?*, p. 4 (14 September 2022), available at: https://site.uit.no/nclos/wp-content/uploads/sites/179/2022/09/Jan-Solski_14092022_NCLOS-blog.pdf (**RUL-177**).

[672] *Ibid*.

[673] Ukraine's Reply, ¶185.

[674] Department of Navigation and Oceanography of the Ministry of Defence of the Russian Federation, Notice to the Mariners Navigation warnings, Weekly Bulletin Issue 17/21 (**UA-621**).

[675] *See* Coastal Warning of the Department of Navigation and Oceanography of the Ministry of Defense of the Russian Federation No. 152/21, 7 April 2021 (**UA-619**); Coastal Warning of the Department of Navigation and Oceanography of the Ministry of Defense of the Russian Federation No. 169/21, 16 April 2021 (**UA-620**).

IV. THE RUSSIAN FEDERATION DID NOT VIOLATE THE CONVENTION BY INSPECTING VESSELS IN THE KERCH STRAIT AND THE SEA OF AZOV

498. In its Reply, Ukraine maintains its assertions regarding the inspections of vessels by the Russian Federation in the Kerch Strait and the Sea of Azov. However, as will be demonstrated in this Section, Ukraine has failed to rebut the Russian Federation's jurisdictional objection to Ukraine's claims concerning the inspection of vessels in the Kerch Strait and the Sea of Azov (**A**). Further, Ukraine's claims relating to the inspections are inadmissible (**B**). Finally, Ukraine has failed to engage with the Russian Federation's argument that the instances of vessel inspection complained of by Ukraine were a legitimate exercise of the Russian Federation's sovereign powers in its internal waters (**C**).

A. UKRAINE HAS FAILED TO REBUT THE JURISDICTIONAL OBJECTIONS TO THE CLAIMS CONCERNING INSPECTION OF VESSELS

499. The Russian Federation maintains its overarching position that the Arbitral Tribunal has no jurisdiction under UNCLOS to rule upon the legality of vessel inspections by the Russian Federation in the Kerch Strait and the Sea of Azov as those sea areas constitute internal waters.[676] It follows that the regime of transit passage relied upon by Ukraine does not apply to the Kerch Strait, and the regimes of the territorial sea and the EEZ do not apply both to the Strait and the Sea of Azov. This entails that the Arbitral Tribunal lacks jurisdiction over events that are alleged to have happened in the Strait and the Sea of Azov, including the inspections complained about by Ukraine. The Russian Federation considers it appropriate to emphasise three points in this regard without prejudice to its other jurisdictional objections.

500. ***First***, UNCLOS does not regulate navigation in the Kerch Strait and the Sea of Azov. Instead, prior to the commencement of this Arbitration, *i.e.* before 16 September 2016, navigation in the Strait and the Sea was governed exclusively by a bilateral treaty between Ukraine and the Russian Federation – the Azov/Kerch Cooperation Treaty, which provided for two separate regimes of navigation for Ukrainian and Russian-flagged vessels, on the one hand, and for vessels flying the flags of 'third States', on the other.[677]

[676] *See* above, Chapter II.

[677] Azov/Kerch Cooperation Treaty, Article 2.

This treaty constituted *lex specialis* to UNCLOS. Consequently, as was argued in the Counter-Memorial and elaborated further in Chapter III hereof, navigation in the Kerch Strait and the Sea of Azov would fall under the Azov/Kerch Cooperation Treaty, and therefore fall outside the scope of the Arbitral Tribunal's jurisdiction. This point was also argued by the Russian Federation in the Counter-Memorial,[678] to which Ukraine has not responded fully in its Reply.[679] Its argument that none of its claims invoked this treaty cannot render the treaty irrelevant.[680] Obviously, the party that fails to address the treaty, apparently for sake of convenience, cannot determine the relevance of the treaty to this case, which is a matter for the Arbitral Tribunal to decide.

501. ***Second***, Ukraine's claim concerning inspections of vessels in the Kerch Strait is aimed at re-introducing into these proceedings the issue of the Russian Federation's sovereignty over Crimea, in circumvention of the 2020 Award.[681] Given that the Russian Federation has been exercising exclusive control over the Kerch Strait since 2014, after Crimea's reunification with the Russian Federation, Ukraine's disputing that exercise of sovereign powers in Russian internal waters presupposes its disagreement with the Russian sovereignty over Crimea, and appears to be another instance of blatant disregard for the 2020 Award.

502. ***Third***, because the Kerch Strait and the Sea of Azov constitute internal waters,[682] there can be neither territorial sea nor EEZ in those bodies of water. Articles 2, 38, 44, 58, 87, and 92 of UNCLOS are therefore inapplicable and irrelevant for the assessment of the legality of the inspections of vessels therein.

B. UKRAINE'S CLAIMS CONCERNING THE INSPECTIONS OF VESSELS ARE INADMISSIBLE

503. Since Ukraine's claims in question are all based on certain events that post-date the 'critical date', *i.e.* 16 September 2016, and, relate, specifically, to events after March 2018, they are inadmissible in these proceedings.

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[678] Counter-Memorial, ¶¶282-285.

[679] Ukraine's Reply, ¶190.

[680] *Ibid*.

[681] 2020 Award, ¶492(a). *See* also *ibid*., ¶¶197-198.

[682] *See* above, Chapter II.

504. According to the established jurisprudence of the ICJ,

> [A]dditional claims formulated in the course of proceedings are inadmissible if they would result, were they to be entertained, in transforming 'the subject of the dispute originally brought before [the Court] under the terms of the Application'... In this respect, it is the Application which is relevant and the Memorial, 'though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein'... *A fortiori,* a claim formulated subsequent to the Memorial, as is the case here, cannot transform the subject of the dispute as delimited by the terms of the Application.[683]

505. In relation to the 'subject of the dispute' and 'the precise nature of the claim', the ICJ further observed that

> It has characterized them as 'essential from the point of view of legal security and the good administration of justice' and, on this basis, has held inadmissible new claims, formulated during the course of proceedings, which, if they had been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application.[684]

506. Specifically, it has clarified that

> If the Court had jurisdiction with regard to disputes resulting from exchanges in the proceedings before it, a respondent would be deprived of the opportunity to react before the institution of proceedings to the claim made against its own conduct. Furthermore, the rule that the dispute must in principle exist prior to the filing of the application would be subverted.[685]

507. This is contradicted neither by international arbitrations conducted by tribunals operating under Annex VII of UNCLOS,[686] nor by jurisprudence of the ITLOS.[687]

508. In Ukraine's Notification of Arbitration and Statement of Claims, which initiated this arbitration on 14 September 2016, there was a single sentence containing the allegation that 'Russian authorities *now* block *Ukrainians* from transit through the Kerch Strait'[688]

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[683] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 656, ¶39 (**RUL-136**).

[684] *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, ICJ Reports 1998, p. 448, ¶29 (**RUL-22**).

[685] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports 2016, p. 851, ¶43 (**RUL-178**).

[686] *See e.g.*, *The 'Enrica Lexie' Incident (Italy v. India)*, PCA Case No. 2015-28, Award of 21 May 2020, pp. 63-64, ¶¶235-238 (**RUL-179**).

[687] *The M/V 'Louisa' Case (St Vincent and the Grenadines v. Kingdom of Spain)*, ITLOS Case No. 18, Judgment of 28 May 2013, pp. 44-45, ¶¶141-149 (**RUL-36**).

[688] Notification of Arbitration and Statement of Claims, ¶24.

[*emphasis* added]. There was not a single word on the underlying facts. Only in a subsequent filing in this case did Ukraine supply, in another single sentence, what might give some flesh to the allegation mentioned above: 'Russia has since April 2018 been impeding both Ukrainian and third-State vessels in the strait and the Sea of Azov by stopping those traveling to and from Ukraine's ports.'[689] Ukraine then added that its border guard service and other agencies '[were] actively investigating and collecting evidence on these stoppages'.[690]

509. As these two single sentences are the only ones that may relate to such actions as inspections or delays of passage in the Kerch Strait and the Sea of Azov, Ukraine's claims concerning inspection and delay of passage were new claims that crept into its Revised Memorial of 21 May 2021 without leave granted by the Arbitral Tribunal, as required under Article 13(5) of the Rules of Procedure. Accordingly, the claims should be struck off this case for want of the Arbitral Tribunal's leave.

510. Alternatively, were the claims in question retained for these proceedings, they should still be dismissed on another ground of inadmissibility, namely that they pertain to certain events that took place long after the start of this arbitration. This part of Ukraine's legal case was clearly built up on certain events that occurred nearly two years *after* the present arbitration had commenced. Those events, even if true, could not possibly support the allegation of blocking transit as contained in the Notification, as mentioned above. Such temporal discrepancy, as noted in the preceding paragraph, seems to have been corroborated by Ukraine's Revised Memorial and Reply, successively.[691] Were these speculative claims, including their early expression in the Notification, allowed to stand, Ukraine might think it possible to expand its legal case at will, and to take advantage of these proceedings as the arbitration takes its course. This would undermine the legal security and good administration of justice, as noted by the ICJ. Moreover, even assuming *arguendo* that some of the inspections and delays in question could be

[689] Ukraine's Written Observations on Jurisdiction, ¶90 (citing two documents issued in 2018 by the US State Department and the EU, respectively).

[690] *Ibid*.

[691] *See* Revised Memorial, ¶159 (referring to the period between July 2018 and March 2021), ¶160 (referring to the period between April 2018 and April 2021), ¶161 (referring to the period between April and December 2018), ¶166 (referring to the period between April and November 2018); Reply, ¶171 (referring to the period between July 2018 and March 2021), ¶172 (referring to the period between April 2018 and April 2021), ¶173 (referring to the period between April and December 2018).

considered viable as part of Ukraine's case that rests on Part III of UNCLOS, the rest, conducted in the Sea of Azov, would constitute new claims not contained in the Notification. These new claims should therefore be dismissed.

C. INSPECTIONS OF VESSELS IN THE KERCH STRAIT AND THE SEA OF AZOV ARE A LEGITIMATE EXERCISE OF THE RUSSIAN FEDERATION'S SOVEREIGN POWERS

511. In its Counter-Memorial, the Russian Federation has demonstrated that the vessel inspections complained of by Ukraine were implemented by it as an appropriate measure in response to a growing security threat to the safety of navigation in the Kerch Strait and the Sea of Azov, and in line with an established practice.[692] The Russian Federation has also drawn the Arbitral Tribunal's attention to the lack of credibility of Ukraine's evidence in this regard. Even with its Reply, Ukraine still falls short of establishing a credible case, as will be shown below.

i. Ukraine Misstates the Russian Federation's Position on Evidentiary Issues

512. Ukraine attempts to prove that the Russian Federation has discriminated against vessels sailing to Ukrainian ports by conducting targeted inspections of such vessels. However, without credible evidence to corroborate its allegation, Ukraine has tried in its Reply to paper over the flaws in its evidence by alleging that

> 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 Article 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.[693]

513. However, it is Ukraine that has misstated, by the passage cited above, the Russian Federation's position. The Russian Federation has not argued for a 'heightened' standard of proof; rather, it has challenged Ukraine's reliance on irrelevant circumstantial evidence.

[692] Counter-Memorial, Chapter 4, Section II.

[693] Ukraine's Reply, ¶175.

514. As the ICJ stated in the *Bosnia Genocide* case, 'it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it.'[694] That reflects the general principle of *actori incumbit probatio* that a State alleging a fact bears the burden of proving it.

515. It is not disputed that, in proving its case, a party may rely on circumstantial evidence. But the standard for proof drawn from such inferences of fact is high. As the ICJ noted in the *Corfu Channel* case, 'The proof may be drawn from inferences of fact, provided that they *leave no room for reasonable doubt*.'[695] [*Emphasis* added]

516. The Russian Federation's point is that the standard for drawing proof from inferences of fact should be higher than what Ukraine mistakenly assumes on invoking its evidence. In order to meet this high standard, a party may be expected to rely only on such circumstantial evidence that has a direct link to the *factum probandum*.[696] As will be demonstrated below, Ukraine's evidence has failed to satisfy this standard.

517. ***Second***, the Russian Federation does not take issue with the ICJ's view, referenced by Ukraine, that 'a 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."'[697] It is, however, noteworthy that the Court allowed such a liberal recourse only for those States which were 'not in a position to provide direct proof.'[698] In the *Corfu Channel* case, the ICJ also made it clear that 'indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion'.[699]

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[694] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 128, ¶204 (**RUL-180**).

[695] *The Corfu Channel Case (UK v. Albania)*, Judgement, ICJ Reports 1949, p. 18 (**RUL-88**).

[696] T. Renno, *Circumstantial Evidence* in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (OUP, 2020), ¶¶30-32 (**RUL-181**).

[697] *Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Uganda)*, Reparations, ICJ Judgement of 9 February 2022, p. 55, ¶120 (citing *The Corfu Channel Case (UK v. Albania)*, ICJ Judgement of 9 April 1949, p. 18 (**UAL-15**)) (**UAL-194**).

[698] *Ibid*.

[699] *The Corfu Channel Case (UK v. Albania)*, Judgement, ICJ Reports 1949, p. 18 (**RUL-88**).

518. In the present case, it is disingenuous of Ukraine to claim that it has had no access to direct evidence, whereas its own witnesses have claimed otherwise. In fact, the evidence of both Ukraine's witnesses, [redacted] and [redacted], suggests their having access to evidence concerning inspections of vessels.[700] Ukraine, however, has chosen to avoid providing such evidence to the Arbitral Tribunal, notwithstanding the Russian Federation's concern expressed in its Counter-Memorial.[701] Instead, Ukraine continues to rely heavily on the same, overly-generalised evidence, such as 'observation of AIS data and navigational patterns'.[702]

519. Hence, the Arbitral Tribunal should apply the appropriate standard for inferences of fact and circumstantial evidence, *i.e*. the one of beyond reasonable doubt.

ii. Ukraine Has Failed to Establish its Case, Since It Is Based on Flawed and Contradictory Evidence

520. In its Reply, Ukraine submits that it 'has provided ample documentary evidence and witness testimony in support of Russia's discriminatory delays and inspections of merchant vessels'.[703] However, despite the Russian Federation's criticisms as to the evidentiary value of Ukraine's evidence, [704] it does not refer to any additional evidence in the Reply or satisfactorily respond to the Russian Federation's criticism. Instead, Ukraine continues to build its case on unreliable witness statements and irrelevant documents of dubious evidentiary value.

521. Ukraine's witness statements, characterised by it as 'informative, credible and well supported by documents',[705] in reality, quite to the contrary, do not add any actual information, and lack credibility and documentary support. In order for those statements to have evidentiary value, they should meet certain criteria. As noted by the tribunal in

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[700] [redacted] Statement, ¶3 (referring to 'the information collected by the Border Service units in Mariupol and Berdyansk'); [redacted] Statement, ¶5 (referring to 'regular access to ... data concerning the delays, stoppages, and inspections faced by Ukrainian-bound vessels in the Sea of Azov and Kerch Strait').

[701] Counter-Memorial, ¶295.

[702] Ukraine's Reply, ¶196.

[703] *Ibid*., ¶170.

[704] Counter-Memorial, ¶295.

[705] Ukraine's Reply, ¶174.

the *M/V 'Norstar'* case, due regard should be given to the following factors when evaluating witness statements:

> [W]hether 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.[706]

522. Ukraine's witness statements do not satisfy any of those factors. They swarm with personal opinions, allegations, and hearsay evidence. For example, [redacted] states that 'Russia's stoppages and delays have undermined the ability of merchant vessels to access the important Ukrainian ports of Mariupol and Berdyansk.'[707] However, he does not even claim to have first-hand knowledge of any inspections supposedly undertaken by the Russian border authorities. He compares the 'work undertaken by [his] unit'[708] with the figures reported in a news article of an interview of a Russian official, which contained unspecified 'commercial and government data'.[709] This part of [redacted] statement therefore represents his personal opinion based on hearsay.

523. [redacted] witness statement relies heavily on hearsay as well. In particular, while making a bold allegation of the number of inspections, [redacted] relies not on any first-hand knowledge, but on vague 'information' contained in Ukrainian ports' databases that record the information allegedly obtained by the Ukrainian Border Guard from interviewing vessel masters.[710] It is especially hypocritical of Ukraine to call such evidence 'credible' in light of Ukraine's accusations of the Russian Federation's use of 'triple hearsay'.[711] In any event, the credibility of the various interview reports on which [redacted] evidence relies cannot be directly verified, including by means of cross-examination.

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[706] *The M/V 'Norstar' Case (Panama v Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019, p. 39, ¶99 (**UAL-138**).

[707] [redacted] Statement, ¶15.

[708] *Ibid*.

[709] *Ibid*., ¶14.

[710] [redacted] Statement, ¶3.

[711] Ukraine's Reply, ¶193.

524. Furthermore, the data relied on by Ukraine's witnesses is of dubious evidentiary value. While Ukraine denotes its witness statements as being 'well supported by documents',[712] both witness statements in fact rely on just five 'documents'[713] and a news report by Ukrainian media.[714] Two of the five 'documents' are pre-printed explanations with handwritten entries.[715] Three other documents are vessel logs.[716] One of the vessel logs is not even properly dated,[717] which complicates the verification of the information reflected therein. Even assuming that these documents may have evidentiary value (*quod non*), Ukraine has provided only two reports and three vessel logs out of more than 1,600 alleged documented inspections.[718] This is notwithstanding the fact that, as Ukraine's witness [redacted] claims, Ukraine purports 'to collect comprehensive information about all stops and inspections carried out by the Russian Border Guard'.[719] It is manifestly untenable for Ukraine to base its claim as to the Russian Federation's alleged discriminatory pattern of conduct on five sporadic instances of vessel inspections.

525. It is even more telling that Ukraine's witnesses claim to possess some relevant information, but fail to provide it, even though the Russian Federation raised this point in its Counter-Memorial.[720] Specifically, [redacted] refers to 'information collected by the Border Service units in Mariupol and Berdyansk' to which he allegedly has access.[721] [redacted], in turn, refers to 'data concerning delays, stoppages, and inspections faced by Ukrainian-bound vessels in the Sea of Azov and the Kerch Strait'[722]

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[712] *Ibid*., ¶174.

[713] [redacted]

[714] Korrespondent net*, Russia is not blocking Ukrainian ships in the Kerch Strait, claims the Federal Security Service of Russia (FSB)* (8 December 2018) (**UA-568**).

[715] [redacted]

[716] [redacted]

[717] [redacted]

[718] Ukraine's Reply, ¶197.

[719] [redacted] Statement, ¶5.

[720] Counter-Memorial, ¶295.

[721] [redacted] Statement, ¶3.

[722] [redacted] Statement, ¶5.

as well as to some 'intelligence sources'.[723] In these circumstances, neither the Russian Federation, nor the Arbitral Tribunal are in a position to evaluate the referenced information and have to take the witnesses' words for granted, even though they do not purport to have any firsthand knowledge of the facts they allege. Noteworthily, Ukraine itself condemns the Russian Federation's reluctance to provide certain information, whereas it is Ukraine who shoulders the burden of proof in this case. It is also difficult to understand why [redacted] refers to 'commercial and government data' to prove the number of 'transits to or from Ukrainian ports', but discloses none,[724] without explaining any difficulty in providing such information.

526. Moreover, the information on which Ukraine relies to build its case on is no more than a body of unsubstantiated allegations. First, Ukraine's reliance on 'Automatic Identification System (AIS) data tracking the location of vessels' is baseless.[725] The Russian Federation reiterates its position articulated in the Counter-Memorial that AIS data may not reasonably prove the allegedly discriminatory inspections of vessels.[726] AIS data would only identify when a particular vessel arrived and departed from a certain sea area.[727] As clarified by an expert in navigation, Captain [redacted], dozens of factors may lead to delays in vessels' navigation, including mechanical failures, adverse weather conditions, or waiting for cargo to become available for loading before proceeding onwards.[728] Ukraine does not appear to dispute this.

527. Further, Map A[729] in [redacted] witness statement is essentially illegible: it contains no description of methodology or designation of persons who 'annotated' that map (let alone their qualifications). It does not even depict exact spots of the alleged inspections, making it impossible to analyse the alleged vessels' deviations 'from standard navigation paths'.[730]

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[723] *Ibid*., ¶7.

[724] *Ibid*., ¶14.

[725] Ukraine's Reply, ¶171.

[726] Counter-Memorial, ¶¶295-296.

[727] *Ibid*., ¶296.

[728] First [redacted] Report, ¶¶39-43.

[729] [redacted] describes this map as 'a navigational chart for the relevant sea area, which [Contact Point Cell] has annotated in light red to reflect the areas in which we identified vessel stops.' *See* [redacted] Statement, ¶9.

[730] *Ibid*., ¶8.

528. As regards Table 1[731] in [redacted] witness statement, it fails to indicate the baseline data used to calculate the alleged 'average delays.' It is plain that, in order to estimate the delay in transiting through the strait, one first needs to know the standard time for such a passage, against the background of which the delay may be assessed. However, [redacted] does not articulate such standard passage time. [redacted] further fails to specify the methodology of calculation, as well as the number of vessels taken into account when assessing 'average delays.' This may well lead to easily manipulated results: *e.g.*, if one takes only two vessels to count average delay – one that waited for two hours and one that waited for 78 hours due to a technical fault – the average delay would be 40 hours.

529. Ukraine has therefore failed to establish its case regarding the inspections of vessels. Its claims are nothing more than unsubstantiated allegations based on personal opinions, unreliable sources and hearsay.

iii. <u>The Russian Federation Has Demonstrated the Legitimacy of Vessels' Inspections</u>

530. In its Counter-Memorial, the Russian Federation has provided a well-substantiated explanation of the reasons for the inspection of vessels in both the Kerch Strait and the Sea of Azov.[732] Ukraine has failed in its Reply to rebut the Russian Federation's arguments regarding the security threats and the prior practice.

531. ***First***, the Russian Federation reiterates that it did not conduct any discriminatory inspections depending on whether the vessels were sailing to or from Ukrainian ports or elsewhere.[733]

532. Ukraine does not dispute that the majority of vessels subjected to inspections actually sailed to the Russian Federation's ports in the disputed period.[734] As the Russian Federation extensively explained in its Counter-Memorial,[735] and as [redacted], head

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[731] [redacted] explains that this table 'breaks out the average wait time for vessels traveling to and from Ukraine's Sea of Azov ports for each month, from July 2018 through April 2021.' *See ibid.*, ¶12.

[732] *See* Counter-Memorial, Chapter 4, Section II.

[733] *See Ibid.*

[734] Ukraine's Reply, ¶173. *See* also *Korrespondent.net*, Russia is not Blocking Ukrainian Ships in the Kerch Strait, Claims the Federal Security Service of Russia (FSB) (8 December 2018) (**UA-568**).

[735] Counter-Memorial, ¶296.

of the Kerch Strait VTS, explains in his witness statement,[736] there were multiple reasons why the vessels sailing to or from Ukrainian ports could face delays, including but not limited to the following:

a. seasonal changes in traffic affect the time of vessels' passage through the Kerch Strait, especially in autumn when grain and other agricultural products are harvested, accompanied by strong winds and high waves;[737]

b. adverse weather conditions could seriously hamper passage through the Kerch Strait, especially from September to May when strong winds up to 20-25 m/s and high waves up to three metres prevent even a safe taking of a pilot on board;[738]

c. vessels often fail to notify the captain of the Kerch Seaport of their intention to pass through the Kerch Strait 48 hours in advance, which was required for being included in shipping schedules under applicable regulations;[739]

d. should a vessel suffer a technical failure, it must delay its passage and stay at the anchorage area until the breakdown is repaired, which often takes dozens of hours.[740]

533. Importantly, as [redacted] confirms,[741] all the mentioned reasons do not depend on the vessel's port of destination, as these are objective factors affecting equally vessels travelling to Ukrainian and Russian ports.

534. [redacted] further explains that 'vessel inspections do not significantly affect the time of passage through the Kerch Strait … [They] are carried out at the time when vessels are at anchorage area waiting for permission to pass through the Strait.'[742] Tellingly, even the cases of inspections selected by Ukraine[743] support [redacted] statement and

[736] [redacted] Statement, ¶¶14-20.

[737] *Ibid*., ¶16.

[738] *Ibid*., ¶17.

[739] *Ibid*., ¶18. *See* also Ministry of Transport of the Russian Federation, Order 'On Approving the Mandatory Regulations in the Kerch Seaport', No. 313, 21 October 2015, Sec. 38 (**RU-724**).

[740] [redacted] Statement, ¶19.

[741] *Ibid*., ¶21.

[742] *Ibid*., ¶15.

[743] [redacted]

thus reveal the lack of any merit in Ukraine's allegations. According to the relevant vessel logs, the average time of inspections did not exceed one hour.[744]

535. ***Second***, the Russian Federation reiterates that the policy of vessel inspection was applied against the backdrop of real and serious threats to its security in the Sea of Azov and the Kerch Strait.[745] During the past few years, it has become clear that the Russian Federation's security concerns were, and remain, real and well-founded. In 2022 and 2023, Ukraine launched a number of attacks targeting the Kerch Strait Bridge and has assumed responsibility for them,[746] and, in 2023, the FSB discovered traces of explosives onboard a vessel that previously visited a Ukrainian port.[747]

536. In its Counter-Memorial the Russian Federation invoked the case of Egypt, after it experienced a *coup d'état*,[748] as an example of State practice of vessel inspection in a state of security threat. Ukraine's criticisms in its Reply in this respect are beyond the point.[749] Ukraine misleadingly asserts that '[t]he strict regulations and procedures that ships generally need to follow to transit through canals … are not comparable to the Kerch Strait.'[750] This assertion is simply wrong in relation to the present case, as the main waterway in the Kerch Strait is the man-built Kerch-Yenikale Canal[751] and all the shipping regulations are applicable to navigation therein.[752] In any case, it is not the traffic regulations that are important. What really matters here is that Egypt, just like the Russian Federation, faced security threats that it had to tackle in order to safeguard the

[redacted]

[744] [redacted]

[745] Counter-Memorial, ¶¶293-294.

[746] *See* above, Chapter I(D)(iv).

[747] Crimean Newswire, *FSB: On 22 July, Traces of Explosives were Found in the Hold of a Foreign Dry Cargo Ship on Its Way from Turkey to the Port of Rostov-on-Don to Load Grain* (24 July 2023), available at: https://crimea-news.com/society/2023/07/24/1137386 html (**RU-726**).

[748] Counter-Memorial, ¶300.

[749] Ukraine's Reply, ¶¶180-181.

[750] Ukraine's Reply, ¶181.

[751] Second [redacted] Report, ¶20.

[752] *See* Ministry of Transport of the Russian Federation, Order 'On Approving the Mandatory Regulations in the Kerch Seaport', No. 313, 21 October 2015 (**RU-724**).

navigation through the canal. Ukraine has failed to rebut this and instead purports to intermingle two different aspects, namely traffic regulation and inspection of vessels.

537. The Russian Federation has not disclosed to Ukraine a detailed account of the FSB's activities due to their confidentiality and due to security concerns in line with Article 302 of UNCLOS. Still, it is not the Russian Federation that shoulders the burden of proof on this issue, which was raised by Ukraine as the Claimant in the present proceedings.

538. ***Third***, the Russian Federation has referenced extensive prior practice of inspections in the Sea of Azov and the Kerch Strait.[753]

539. In attempting to criticise this approach, Ukraine alleges the existence of 'stark distinctions between the pre- and post-2014 practice of inspections'[754] and tries to portray the pre-2014 practice of inspections as 'non-discriminatory' and 'coordinated efforts between both States'.[755] But Ukraine's criticism is beside the point. The only piece of evidence cited by Ukraine in support of the difference between the inspections conducted before and after 2014 is the fact that some politically biased sources criticised the Russian Federation for its practice of vessel inspections in the Kerch Strait and the Sea of Azov.[756] Tellingly, all such sources did so only after the commencement of the present proceedings in 2016, and mostly postdate 2018, even though Ukraine misleadingly labels them as relating to the 'post-*2014* inspections'.[757]

540. In sum, the Russian Federation did not violate UNCLOS by conducting inspections of vessels in the Sea of Azov and the Kerch Strait, as it exercised its sovereign powers over

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[753] Counter-Memorial, ¶¶290-293.

[754] Ukraine's Reply, ¶193.

[755] *Ibid*., ¶192.

[756] *See, e.g*., 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**); Radio Free Europe/Radio Liberty, *Sea of Troubles: Azov Emerging As 'Tinderbox' In Russia-Ukraine Conflict*, 7 August 2018 (**UA-826**); European Council On Foreign Relations, *Strait to War? Russia and Ukraine Clash in the Sea of Azov* (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**)

[757] Ukraine's Reply, ¶193.

those bodies of sea which constitute its internal waters, and Ukraine's claims in this respect are outside the Arbitral Tribunal's jurisdiction or inadmissible. Should the Arbitral Tribunal decide to exercise jurisdiction over Ukraine's claims, the Russian Federation submits that the inspections were not discriminatory and in no way hampered navigation through the Kerch Strait and in the Sea of Azov.

V. UKRAINE'S CLAIMS CONCERNING THE SEIZURE AND RE-FLAGGING OF JDRS ARE UNMERITORIOUS

541. In the Counter-Memorial, the Russian Federation set out its detailed objections to Ukraine's claims concerning two jack-up drilling rigs, the *Tavrida* and *Sivash* (the 'JDRs').[758] In its Reply, while raising several points, Ukraine has essentially failed to engage with the Russian Federation's objections to jurisdiction and admissibility as well as its substantive arguments concerning the JDR-related claims.

542. In this Section, the Russian Federation will demonstrate that Ukraine's JDR-related claims fall outside the jurisdiction of the Arbitral Tribunal (**A**) and are inadmissible (**B**). Without prejudice to this position, the Russian Federation will demonstrate that Ukraine's arguments under Articles 91 and 92 of UNCLOS rest on the wrong premise, and that the Russian Federation did not violate those provisions by registering the JDRs (**C**).

A. THE ARBITRAL TRIBUNAL HAS NO JURISDICTION OVER UKRAINE'S JDR-RELATED CLAIMS

543. Ukraine essentially asserts two JDR-related sets of claims that concern (i) 'seizure' of the JDRs and (ii) their 're-flagging'. As the Russian Federation has underlined, both claims concern issues that are not regulated by UNCLOS and fall outside the Arbitral Tribunal's competence, namely, the sovereignty over Crimea and the ownership rights to the JDRs of their present rightful owner, the State Unitary Enterprise 'Chernomorneftegaz' ('Crimean CNG').[759] In the Reply, Ukraine simply argues that the JDRs' re-flagging is a separate question under Article 91 of UNCLOS and can be resolved independently from the above issues. In this respect, two observations are warranted.

544. ***First***, Ukraine's 'seizure' claims are plainly outside the Arbitral Tribunal's jurisdiction under UNCLOS. In the Reply, Ukraine has provided no response whatsoever to the Russian Federation's jurisdictional objection in relation to its 'seizure' claims.[760]

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[758] Counter-Memorial, Chapter 5.

[759] Counter-Memorial, ¶¶308-313.

[760] *See* Ukraine's Reply, ¶202, addressing the Russian Federation's jurisdictional objection to the 're-flagging' claims only.

545. In this respect, factual background relating to the change of JDRs' owner is worth brief recollection.

546. Following the secession of Crimea from Ukraine and its accession to the Russian Federation in March 2014, the JDRs became owned by the Republic of Crimea and were transferred to Crimean CNG as the new rightful titleholder. This change is what Ukraine calls the 'seizure', which took place when the JDRs were located 'near the Yarylgach Bay in Crimea's territorial sea, over which Russia claims sovereignty.'[761]

547. In its Memorial, Ukraine originally asked the Arbitral Tribunal to order the Russian Federation to return the JDRs by way of *restitutio in integrum*.[762] Thus, what Ukraine really sought was to contest Crimean CNG's ownership rights to the JDRs.

548. The Arbitral Tribunal's 2020 Award required Ukraine to remove any claims that required assessment of sovereignty over Crimea.[763] However, Ukraine's amended claims in the Revised Memorial essentially pursue the same objective with the same reasoning as before, requesting that the Russian Federation be ordered to 'release to Ukraine the two Ukrainian-flagged JDRs it unlawfully seized'.[764] Clearly, it is impossible to determine the legality of 'seizure' without determining who is the rightful owner of the vessels.

549. In the Counter-Memorial, the Russian Federation explained that UNCLOS does not provide the legal framework to assess the transfer of the JDRs' ownership title and thus the Arbitral Tribunal cannot consider this issue.[765] Ukraine has not addressed the Russian Federation's objections in this regard. Although its Reply retains the term 'seized' in the heading of the JDR-related section, Ukraine seems to sweep its 'seizure' claims under the rug and pursue the 're-flagging' case only:

> 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.[766]

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[761] Ukraine's Revised Memorial, ¶179.

[762] Ukraine's Memorial, ¶266(a).

[763] 2020 Award, ¶492(d).

[764] Ukraine's Revised Memorial, ¶316(b) and (c).

[765] Counter-Memorial, ¶¶309-310.

[766] Ukraine's Reply, ¶204; *see* also Ukraine's Reply, ¶202.

550. At the same time, Ukraine did not change or amend its request for relief, seeking 'release' of the 'unlawfully seized' JDRs. Accordingly, Ukraine is taken to maintain its request that the Arbitral Tribunal decide the issues that also entail assessment of the transfer of sovereignty over Crimea that resulted in transfer of assets possessed by Ukrainian state-owned company 'Chernomorneftegaz' to newly established entities, and ultimately the acquisition of title to the disputed JDRs by their present rightful owner, Crimean CNG.[767]

551. Ukraine states that 'this Tribunal is being asked to decide which sovereign State exercises jurisdiction over the vessels, not which oil and gas company owns the vessels'.[768] However, giving effect to its requests for 'release' of the JDRs and 're-establishment' of Ukraine's 'exclusive jurisdiction' over those[769] will naturally lead to expropriation of the JDRs into the ownership of Ukraine.

552. Ukraine conceals that it has adopted legislation,[770] which provides that assets owned by entities directly or indirectly controlled by the Russian Federation are confiscated without refund. Accordingly, since Crimean CNG is owned by the constituent entity of the Russian Federation,[771] the JDRs are likely to be seized and confiscated straight away if released to Ukraine.

553. Therefore, an award upholding Ukraine's request for release of the JDRs will inevitably predetermine the issue of their ownership – a question that is outside the Arbitral Tribunal's competence.

554. Ukraine's insistence on its 'seizure' claims is all the more egregious considering that it goes against the Arbitral Tribunal's specific instructions in the 2020 Award that requested Ukraine to *revise* the original version of its Memorial in order to exclude all issues that

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[767] *See* Counter-Memorial, ¶312; Resolution of the State Council of the Republic of Crimea No. 1758-6/14 'On Matters of Energy Security of the Republic of Crimea', 17 March 2014, ¶1 (**RU-401**); *see* also M. Shaw, INTERNATIONAL LAW (8th ed., OUP, 2017), pp. 747-751 (**RUL-184**).

[768] Ukraine's Reply, ¶202.

[769] Ukraine's Revised Memorial, ¶316(b).

[770] Law of Ukraine No. 2116-IX 'On the Main Principles of Forced Seizure of the Property of the Russian Federation and Its Residents in Ukraine', 3 March 2022, Article 2, available at: https://zakon rada.gov.ua/laws/show/2116-20#Text (**RU-727**).

[771] Charter of the State Unitary Enterprise 'Chernomorneftegaz', approved by the Order of the Ministry of Fuel and Energy of the Republic of Crimea No. 560-OD of 25 December 2020, Clause 1.1, available at: https://gas.crimea ru/images/2021_Устав_Черноморнефтегаз.pdf (**RU-730**).

fall outside the Arbitral Tribunal's jurisdiction.[772] Thus, the proper reaction for Ukraine should have been to exclude the JDR-related claims from the Memorial as they are clearly sovereignty-related. In view of Ukraine's failure to do so in the Revised Memorial and subsequent filings, the Arbitral Tribunal should declare that it has no jurisdiction to consider the JDR-related claims.

555. ***Second***, the Arbitral Tribunal does not have jurisdiction to resolve Ukraine's re-flagging claims either.

556. In the Reply, Ukraine argues that the JDRs' de-registration is a separate question under Article 91 of UNCLOS and can be resolved independently from the status of Crimea and Crimean CNG's title to JDRs.[773] However, Ukraine's re-flagging claim suffers from the same deficiencies as its original JDR-related claims. In so far as Article 91 allows a State to regulate the registration of ships in its territory, Ukraine's argument is necessarily premised on Crimea being a part of its territory. The Arbitral Tribunal would therefore have to consider whether Crimea belongs to Russia or Ukraine, which is a matter it has held to be outside its jurisdiction in the 2020 Award.[774]

557. In June 2014, prior to the registration of the *Tavrida* and *Sivash* in the Russian Vessels Registry, Crimean CNG applied to Ukrainian authorities to have the JDRs removed from the Ukrainian Vessels Registry.[775] Yet, Ukraine preferred to ignore this application, despite the legal obligation under Ukrainian law to address even incomplete or otherwise defective applications and indicate the reasons for refusal to de-register a vessel.[776]

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[772] 2020 Award, ¶492(d); *see* also Rules of Procedure, Article 13(1); *see* also Procedural Order No. 6, ¶2(a).

[773] Ukraine's Reply, ¶¶202, 204.

[774] 2020 Award, ¶179

[775] Counter-Memorial, ¶315.

[776] Counter-Memorial, ¶316; *see* also Article 27 of the Merchant Shipping Code of Ukraine, No. 176/95-VR, 23 May 1995, available at: https://zakon.rada.gov.ua/laws/show/176/95-%D0%B2%D1%80/ed20220101#Text: '*It shall be prohibited for an official of the central executive authority implementing the state policy in the sphere of maritime transport to refuse the acceptance of an application for reasons not defined by this Article*, including the imposition of any conditions for accepting an application not defined by this Article. *Based on the results of consideration of the application, the central executive authority implementing the state policy in the sphere of maritime transport: carries out registration... refuses registration or temporary registration of the vessel...* Grounds for refusal to register or temporarily register a vessel, to terminate or temporarily terminate the registration of a vessel, to make changes to the State Vessel Registry of Ukraine, to issue new documents to replace lost ones are: failure to submit the documents specified in this article; submission of documents containing unreliable information; non-compliance of submitted documents with the requirements of the law.' [*Emphasis* added] (**RU-643**); s*ee* also District Administrative Court of Kiev, Case No. 826/5749/17, Decision, 27 August 2018,

558. The only viable explanation for Ukraine's flagrant disregard of its own legislation and Crimean CNG's rights is that Ukraine would not recognise the change in Crimea's status and the related transfer of the title to the JDRs. This understanding is confirmed by Ukraine's laws that declare unlawful the existence and activities of the Crimean authorities and entities under their control (which include Crimean CNG), as well as by Ukraine's sanctions introduced against Crimean CNG, including 'suspension of economic… obligations' and 'cancellation of official visits, meetings, negotiations on the conclusion of contracts or agreements'.[777] Ukraine's argument that Crimean CNG should have applied to Ukrainian courts is therefore completely implausible.[778] Any such attempt to seek justice from Ukrainian courts would have been doomed to failure due to Ukraine's outright non-recognition of Crimea's reunification with the Russian Federation and adoption of Ukrainian legislation against Crimean bodies and companies that followed this pattern of non-recognition. This plainly evident administrative practice rendered all Ukrainian judicial remedies *a priori* ineffective.[779]

559. In hindsight, it was therefore a logical step for Crimean CNG, as the rightful owner of the JDRs, to apply to the Russian Vessels Registry for the listing of the JDRs considering Ukraine's omission to act and the obvious futility of applying to the Ukrainian courts.

560. In view of the above, the Russian Federation reiterates that to assess whether 'Russia has improperly seized two Ukrainian-flagged JDRs and re-flagged them',[780] the Arbitral Tribunal would have to engage in discussing the issues of state succession in respect of

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available at: https://youcontrol.com.ua/ru/catalog/court-document/76159534/: 'As can be seen from the letter of the State Transport Safety Service of Ukraine No. 1464/02/15-17 dated 22 February 2017, sent to the claimant after reviewing his application, the respondent in this letter *did not indicate either the approval of the person's application or the refusal to register the vessel*, and did not justify the reasons for such refusal. The respondent provided a list of documents, which, according to the requirements of Procedure No. 1069, must be submitted to have the vessel excluded from the State Ship Register of Ukraine or registered in such register. *The above indicates that the respondent has violated the requirements of Procedure No. 1069 in terms of providing a proper response to the application for the vessel's registration*...' [*Emphasis* added] (**RU-642**).

[777] Annex 2 to the Decision of the National Security and Defence Council of Ukraine 'On the Application, Cancellation and Amendment of Personal Special Economic and Other Restrictive Measures (Sanctions)', 23 March 2021, available at: https://www.president.gov.ua/documents/1092021-37481, ¶36 (**RU-729**).

[778] Ukraine's Reply, ¶208.

[779] Constitutional Court of Ukraine, Case No. 2-rp/2014, Decision, 14 March 2014, available at: https://zakon rada.gov.ua/laws/show/v002p710-14#Text (**RU-602**): 'the Constitutional Court of Ukraine has decided as follows: … The Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea 'On the Holding of an All-Crimean Referendum' of 6 March 2014 No. 1702-6/14 is declared inconsistent with the Constitution of Ukraine (unconstitutional)'.

[780] Ukraine's Reply, Chapter Three, Section III.

Crimea, as well as the transfer of title to the JDRs that took place as a result of such succession. Both questions are plainly outside the scope of the Convention. Ukraine's amended JDR-related claims are, therefore, yet another instance of Ukraine's dressing up its submissions in a way to reintroduce the issues that are not encompassed by the Arbitral Tribunal's jurisdiction.

B. UKRAINE'S JDR-RELATED CLAIMS ARE INADMISSIBLE

561. Should the Arbitral Tribunal nevertheless decide that it has jurisdiction, the JDR-related claims would still fall outside the ambit of its purview due to their inadmissibility. In its Reply, Ukraine has failed to rebut the objections to the admissibility of the JDR-related claims stated in the Russian Federation's Counter-Memorial.[781]

562. ***First***, the Ukraine's 're-flagging' claims are inadmissible as they were inappropriately added for the first time at the merits stage of the proceeding. It is only in the Revised Memorial that Ukraine has raised the incompatibility of the JDRs' re-flagging with Article 91 of UNCLOS.[782] The Reply also reaffirms the request for relief made in the Revised Memorial that the Arbitral Tribunal order the Russian Federation to release the JDRs to Ukraine, and to 'withdraw all claims to have re-flagged under the Russian flag the two Ukrainian flagged JDRs it unlawfully seized.'[783]

563. Ukraine's attempt to bring these new claims through the backdoor must fail. As explained above, it is well-settled in inter-State dispute resolution that unauthorised alternation of claims is contrary to the effective administration of justice and may prejudice the interests of the other party.[784] It is also a well-established requirement under international law that for a new claim to be admitted, it must arise directly out of the application instituting proceedings or be implicit in it.[785] The rationale for this is that the parties to a case cannot

[781] Counter-Memorial, ¶¶305-306, 311.

[782] Ukraine's Revised Memorial, ¶¶176-180.

[783] Ukraine's Reply, ¶414; Ukraine's Revised Memorial, ¶316(b) and (c).

[784] *See* Rejoinder, Chapter I(D)(iii).

[785] *The M/V 'Louisa' Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, ITLOS Case No. 18, Judgment of 28 May 2013, ¶142 (**UAL-71**).

in the course of proceedings 'transform the dispute brought before the [tribunal] into a dispute that would be of a different nature'.[786]

564. The introduction of the re-flagging claims fits squarely into the type of conduct so prohibited. Ukraine's original Memorial described the taking control of the JDRs by the Russian Federation as a violation of Articles 2, 56, 58, 60, 77, and 92 of UNCLOS.[787] Nowhere did Ukraine contend that the JDRs' re-flagging amounts to a breach of UNCLOS, nor did it base its claims specifically on Article 91 of UNCLOS, which was first invoked only in the Revised Memorial. In a similar vein, Ukraine's original Memorial did not rely on the facts surrounding the JDRs' re-flagging but instead focused only on their alleged 'seizure' by the Russian Federation.[788] Accordingly, Ukraine has improperly advanced new claims in the Revised Memorial, thus undermining the principles of legal certainty and fair administration of justice.

565. ***Second***, in its Reply, Ukraine fails to respond to Russian Federation's concerns raised in the Counter-Memorial with regard to the risk of double recovery stemming from Ukraine's JDRs-related claims in a parallel investment arbitration against the Russian Federation initiated by, *i.a.*, Ukraine's state-owned company 'Chernomorneftegaz'.[789]

566. Prohibition of double recovery is a well-established general principle of the law of international responsibility. The rule was affirmed by the PCIJ in the seminal case *Factory at Chorzów*, where the Court held that '[the remedy] asked for by the German Government cannot… be granted, or the same compensation would be awarded twice over'.[790] ARSIWA further confirms that imposition of double liability is inadmissible. In particular, Article 47(2), referring to the issue of plurality of responsible States, notes that '[it] does not permit any injured State to recover, by way of compensation, *more than*

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[786] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 265, ¶63 (**RUL-56**).

[787] Ukraine's Memorial, ¶¶145, 265(d).

[788] Ukraine's Memorial, ¶¶119-122.

[789] Counter-Memorial, ¶311. See also *NJSC Naftogaz of Ukraine (Ukraine) et al. v. The Russian Federation*, PCA Case No. 2017-16, Final Award of 12 April 2023 (**RUL-185**). Chernomorneftegaz (Ukrainian entity), being one of the Claimants in the latter arbitration, was the prior owner of the JDRs before they became owned by the Republic of Crimea.

[790] *Case Concerning The Factory at Chorzów,* Claim for Indemnity, Merits, Judgment, PCIJ Series A. No. 17, 13 September 1928, p. 59 (**RUL-96**).

the damage it has suffered' [*Emphasis* added].[791] The ILC's Commentary to ARSIWA specifically states that this provision 'addresses the question of double recovery'.[792] Just as the same damages cannot be recovered from two States, one State cannot be subjected to double liability.

567. In the Reply, Ukraine merely states that 'there is no overlap' between the request for relief in the present proceedings and the one made in the investment arbitration.[793] This is misconceived: both cases concern the same JDRs, and there is a clear risk of double recovery in case of their release to Ukraine in this arbitration, which would parallel the payment of compensation to Chernomorneftegaz in the investment arbitration.[794] This risk is real, as the tribunal in the investment arbitration has awarded a monetary compensation to Chernomorneftegaz for the alleged expropriation of the disputed JDRs by the Russian Federation.[795] If the Arbitral Tribunal were to grant a release of the same assets (*i.e.*, the *Tavrida* and *Sivash*) to Ukraine, there would clearly be double recovery, as the Russian Federation would be prejudiced by two awards against it flowing from the same set of facts. Ukraine's JDR-related claims for relief must therefore be deemed moot and thus inadmissible in these circumstances.

568. ***Third***, and in any event, upholding Ukraine's re-flagging claims does not make any sense in view of Ukraine's own legislation.

569. In accordance with Ukrainian laws, Crimea has been considered as an 'occupied' territory of Ukraine since 20 February 2014; any Crimean bodies and their activities are considered illegal if these bodies were established under laws others than those of Ukraine. Any acts issued by such bodies are void and do not create legal consequences.[796] Crimean CNG,

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[791] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, Article 47 (2) (**UAL-33**).

[792] *Ibid*., Commentary to Article 47, p. 125, ¶9.

[793] Ukraine's Reply, ¶203.

[794] *NJSC Naftogaz of Ukraine (Ukraine) et al. v. The Russian Federation*, PCA Case No. 2017-16, Final Award of 12 April 2023 (**RUL-185**).

[795] The tribunal in that case ordered the Russian Federation to pay to the Claimants, *inter alia*, USD 34,000,000 and USD 16,000,000 for the *Tavrida* and *Sivash*, respectively, *see NJSC Naftogaz of Ukraine (Ukraine) et al. v. The Russian Federation*, PCA Case No. 2017-16, Final Award, 12 April 2023, p. 219, ¶716 (**RUL-185**).

[796] Law of Ukraine No. 1207-VII 'On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine', 15 April 2014, available at: https://zakon rada.gov.ua/laws/show/1207-18#Text: 'The Autonomous Republic of Crimea and the city of

which now owns the JDRs, is a State Unitary Enterprise owned by the Republic of Crimea (constituent entity of the Russian Federation). Crimean CNG is a legal successor to the Crimean Republican Enterprise 'Chernomorneftegaz', which was established by the Republic of Crimea as an independent State after its secession from Ukraine.[797] It follows from Ukraine's legislation that Crimean CNG and its predecessor were established and operate under the enactments that Ukraine by its own laws considers to be void. Moreover, Ukraine introduced sanctions against Crimean CNG, including 'suspension of economic and financial obligations' and 'cancellation of official visits, meetings, negotiations on the conclusion of contracts or agreements.[798]

570. Furthermore, Ukraine neglects to mention that its current laws specifically forbid vessels owned by entities of the so-called 'aggressor State' (*i.e.,* Russia) to fly the Ukrainian flag.[799] Moreover, a vessel cannot be registered in the Ukrainian Vessels Registry if it is owned by Russian citizens or entities.[800] The same law revokes Ukrainian registration from any vessel which 'lost the right to fly the Ukrainian flag'.[801]

571. Ukraine's authorities also explicitly declared that they would 'prevent the vessels from being re-registered to the fake Chornomornaftogaz, registered in Russian jurisdiction [*i.e.*, Crimean CNG].'[802] Thus, it is obvious that Ukraine would have never let the de-

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Sevastopol have been temporarily occupied by the Russian Federation since February 20, 2014'; '*any bodies*, their officials and employees in the temporarily occupied territory and their activities *are considered illegal* if these bodies or persons are established, elected or appointed in a manner not provided for by law'; '*any act (decision, document) issued by the bodies* and / or persons referred to in part two of this Article *is invalid and does not create legal consequences*…' [*Emphasis* added], Articles 1 and 9 (**RU-728**).

[797] State Unitary Enterprise 'Chernomorneftegaz', Charter approved by the Order of the Ministry of Fuel and Energy of the Republic of Crimea No. 560-OD of 25 December 2020, available at: https://gas.crimea ru/images/2021_Устав_Черноморнефтегаз.pdf, Clauses 1.1.-1.2.: '1.1. State Unitary Enterprise 'Chernomorneftegaz' is the property of the Republic of Crimea, was established based on a right of economic management, hereinafter referred to as the 'Enterprise'. 1.2. The Enterprise possesses all rights and obligations, which belonged to Crimean Republican Enterprise 'Chernomorneftegaz', established under the order of the Council of Ministers of the Republic of Crimea of 17 March 2014 No. 165-r 'On Establishing the Crimean Republican Enterprise 'Chernomorneftegaz''(**RU-730**).

[798] Annex 2 to the Decision of the National Security and Defence Council of Ukraine 'On the Application, Cancellation and Amendment of Personal Special Economic and Other Restrictive Measures (Sanctions)', 23 March 2021, available at: https://www.president.gov.ua/documents/1092021-37481, ¶36 (**RU-729**).

[799] Merchant Shipping Code of Ukraine, No. 176/95-VR, 23 May 1995, Article 32, available at: https://zakon rada.gov.ua/laws/show/176/95-%D0%B2%D1%80/ed20220101#Text (**RU-643**).

[800] *Ibid*., Article 26.

[801] *Ibid*., Article 29.

[802] Centre for Investigative Journalism, *The Chornomornaftogaz Fleet: How Russia is Confusing the Traces of Its Crimes in Crimea* (12 June 2020), available at: https://investigator.org.ua/ua/investigations/226007/ (**RU-604).**

registration proceed. Ukraine's 're-flagging' claim therefore lacks any practical effect and should be denied.

572. Thus, insofar as the JDRs are owned by Crimean CNG, under Ukraine's own laws they cannot fly Ukraine's flag and be registered in Ukraine, as any such registration must be considered annulled. Consequently, an award that upholds re-flagging of the JDRs back from Russian to Ukrainian flag will be unenforceable and have no practical effect. It is plainly evident that Ukraine intends to interpret such an award as grounds for transfer of ownership of the JDRs to Ukraine, otherwise its claims would be in contravention of its own legislation.

573. The above analysis demonstrates that Ukraine's claims are deficient in several respects and should be held inadmissible.

C. UKRAINE'S ARGUMENTS BASED ON ARTICLES 91 AND 92 OF UNCLOS ARE MISCONCEIVED

574. In its Reply, Ukraine maintains its claim that the registration of the JDRs in the Russian Vessels Registry, before their de-registration from the Ukrainian Vessels Registry, has violated Article 91 of UNCLOS.[803] Ukraine further insists that under that provision it has exclusive authority over the process of de-registration of its vessel,[804] and that the contrary would fly in the face of Article 92(1) of the Convention.

575. For the reasons set out below, Ukraine's reliance on Articles 91 and 92 is unfounded.

576. ***First***, in attempting to justify its misfeasance in treatment of Crimean CNG's application for de-registration of the JDRs from the Ukrainian Vessels Registry,[805] Ukraine misinterprets Article 91 of UNCLOS by reading into it a non-existent element of 'exclusivity of flag state authority over de-registration'.[806] Such interpretation is without merit.

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[803] Ukraine's Reply, ¶200.

[804] Ukraine's Reply, ¶88, *see* also Ukraine's Revised Memorial, ¶178.

[805] Chernomorneftegaz Crimean Republican Enterprise, Letter No. 12/02-530 to the State Service of Ukraine for the Safety of Maritime and River Transport, 6 June 2014 (**RU-402**).

[806] Ukraine's Revised Memorial, ¶178 (citing R. Wolfrum, Reflagging and Escort Operation in the Persian Gulf: An International Law Perspective, *Virginia Journal of International Law*, 1989, Vol. 29 (**UAL-147**) and R. Barnes, *Flag States* in D. Rothwell *et al*. (eds.), THE OXFORD HANDBOOK OF THE LAW OF THE SEA (OUP, 2015) (**UAL-148**).

577. Ukraine's argument fails to take into account that UNCLOS in general, and Article 91 in particular, does not require that a ship fly the flag of a particular State. It is ultimately the shipowner's will that constitutes a primary prerequisite for the registration and re-registration of a vessel. Otherwise, such concepts as 'flag of convenience' or 'flagging out' would never find their way in international maritime law.[807]

578. Ukraine's approach ignores the interests of shipowners and precludes a State from registering a vessel at their request when the former flag State refuses to de-register the vessel. Ukraine has not provided any meaningful authorities in favor of the existence of 'exclusivity of flag state authority over de-registration' in practice, except for a reference to writers' opinions and an opportunistic reading of the *M/V 'Saiga' (No. 2)* judgment.[808]

579. The writers referenced by Ukraine only note that the registration of a vessel is valid even if a flag State does not exercise jurisdiction and control over the ship. However, this observation is irrelevant to the present case since the Russian Federation does not plead that the JDRs were re-registered in view of the fact that Ukraine lost jurisdiction and control over them. What the Russian Federation has been arguing is that its power to register the JDRs is independent of Ukraine's abusive disregard of Crimean CNG's de-registration application.[809] The text of Article 91(1) only recognizes the obligation for every State to fix the conditions for the grant of nationality, registration, and the right to fly a national flag without treating such in a hierarchy. Nothing in the plain text of Article 91 suggests otherwise. Indeed, Russian laws specifically provide for the possibility to register a vessel in the Russian Vessels Registry upon the expiry of 30 days following the application to de-register that vessel from another State's vessels registry.[810]

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[807] Commentators note tax evasion is one of the main reasons for the shipowners' 'flagging out' of their 'actual' flag State and choosing the flag of convenience. If re-flagging were not conditioned only by the shipowner's will, 'actual' flag States would easily exercise their (in Ukraine's words) 'exclusive authority over the de-registration' to stop leakage of their tax incomes. *See* G. Johannssen, Flag of Convenience, *British Tax Review*, Issue 5, 1961, p. 305: 'By registering their ships under such "flags of convenience", the owners hope to escape tax on the profits at their residence; they also hope to evade certain legal restrictions and social security taxes imposed by the great shipping nations upon shipping operated under their flag' (**RUL-182**).

[808] Ukraine's Revised Memorial, ¶178, fn. 365.

[809] Counter-Memorial, ¶317. *See* also *ibid.*, ¶316 (citing the *Virginia Commentary* in this regard).

[810] Federal Law No. 81-FZ 'Merchant Shipping Code of the Russian Federation', 30 April 1999 (as amended 28 February 2023), Article 37(2): 'If upon the expiry of thirty calendar days no answer is received from the national maritime administration of the state of previous registration in response to the application of the vessel's owner, he has the right to file with the state registration authority an application for that vessel's state registration in one of the ship registers' (**RU-766**).

580. Ukraine also cites the ITLOS judgment in the *M/V 'Saiga' (No. 2)* case, which states that as regards Article 91 '[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.'[811] However, Ukraine reads too much into that passage. Article 91 only regulates a State's obligations to establish procedures for the registration and de-registration of vessels in its national registry.

581. Even if Article 91 were to be interpreted as vesting a flag State with 'exclusive authority over the process of de-registration of its vessel' as Ukraine argues,[812] with which interpretation the Russian Federation is in disagreement, there must clearly be limits placed on the proposition of *M/V 'Saiga' (No. 2)*, cited above, regarding the procedures for withdrawing the nationality of ships.

582. Scholars qualify a State's right to register a vessel to fly its flag, where that vessel already flies another State's flag by reference to the vessel owner's intention to waive the earlier registration (which is precisely the case at hand).[813] After all, the use of the term 'entitled' in Article 91(1) of UNCLOS suggests that a vessel owner has a right, but not an obligation, to fly the flag of a particular State.[814]

583. Accordingly, where a State does not respond to a de-registration application during a reasonable amount of time, the vessel owner should be allowed to register the vessel in another jurisdiction and to have its nationality changed for the purposes of Article 91. Otherwise, a State that ignores de-registration applications would be able to frustrate any attempts to change a vessel's nationality.

584. A parallel may be drawn in this respect between nationality of ships and nationality of persons. Indeed, it is trite that Article 91 was drafted in light of the *Nottebohm* case

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[811] *The M/V 'Saiga' (No. 2) (St. Vincent and the Grenadines v. Guinea),* Judgment dated 1 July 1999, ITLOS Reports 1999, pp. 36-37, ¶63 (**UAL-28**).

[812] Ukraine's Reply, ¶88.

[813] J. Mertus, The Nationality of Ships and International Responsibility: The Reflagging of the Kuwaiti Oil Tankers Reflagging of the Kuwaiti Oil Tanker, *Denver Journal of International Law & Policy*, 1988, Vol. 17, Issue 1, p. 212: 'a state is not allowed to impose its nationality upon vessels that already have, *and desire to maintain*, the nationality of another state.' [*Emphasis* added] (**RUL-183**).

[814] This is confirmed by the fact that the drafters of Article 91 refused to replace the wording 'whose flag they are entitled to fly' with 'whose flag they are authorised to fly'. *See* M. Nordquist (ed.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY (Brill | Nijhoff, 2003), Vol. III, pp. 105-106, ¶91.7 (**RUL-162**).

concerning nationality of persons in the context of diplomatic protection.[815] Granting nationality is a sovereign prerogative of a State, and existence of a nationality of another State does not per se exclude the possibility of granting a new nationality.

585. In fact, in its own laws, Ukraine expressly treats registration of a vessel in a foreign State's registry as constituting no bar to re-registration of that vessel in the Ukrainian Vessels Registry.[816]

586. ***Second***, in the instant case the de-registration of the JDRs from the Ukrainian Vessels Registry did not take place because of Ukraine's inaction. Ukrainian authorities were meant to provide a meaningful response to Crimean CNG's application, specifying alleged defects in a precise manner.[817] Ukraine does not dispute its inaction in relation to the application, but attempts to explain it away by alleging in its Reply of certain deficiencies in the application.[818]

587. ***Third***, Ukraine's last resort is claiming that the Russian Federation has failed to provide any evidence that the Ukrainian authorities received the application from Crimean CNG.[819] Ukraine makes this curious assertion but does not explicitly deny the receipt of the application or the fact that the Russian Federation has provided, in exhibits in this case, a copy of Crimean CNG's application together with the duly stamped and signed postal receipt evidencing its dispatch.[820] The fact that the application was submitted is further corroborated by the evidence of [redacted], who was personally involved in this process.[821] Tellingly, relevant Ukrainian legislation specifically recognizes

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[815] *Nottebohm (second phase) (Liechtenstein v Guatemala)*, Judgement of 6 April 1955, I.C.J. Reports 1955, p. 23 (**RUL-219**), noting that 'international law leaves it to each State to lay down the rules governing the grant of its own nationality'.

[816] Merchant Shipping Code of Ukraine, No. 176/95-VR, 23 May 1995, Article 29, available at: https://zakon rada.gov.ua/laws/show/176/95-%D0%B2%D1%80/ed20220101#Text (**RU-643**).

[817] Resolution of the Cabinet of Ministers of Ukraine No. 1069 'On the Approval of the Procedure for Maintaining the State Ship Register of Ukraine and the Ship Book of Ukraine', 23 May 1995, Clause 21, available at: https://zakon rada.gov.ua/laws/show/1069-97-%D0%BF#Text: 'The decision on the registration of the vessel or its refusal registration is provided within 15 working days from the day of receipt of the applications and necessary documents' (**UA-570**).

[818] Ukraine's Reply, ¶207.

[819] Ukraine's Reply, ¶207

[820] Chernomorneftegaz Crimean Republican Enterprise, Letter No. 12/02-530 to the State Service of Ukraine for the Safety of Maritime and River Transport, 6 June 2014 (**RU-402**).

[821] [redacted] Statement, ¶¶35-38.

dispatch of an application for withdrawal from the Ukrainian Vessels Registry by post as a valid mean of submission.[822]

588. ***Fourth***, Ukraine's reference to Article 92(1) of UNCLOS in support of its argument that 'a State may not grant a vessel the right to sail its flag if the vessel already has a flag'[823] is inapposite.

589. The rationale behind Article 92 is to prevent the abusive practice of vessels flying flags of two or more States on the high seas, by preventing shipowners from taking advantage of it, and by assimilating such ships to ships without nationality, *i.e.*, under no protection of any flag State under international law. This is corroborated by the ILC commentary, which noted that '[d]ouble nationality may give rise to serious abuse by a ship using one or another flag during the same voyage, according to convenience'.[824]

590. More importantly, Article 92 addresses shipowners, spelling out for them the consequences of flying more than one national flag at any given time. The presumption is that shipowners may elect to apply for the protection of a national flag at their will, and that national jurisdiction applies according to their choice of the flag.

591. This is clearly distinguishable from the case at hand, as this Arbitration does not involve navigation on the high seas, which is the context in which Article 92 (together with Article 91) applies.[825] Nor does it concern a situation where the owners of the JDRs has ever attempted or are planning to fly the flags of several States at the same time. In this regard, there is no issue of flag of convenience with the JDRs in question, since after the transfer of the ownership to Crimean CNG, the JDRs only flew the Russian flag.

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[822] Merchant Shipping Code of Ukraine, No. 176/95-VR, 23 May 1995, Article 27, available at: https://zakon rada.gov.ua/laws/show/176/95-%D0%B2%D1%80/ed20220101#Text: 'An application for registration or temporary registration of a vessel, termination or temporary termination of registration of a vessel in the State Ship Register of Ukraine and the documents attached to it are submitted to the central executive body implementing state policy in the field of maritime transport in one of the following ways: … *sent by post with acknowledgment of receipt and a list of the contents*…' [*Emphasis* added] (**RU-643**).

[823] Ukraine's Reply, ¶206.

[824] M. Nordquist (ed.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY (Brill | Nijhoff, 2003), Vol. III, p. 124 (fn. on p. 123) (**RUL-162**).

[825] *See* D. Guilfoyle, *Article 91 Nationality of Ships* and *Article 92 Status of Ships* in A. Proelss (ed.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Beck, Hart, Nomos, 2017), p. 693, ¶1, p. 700, ¶1 (**RUL-161**).

592. Assuming that Article 92(1) of UNCLOS has applicability in this case (*quod non*), its provision supports the position of the Russian Federation. While Article 92(1) does not allow for a ship to change its flag during a voyage or while in a port of call, it provides for an exception 'in the case of a real transfer of ownership or change of registry'. Notably, the ILC commented that this provision is 'intended to condemn any change of flag which cannot be regarded as a *bona fide* transaction'.[826]

593. It follows from Article 92(1) that a transfer of ownership or change of registry, which is *bona fide*, warrants the change of flag when the ship is on a voyage or in a port of call. Given that a voyage and a port call may involve passage within the territorial sea or internal waters, the change of flag due to a real transfer of ownership or change of registry in that process remains legal, even if the ship is in the territorial sea of another State.

594. As explained above, there was a real transfer of ownership because the JDRs became owned by Crimea and the Crimean CNG became the rightful titleholder following the accession of Crimea to the Russian Federation. There was also a real change of registry because the Crimean CNG had intended and did in fact waive earlier registration with the Ukrainian Vessels Registry before it registered the JDRs with the Russian Vessels Registry.

595. In sum, the Russian Federation respectfully asks the Arbitral Tribunal to decline jurisdiction over Ukraine's claims concerning the seizure and re-flagging of the JDR's, or rule that they are not admissible. Without prejudice to those arguments, the Russian Federation also maintains its submissions that it did not violate Articles 91 and 92 of UNCLOS by registering the JDRs in the Russian Vessels Registry

[826] M. Nordquist (ed.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY (Brill | Nijhoff, 2003), Vol. III, p. 127, referring to Report of the ILC (fn. on p. 123) (**RUL-162**).

VI. THE RUSSIAN FEDERATION COMPLIED WITH ITS OBLIGATIONS UNDER UNCLOS WITH REGARD TO PROTECTION OF THE MARINE ENVIRONMENT

596. In the Counter-Memorial,[827] the Russian Federation has extensively demonstrated that it duly accounted for any potential environmental impact at all material times, in particular, when it undertook its Infrastructure Projects in the Kerch Strait – as it adequately assessed, mitigated, monitored, and made public their possible impacts on the marine environment. In the Reply, however, Ukraine continues to accuse the Russian Federation of 'blatant disregard for its environmental obligations' under Articles 204, 205 and 206 of UNCLOS[828] and tries to impose on it an impossibly broad and impermissibly heightened standard for fulfilling these obligations, as well as to downplay the efforts that the Russian Federation undertook to protect and preserve the marine environment of the Black Sea, Kerch Strait and Sea of Azov basin, in particular when it was preparing and implementing the Infrastructure Projects.

597. The Russian Federation reiterates its overarching argument that the Sea of Azov and the Kerch Strait, where the Infrastructure Projects were contemplated and implemented, constitute internal waters and are not governed by the Conventions.[829] Without prejudice to that general position, this chapter will address the Russian Federation's response to Ukraine's arguments and demonstrate that the Russian Federation did not violate Article 206 of UNCLOS governing environmental impact assessment (**A**), or Articles 204 and 205 of UNCLOS concerning monitoring and reporting obligations (**B**). Furthermore, the Russian Federation will show that it did not violate UNCLOS in connection with the alleged oil spill on Sevastopol beach in May 2016 (**C**). Finally, the Russian Federation will show that there is no merit to Ukraine's claims concerning the alleged violation of Articles 123, 192 and 194 of UNCLOS (**D**).

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[827] Counter-Memorial, Chapter 6. Notably, in its Reply, Ukraine has failed to refer to any authorities supporting its assertion that relevant Articles of UNCLOS governing environmental protection, including Articles 204-206, apply to *internal waters* specifically. Ukraine's authorities refer to their application in the territorial sea or EEZ. *See* Ukraine's Reply, ¶213, fn 268.

[828] Ukraine's Reply, ¶210.

[829] *See* Rejoinder, Chapter II.

A. THE RUSSIAN FEDERATION DID NOT VIOLATE ARTICLE 206 OF UNCLOS

598. In this sub-section, the Russian Federation will respond to the assertions raised in Ukraine's Reply concerning the Russian Federation's alleged breach of Article 206. ***First***, the Russian Federation will address proper interpretation of Article 206 of UNCLOS and show that, contrary to Ukraine's unfounded assertion, there is no 'objective standard', and the State implementing the activity possesses considerable discretion (**i**). ***Second***, the Russian Federation will further demonstrate that Ukraine's case is unfounded on the facts, and that the environmental impact assessments ('EIA') conducted by the Russian Federation were adequate and sufficient, both in scope and substance, while the laying of the undersea Communication Cable (the 'Communication Cable') did not require an EIA (**ii**). ***Third***, Ukraine's assertions concerning the Russian Federation's failure to mitigate the alleged environmental risks, and regarding the specific alleged deficiencies of the Kerch Bridge EIA are misconceived (**iii**).

i. Proper Interpretation of Article 206

599. In the Counter-Memorial, the Russian Federation has demonstrated that, properly interpreted, as supported by both international judicial practice and authoritative doctrine,[830] Article 206 of UNCLOS vests the State implementing an activity with substantial discretion as to how it would comply with the obligation thereunder. As the ICJ explained in the *Pulp Mills* case:

> Consequently, it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.[831]

600. As the ICJ's findings confirm, the obligation to conduct an EIA is case- and fact-specific. Where an obligation is so dependent on the peculiarities of each individual case, and on the capabilities of an individual State in question, it is plainly impossible to create an

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[830] Counter-Memorial, Chapter 6, Section (I)(A).

[831] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, p. 83 (**UAL-152**), ¶205. See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 707, ¶104 (**UAL-153**).

'objective' standard, as Ukraine argues. This approach is also supported by leading academics who uphold the 'subjective' nature of the EIA process.[832]

601. In the Reply, however, Ukraine once again tries to read into Article 206 of UNCLOS obligations that are not envisaged by it, and to impose upon the Russian Federation an unspecified and an improbably vague 'objective international standard'.[833] Ukraine is, however, unable to specify precisely and clearly what that 'standard' encompasses. Even the measures cited by Ukraine's expert [redacted] that the Russian Federation allegedly should have taken while implementing the Infrastructure Projects,[834] are specific for this case, represent the views of an individual expert with regard to the characteristics of the Sea of Azov – Kerch Strait water area only, and can hardly be considered an 'objective', let alone 'international' standard. Nevertheless, Ukraine wildly accuses the Russian Federation of not complying with the said unspecified 'standard'.

602. At the outset, the Russian Federation takes note of Ukraine's acceptance that 'the EIA obligation under Article 206 may leave the procedures or formats for conducting the EIA to national discretion'[835] and that its case 'does not turn on whether Russia adopted a particular methodology over another'.[836] Accordingly, it is understood that Ukraine does not and cannot challenge the Russian Federation's methods of conducting EIAs.

603. In light of this, Ukraine's reference[837] to the *Gabčikovo* case is in contradiction with its own position and thus should be disregarded. Ukraine attempts to read into the Russian Federation's reasoned legal position a denial of the modern state of scientific and technological development,[838] which is simply not true. This remark is entirely speculative, and should not be accepted, as this is precisely an accusation of 'sidelin[ing]

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[832] M. Shaw, INTERNATIONAL LAW (8th ed., CUP, 2017), p. 657 (**RUL-187**): 'To date, the requirement focuses upon the state undertaking the activity in question and thus to some extent remains a *subjective* process.' [*Emphasis* added]. See also A. Boyle, C. Redgwell (eds), BIRNIE, BOYLE & REDGWELL'S INTERNATIONAL LAW AND THE ENVIRONMENT (4th ed., OUP, 2021), p. 195 (**RUL-105**).

[833] Ukraine's Reply, ¶¶230, 233.

[834] Ukraine's Reply, ¶234 with reference to the Expert Report of [redacted] dated 17 May 2021 ('First [redacted] Report'), Part V.C.

[835] Ukraine's Reply, ¶230.

[836] Ukraine's Reply, ¶235.

[837] Ukraine's Reply, ¶235.

[838] Ukraine's Reply, ¶235.

good scientific practice', and an attempt to attack the methods and procedures used by the Russian Federation when conducting EIAs – just under a different coat of paint.

604. In any event, Ukraine has failed to show that the ICJ's findings in *Gabčikovo* are of universal application. In its selective citation, Ukraine obscures the fact that said obligation was found by the ICJ in the provisions of the bilateral 1977 Treaty between Hungary and Slovakia:

> 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 [of the 1977 Treaty], 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 lo protect nature.[839]

605. Regardless, Ukraine also failed to prove that the EIA methodology proposed by its expert [redacted][840] is in any way better in achieving compliance with Article 206 of UNCLOS than that used by the Russian Federation,[841] or that the EIAs conducted by the Russian Federation were in any way inadequate or did not take into consideration any new scientific methods. The EIA procedure maintained by the Russian Federation is developed, effective and constantly improving.

606. The Arbitral Tribunal should start its analysis of Article 206 of UNCLOS from its express wording and plain text. Article 206 clearly requires only assessment of the potential effects of planned activities on the marine environment 'as far as practicable', and when there are 'reasonable' grounds to believe that it may ensue 'substantial pollution' or 'significant and harmful changes to the marine environment'.

607. There is plainly no reference to any 'international standard' in Article 206, unlike, for instance, in Articles 207 and 208 of UNCLOS,[842] which expressly provide such references.[843] It is submitted that, had the drafters of the Convention intended to reference

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[839] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, ¶140 (**UAL-201**).

[840] Ukraine's Reply, ¶234.

[841] The Russian Federation will deal with [redacted] suggestions more specifically in Section II below.

[842] *See* A. Boyle, C. Redgwell (eds), BIRNIE, BOYLE & REDGWELL'S INTERNATIONAL LAW AND THE ENVIRONMENT (4th ed, OUP, 2021), p. 197 (**RUL-105)**.

[843] *See* Article 207(1): 'States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, *taking into account internationally agreed rules, standards and recommended practices and procedures*.' [*Emphasis* added]. See also Article 208 which obliges, in paragraph 1, 'Coastal States shall adopt laws and regulations to

an 'objective international standard' in Article 206, they would have done so specifically, like they did in subsequent Articles. Indeed, when discussing the reference to, and incorporation of, various extraneous rules and standards on environmental protection into UNCLOS, scholars discuss other provisions of UNCLOS which contain specific language in that respect, but not Article 206.[844]

608. Nothing favours the unreasonably broad reading of Article 206 that Ukraine suggests. To reach its desired objective, Ukraine resorts to misrepresentation of legal authorities, and quotes irrelevant sources. Read properly, Ukraine's authorities do not support its conclusions, but rather further underpin the Russian Federation's reading of Article 206.

609. For instance, Ukraine's reference to the *Whaling* case is inapposite.[845] First and foremost, that case did not deal with an EIA under Article 206 of UNCLOS, nor did it concern an EIA in a more general context. Moreover, while in that case the ICJ did refer to an 'objective standard of review', it did so in order to establish whether a program was conducted for scientific research. It concluded that this determination did not hinge on particular government officials' intentions.[846] This analysis entirely misses the point with respect to EIA, and the discretion that the State conducting EIA possesses.

610. Ukraine also refers to the findings of the tribunal in the *South China Sea* award.[847] However, in that case, the tribunal found a violation of the Article 206 obligation on China's part because, *inter alia*:

> …neither the Tribunal, the Tribunal-appointed experts, the Philippines, nor the Philippines' experts have been able to identify any report that would resemble an environmental impact assessment that meets the requirements of Article 206 of the Convention, *or indeed under China's own Environmental Impact Assessment Law of 2002*.[848] [*Emphasis* added]

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prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction' and further requires, in paragraph 3 that 'Such laws, regulations and measures *shall be no less effective than international rules, standards and recommended practices and procedures*.' [*Emphasis* added].

[844] See L.N. Nguyen, Expanding the Environmental Regulatory Scope of UNCLOS Through the Rule of Reference: Potentials and Limits, *Ocean Development & International Law*, 2021, Vol. 52, Issue 4, pp. 419-444 (**RUL-194**).

[845] Ukraine's Reply, ¶220, fn. 484.

[846] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, I.C.J. Reports 2014, p. 260, ¶97 (**UAL-155**).

[847] Ukraine's Reply, ¶231.

[848] *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award, 12 July 2016, ¶989 (**UAL-11**).

611. The tribunal then proceeded to analyse the publicly available documents produced from the standpoint of Chinese national law, thus confirming an element of national discretion. The tribunal's findings of non-compliance with Article 206 were made for want of documents envisaged by and meeting the requirements of the Chinese domestic legislation:

> *By China's own legislative standards*, an EIA must be 'objective, open and impartial, comprehensively consider impacts on various environmental factors and the ecosystem they form after the implementation of the plan or construction project, and thus provide scientific basis for the decision-making.' Additionally, the 'state shall encourage all relevant units, experts and the public to participate in the EIA in proper ways.' With respect to construction projects, Chinese law requires an EIA to include, inter alia, analysis, projection and evaluation on the potential environmental impacts of the project, and suggestions on implementation of environmental monitoring. *The SOA Statement and the SOA Report which the Tribunal did manage to locate both fall short of these criteria,* and are far less comprehensive than EIAs reviewed by other international courts and tribunals, or those filed in the foreign construction projects to which the SOA scientists referred in their report.[849] [*Emphasis* added]

612. Thus, there is nothing in the *South China Sea* award that would suggest importation into Article 206 of an 'objective international standard' rigorously advocated by Ukraine in this Arbitration. The tribunal's analysis in that case expressly focused on compliance with *national* law, and the reference to 'international courts and tribunals' was made by way of comparison, not to the exclusion of national discretion, and not as demonstrating any particular 'objective standard'.

613. In addition, Ukraine does not interact with another important finding of the tribunal in the *South China Sea* case, where it expressly confirmed that 'the terms 'reasonable' and 'as far as practicable' contain an element of discretion for the State concerned' in comparison to the obligation to communicate EIA results which is 'absolute'.[850]

614. The Inter-American Court's Advisory Opinion[851] relied upon by Ukraine is also of no use to its position. The paragraph cited by Ukraine represents the Court's findings on the

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[849] *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award, 12 July 2016, ¶990 (**UAL-11**).

[850] *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award, 12 July 2016, ¶948 (**UAL-11**).

[851] *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 (**UAL-154**).

more general obligation 'to prevent pollution' envisaged by Article 192 of UNCLOS, not on Article 206 and the disputed point of the State's discretion regarding EIA procedure. With respect to EIA, the Inter-American Court in fact confirms the common approach that it is for the State to determine the contents of the EIA in each individual case:

> The content of the environmental impact assessment will depend on the specific circumstances of each case and the level of risk of the proposed activity. Both the International Court of Justice and the International Law Commission have indicated that each State should determine in its laws the content of the environmental impact assessment required in each case. *The Inter-American Court finds that States should determine and define, by law or by the project authorization process, the specific content required of an environmental impact assessment, taking into account the nature and size of the project and its potential impact on the environment.*[852] [*Emphasis* added]

615. Ukraine also cites the *Certain Activities and Construction of a Road* case, referencing the ICJ's use of the word 'appropriate' before 'environmental impact assessment' as allegedly confirming the existence of an 'objective standard'.[853] However, nothing in the referenced judgment suggests the existence of such a 'standard', or its supposed contents. In fact, the ICJ did not depart from its conclusion in *Pulp Mills* that it is for the State concerned to determine the scope and content of the EIA. The violation found by the ICJ in that case was actually the belatedness of the EIA conducted that effectively defeated the EIA's inherent prognostic nature – not its failure to meet some 'international objective standard':

> In the present case, Costa Rica was under an obligation to carry out such an assessment prior to commencing the construction of the road, to ensure that the design and execution of the project would minimize the risk of significant transboundary harm. In contrast, Costa Rica's Environmental Diagnostic Assessment and its other studies were *post hoc* assessments of the environmental impact of the stretches of the road that had already been built. These studies did not evaluate the risk of future harm…[854]

616. Thus, an 'appropriate' EIA in the sense implied by the ICJ is an assessment conducted before the implementation of the project, not thereafter, when an actual impact may

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[852] *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, ¶170 (**UAL-154**).

[853] Ukraine's Reply, ¶231.

[854] *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)*, Judgment, I.C.J. Reports 2015, pp. 722-723, ¶161 (**UAL-153**).

already occur. There is no basis to impose an 'objective international standard' of EIAs based on that finding.

617. Judge Dugard's Separate Opinion in that case is of no support to Ukraine's position either. First, being a Separate Opinion, it does not represent the majority's approach analysed above. Further, a closer look makes it obvious that that there is nothing in the Separate Opinion that would support Ukraine's claims. Judge Dugard merely noted that a State undertaking an EIA must assess the potential harm that its planned activities may cause, referencing ILC's Commentaries to Article 7 of the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities as guidance:

> But there are certain matters inherent in the nature of an environmental impact assessment that must be considered if it is to qualify as an environmental impact assessment and to satisfy the obligation of due diligence in the preparation of an environmental impact assessment. *This is made clear by the International Law Commission in its Commentary on Article 7 of its Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities which declares that an environmental impact assessment should relate the risk involved in an activity 'to the possible harm to which the risk could lead', contain 'an evaluation of the possible transboundary harmful impact of the activity', and include an assessment of the 'effects of the activity not only on persons and property, but also on the environment of other States'.*[855] [*Emphasis* added]

618. The above only further fleshes out the logic behind the ICJ's decision and is already within the express wording of Article 206. There is nothing in Judge Dugard's Separate Opinion that would deny the discretion that States enjoy with regard to establishing and implementing their EIA procedures.

619. In fact, the ILC's commentary to Article 7 confirms the Russian Federation's reading of the obligation envisaged by Article 206 as granting discretion to the State:

> (5) *The question of who should conduct the assessment is left to States.* Such assessment is normally conducted by operators observing certain guidelines set by the States. These matters would have to be resolved by the States themselves through their domestic laws or as parties to international instruments. However, it is presumed that a State of origin will designate an authority, whether or not governmental, to evaluate the assessment on behalf of the Government and will accept responsibility for the conclusions reached by that authority.

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[855] *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)*, Judgment, Separate Opinion of Judge *ad hoc* Dugard, p. 849, ¶18 (**UAL-200**).

> (6) *The article does not specify what the content of the risk assessment should be.* Obviously the assessment of risk of an activity can only be meaningfully prepared if it relates the risk to the possible harm to which the risk could lead. This corresponds to the basic duty contained in article 3. *Most existing international conventions and legal instruments do not specify the content of assessment.* There are exceptions, such as the Convention on Environmental Impact Assessment in a Transboundary Context, which provides in detail the content of such assessment. The 1981 study of the legal aspects concerning the environment related to offshore mining and drilling within the limits of national jurisdiction, prepared by the Working Group of Experts on Environmental Law of UNEP, also provides, in its conclusion No. 8, in detail the content of assessment for offshore mining and drilling.
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> (7) *The specifics of what ought to be the content of assessment is left to the domestic laws of the State conducting such assessment.* For the purposes of article 7, however, such an assessment should contain an evaluation of the possible transboundary harmful impact of the activity. In order for the States likely to be affected to evaluate the risk to which they might be exposed, they need to know what possible harmful effects that activity might have on them.[856] [*Emphasis* added]

620. In sum, as is clear from Ukraine's own sources discussed above, Article 206 of UNCLOS, being case-specific in its application, does not and cannot envisage the importation of an 'objective international standard'.

621. Indeed, as the ITLOS noted in its 2011 Advisory Opinion, 'article 206 of the Convention gives only few indications of this scope and content'.[857] Leading commentators agree: the *Virginia Commentary* states that Article 206 'implies an element of discretion on the part of the State concerned'.[858]

622. As summarised in authoritative scholarly writings:

> *However, considering the principle of international sovereignty and the distinction between national capabilities, it is not appropriate to set a unified assessment standard*. 'As far as practicable' means that countries are empowered to adopt different standards according to their domestic laws and

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[856] The International Law Commission of the UN, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, Yearbook of the International Law Commission A/56/10, 2001, vol. II, Part Two, Commentary to Article 7, ¶¶(5)-(7) (**RUL-100**).

[857] *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)*, Advisory Opinion, 1 February 2011, ¶149 (**RUL-101**).

[858] M. Nordquist (ed.), *United Nations Convention on the Law of the Sea*, *1982*: *A Commentary*, Vol. IV, Nijhoff, 2002, p. 124 (**RUL-162**).

> different national conditions. Therefore, the EIA criteria under UNCLOS vary from country to country.[859] [*Emphasis* added]

623. The European Court of Justice has also endorsed this approach in its case law:

> [T]he limits of discretion conferred on the Member States by Article 4(2) of the [Council] Directive [85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment] are to be found in the obligation set out in Article 2(1)… and that the criteria and/or thresholds mentioned in Article 4(2) are designed to facilitate the examination of the actual characteristics exhibited by a given project in order to determine whether it is subject to the requirement to carry out an assessment.[860]

624. In essence, as scholarly literature aptly notes, EIA under Article 206 is a tool 'to provide decision-makers with information about possible environmental effects when deciding whether to authorise a potentially harmful activity'.[861] How this information is obtained cannot be subjected to an objective standard, as it differs from State to State, and depends on the specificities of a given project.

625. This is indeed so if one analyses State practice and States' legal positions. There is no need to discuss all States, but a few examples from different legal systems would be in order and apposite to unequivocally demonstrate that there is no 'objective international standard' that States follow when conducting EIAs. Instead, they are guided by their own capabilities and considerations and subject the EIA procedures to their discretion:

    a. For example, Mexico supports the Russian Federation's interpretation of Article 206. When discussing the scope of Article 206 in 2017, Mexico stated as follows: 'However, its content is not yet defined and *nowadays it is upon each State to determine the content and scope of the EIA*, taking into account the magnitude and potential effects of a project liable to harm the environment'.[862] [*Emphasis* added].

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[859] T. Qin, F. Hou, *Environmental Impact Assessments in Protection and Preservation of the Marine Environment* in M. Nordqvist, J. Norton et al. (eds.), COOPERATION AND ENGAGEMENT IN THE ASIA-PACIFIC REGION (Brill, 2019), pp. 149-150 (**RUL-195**).

[860] European Court of Justice, Case C-301/95, Sixth Chamber, Judgment, 22 October 1998, ¶45 (**RUL-196**).

[861] A. Boyle, C. Redgwell (eds), BIRNIE, BOYLE & REDGWELL'S INTERNATIONAL LAW AND THE ENVIRONMENT (4th ed, OUP, 2021) p. 184 (**RUL-105)**.

[862] SRE, Submission by Mexico, Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of area beyond national jurisdiction regarding The U.N. General Assembly Resolution 69/292, 24 April 2017, p. 10. Available at: https://www.un.org/depts/los/biodiversity/prepcom_files/streamlined/Mexico.pdf (**RU-737**).

b. The Republic of Korea perceives EIA differently. To give just one example, Mexico's regulations do not require monitoring plans as part of an EIA, while Korea's do.[863] It is trite that an EIA performed in Mexico would differ from that performed in South Korea, given the two States' different capabilities and understandings of the issue. The legal doctrine has also underlined the discretion that Korean authorities have vested in their national regulators: 'The [Korean] *Supreme Court has been also extremely deferential to government agency discretion* and has held that regulations or policies are legitimate if, and only if, the procedural requirements are satisfied, without further reviewing whether the environmental right of the plaintiff has been damaged'[864]

c. The United Kingdom has supported a position almost identical to the Russian Federation in its *MOX Plant* dispute against Ireland. While that case was not resolved on the merits, it is still demonstrative of the UK's position on the matter. According to the UK, Article 206 (like the Russian Federation argues in this case) does not provide for any 'objective standards', nor for their importation from other legal instruments. Instead, it leaves its contents to the domestic law.[865]

626. Therefore, contrary to Ukraine's arguments, the EIAs carried out in respect of the Infrastructure Projects were subject to the standards and procedures established by the Russian Federation within its discretion, and not to some non-existent 'objective international standard', as advocated by Ukraine.

627. In any event, as the Russian Federation has demonstrated in its Counter-Memorial, and as will be shown further below, the EIAs conducted with respect to the Infrastructure Projects were adequate, in full compliance with Russia's domestic legislation, and provided the authorities with all relevant information, thus ensuring compliance with Article 206 of UNCLOS.

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[863] *See* Environmental Law Alliance Worldwide, Legal Framework of Mexico, 25 October 2019, available at: https://www.elaw.org/eialaw/mexico (**RU-738**). See Environmental Law Alliance Worldwide, Legal Framework of South Korea, 26 June 2019, available at: https://www.elaw.org/korea (**RU-739**).

[864] H. Cho, G. Choi, *South Korea*, in E. Lees, J. Vinualez (eds.), THE OXFORD HANDBOOK OF COMPARATIVE ENVIRONMENTAL LAW (OUP, 2019), p. 338 (**RUL-197**).

[865] *MOX Plant Case (Ireland v. United Kingdom)*, Case No. 2002-01, Counter-Memorial of the United Kingdom, 9 January 2003, ¶¶5.14-5.32 (**RUL-198**); Rejoinder of the United Kingdom, 24 April 2003, ¶¶6.23-6.24 (**RUL-199**).

ii. The Russian Federation Conducted Adequate and Comprehensive EIAs in Line with Article 206 of UNCLOS

628. In the Reply, Ukraine contends that the Russian Federation allegedly failed to conduct proper EIAs for the Infrastructure Projects. It takes issue with the EIA materials submitted by the Russian Federation stating that they have 'multiple deficiencies' and 'cannot be used to adequately identify, assess, or mitigate the risk of significant environmental harm implicated by the Construction projects'.[866] This is false. As will be demonstrated below, the Russian Federation has undertaken extensive and adequate measures as part of the EIAs in relation to the Construction Projects, and the materials disclosed in this Arbitration are more than sufficient to prove this. The Russian Federation will also show that Ukraine's accusations of not conducting an EIA for the laying of the submarine Communication Cable are inadmissible and, in any event, without merit as an EIA was not required for that project.[867]

a. Ukraine's Claims Concerning the Alleged Deficiencies of the Russian Federation's EIAs are Unfounded and Unmeritorious

629. In its Reply, Ukraine continues to maintain its unfounded claims as to a 'rushed and inadequate' construction and EIA process,[868] also extending them, unlike in its original submissions, to the Gas Pipeline (the 'Gas Pipeline') and Power Cables (the 'Power Cables') projects. Ukraine's contentions still hinge on misrepresentation of applicable Russian law and environmental procedures.

(1) Ukraine's Denial that the EIA Documents Submitted by the Russian Federation are Indeed EIA materials is Contrived

630. Being unable to rebut the evidence that all EIAs for the Infrastructure Projects successfully passed a stringent environmental review (SEER),[869] Ukraine now resorts to mischaracterising the SEER-approved EIA materials submitted by the Russian Federation as improper documents. This latest effort is misconceived.

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[866] Ukraine's Reply, ¶237.

[867] Counter-Memorial, Chapter 6, Section (I)(E).

[868] Ukraine's Reply, Chapter Four, Section (I)(B)(2)(iii).

[869] *See* Counter-Memorial, ¶343.

631. Specifically, Ukraine falsely suggests that the EIA materials in respect of the Kerch Bridge construction that Russia submitted to the Tribunal are not the actual EIA documents 'that would normally be generated' for Rosprirodnadzor's (Russian Federal Agency for Environmental Monitoring) environmental review'.[870] In so doing, Ukraine parrots [redacted] suggestion that 'Russia has not submitted any actual ESIA (OVOS) typically required under the SEER/Expertiza Review', and that what Russia submitted merely represents 'environmental impact information included in various *"design documentation"*.'[871] [*Emphasis* added]. The latter, Ukraine argues, is not what should 'normally be generated' for SEER in the Russian Federation.[872] However, neither Ukraine nor its expert attempt to substantiate their position, even with reference to relevant Russian law or any other sources. The only evidence is [redacted] own professed expertise in the matter.

632. Ukraine's contentions fail upon the most basic review of applicable Russian law. While [redacted] tries to suggest that an EIA in the Russian Federation is developed and reviewed by the authorities as a separate and unique piece of *nomenclature* (documentation), this is simply not the case. There is no such independent *document* as an 'EIA' (or 'OVOS') that is to be subject to SEER,[873] and Russian law explicitly provides that what undergoes SEER is '*design documentation*',[874] which embraces the totality of technical documents on the construction project, including its EIA. In fact, the very name of this procedure, as represented in full in the relevant enactment, directly reflects this: 'State environmental expert review of *design documentation*'.[875]

633. The composition of design documentation is clearly defined in Russian law. It must contain a section called *'Environmental Protection'*, which includes (i) the EIA, and (ii)

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[870] Ukraine's Reply, ¶¶237-238.

[871] Second [redacted] Report, ¶24.

[872] Ukraine's Reply, ¶245.

[873] Federal Law No. 174-FZ 'On Environmental Expert Review', 23 November 1995, Article 11 (**RU-740**).

[874] Government of the Russian Federation, Resolution of the No. 87 'On the Scope of Design Documentation Sections and Requirements to the Contents Thereof', 16 February 2008 (as amended), ¶40 (**RUL-114**).

[875] Parliament of the Russian Federation, Town Planning Code of the Russian Federation (Federal Law No. 191-FZ, 29 December 2004, Article 49: '*Expert review of design documentation and engineering survey outcomes, state environmental expert review of design documentation* for the facilities to be constructed or reconstructed in the exclusive economic zone of the Russian Federation, on the continental shelf of the Russian Federation, in the internal sea waters, in the territorial sea of the Russian Federation, in specially protected natural areas and the Baikal natural area' [*Emphasis* added] (**RU-113**); Federal Law No. 174-FZ 'On Environmental Expert Review', 23 November 1995 (as amended) (excerpts), Article 14(1.1) (**RU-740**).

the list of measures for the prevention and/or mitigation of potential negative environmental impact.[876] This is exactly what the Russian Federation provided to the Arbitral Tribunal,[877] demonstrating that its EIAs fully complied with Russian law, contrary to [redacted] misconceived suggestion.

634. [redacted] further confirms this in his second report, noting that the relevant design documentation submitted by the Russian Federation indeed constitutes the proper EIA materials that duly received SEER approval.[878] As [redacted] notes:

<< [redacted] >>

635. [redacted] attempt to put this into question trips upon his own experience disclosed. [redacted] claims to have been responsible for the environmental management of the Aginskoe Gold Mining Project in Russia's Kamchatka Oblast, including EIA preparation and its SEER approval.[880] A limb of that project has recently undergone a SEER, for

[876] Government of the Russian Federation, Resolution o No. 87 'On the Scope of Design Documentation Sections and Requirements to the Contents Thereof', 16 February 2008, ¶40 (**RUL-114**). Beyond this there are no explicit requirements as to how exactly the EIA materials inside the section should be structured, composed or titled. *See*, for instance, Second [redacted] Report, ¶31.

[877] *See*, e.g. STG-ECO, Kerch Bridge Design Documentation, Section 7, Environmental Protection, Part 4, Surface and Ground Water Protection. Aquatic Biological Resources Protection, Book 1, 12/02-PIR-OOS4.1, 2015 (**RU-93**); [redacted]

[878] Second [redacted] Report, ¶28.

[879] [redacted] (**Confidential** [redacted] (**Confidential Exhibit**)> [redacted] (**Confidential Exhibit**).>>

[880] *See* First [redacted] Report, Annex 1, p. 7, containing [redacted] Curriculum Vitae.

which precisely the project's *design documentation* was submitted.[881] Similar to the relevant Infrastructure Projects,[882] this design documentation includes, e.g., a section titled 'List of environmental protection measures' (including the environmental monitoring programme), a collection of 'EIA materials' describing the possible impacts, and is supported by a collection of baseline data collection reports, divided by the relevant engineering survey type (geodetic, geological, hydrometeorological and environmental).[883]

636. The EIA materials prepared for [redacted] project are thus fully in line with the ordinary EIA/SEER procedure in the Russian Federation as set out above. Even the website of the Russian Federal Agency for Environmental Monitoring ('Rosprirodnadzor') inexplicably provides that design documentation is exactly what is being reviewed in the course of SEER.[884] It is therefore unthinkable that Ukraine's EIA expert, who claims to have managed EIA/SEER processes for numerous construction projects in the Russian Federation, could be unaware of this most basic fact.[885]

637. Ukraine's reliance on the above misconception is all the more egregious considering that its own legislation envisaged a similar EIA review procedure until 2017, providing for an

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[881] Laboratoriya Proyecta CJSC, Design Documentation for Reservoir of Enrichment Waste From the Gold Extraction Plant of the Aginsky Mining and Processing Plant. Reconstruction of the Cake Storage Section. Design Documentation, Book 1.1, Section 1.1 'Composition of the 'Design Documentation', 2678.21.00-SP, 2022 (**RU-741**).

[882] *See*, e.g. STG-ECO, Kerch Bridge Design Documentation, Section 7, Environmental Protection, Part 4, Surface and Ground Water Protection. Aquatic Biological Resources Protection, Book 1, 12/02-PIR-OOS4.1, 2015 (**RU-93**); [redacted]

[883] Inventory of Documents to Be Submitted for State Environmental Review in the Composition Defined by Article 14 of Federal Law No. 174-FZ, 2022 (excerpts) (**RU-742**).

[884] Rosprirodnadzor, Information on expert reviews conducted by the central office of Rosprirodnadzor in 2023, available at: https://rpn.gov ru/upload/iblock/0a5/v5bnt00zgna7dplia3heqsj12ue6vy28/provedennye-ekspertizy-2023-g.-_07.12.2023_.docx. (**RU-743**).

[885] Ukraine's argument falls so flat because it hangs entirely on a legal term's translation – not its substance. As provided above, design documentation («проектная документация» in Russian, which may be translated alternatively as '*project* documentation') covers all main aspects of the project, including the EIA. Meanwhile, [redacted] apparently confuses this with a structure's technical 'design', e.g., '…site preparation and development plans, structural aspects, construction processes, materials, methods… ', which is only one component of design documentation (Second [redacted] Report, ¶25). [redacted] should be well-aware of what the term embodies.

EIA to be 'executed in the form of a separate volume (book, section) of [design] documentation.'[886]

638. Thus, [redacted] claim that 'Russia's apparent reliance on design documentation is a departure from normal Russian practice', [887] on which Ukraine's case rests, is manifestly misleading. There was no place for an honest mistake on the part of both [redacted] and Ukraine.

639. [redacted] further assertion that design documentation 'falls short of what objectively is required to adequately assess a project's environmental impacts' because the core elements of the construction project 'must be defined through design documentation prior to conducting an ESIA' [888] is also erroneous. As [redacted] explains, the requirement of submitting EIA for SEER as part of the design documentation reflects the Russian Federation's integrated approach aimed exactly at ensuring that EIAs are conducted and reviewed with reference to other technical elements of the project, and thus fully correspond to them. [889] For instance, this is crucial for ensuring that the mitigation measures correspond to the anticipated impacts.[890] This refutes [redacted] assertion[891] that design documentation cannot achieve that aim.

640. Finally, there is one additional remark by [redacted] (reproduced by Ukraine in the Reply) that warrants commenting. [892] Ukraine suggests that relying on the design documentation is 'unorthodox' and 'incompatible with the goal of adequately assessing … environmental risks'. This is wrong. To the contrary, EIAs conducted as part of the development planning process and reflected in the project development plans are far from 'unorthodox'. This is, in fact, the *modus operandi* suggested by international sources.[893]

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[886] Verkhovnaya Rada, Law No 45/95-VR, 'On Environmental Expert Review', 9 February 1995 (as amended), Article 15(1), available at: https://zakon.rada.gov.ua/laws/show/en/45/95-%D0%B2%D1%80/ed20171218?lang=uk#Tex (**RU-744**).

[887] Second [redacted] Report, ¶25.

[888] Second [redacted] Report, ¶25.

[889] Second [redacted] Report, ¶32.

[890] Second [redacted] Report, ¶32.

[891] Second [redacted] Report, ¶25.

[892] Ukraine's Reply, ¶238; Second [redacted] Report, ¶25.

[893] See, for example, Council of Europe, Explanatory Report to the European Convention on the Protection of the Archaeological Heritage (Revised), ETS No. 143 (16 January 1992), p. 6 (**RUL-123**): 'States are required to

641. To conclude, Ukraine's and [redacted] denial that the EIA materials submitted by the Russian Federation are indeed proper EIA materials hangs on an artificial and misleading allegation that is not only contrary to the EIA/SEER procedure under Russian law but would also go against the plain logic of an effective EIA process. This resort to misrepresentation of Russian law is telling. It encapsulates the lack of merit in Ukraine's case on environmental protection.

(2) The Environmental Impact of the Gas Pipeline and Power Cables Could Only Have Been Minimal and Was Subject to Thorough and Adequate EIA

642. Ukraine has chosen not to engage with the EIA materials for the Gas Pipeline and the Power Cables submitted by the Russian Federation, arguing that those materials 'are so minimally excerpted that they are not amenable to any meaningful review or analysis'.[894] It seeks dismissal of this evidence simply due to 'the extent of redactions' and 'the lack of witness or expert evidence'.[895] This is a clear attempt to sideline the fact that the projects were obviously subject to EIA, and to avoid any meaningful discussion thereof.

643. First, the Russian Federation did not even need to exhibit any EIA materials, in the first place, to demonstrate that the EIAs were actually performed. The Counter-Memorial references a wealth of public sources, originating from both mass media and the responsible authorities, that evidence and describe the Gas Pipeline and Power Cables EIA processes.[896]

644. Second, Ukraine and its environmental experts have not tendered any arguments for the Russian Federation to respond to, besides their simple assumption that there was no EIA of these projects. Indeed, as [redacted] states:

> … I do not think that [redacted] or Ukraine have "flagged" much in terms of particular impacts, or other specific concerns pertaining to these ancillary

involve archaeologists in the entire plannig [sic] process and to ensure that archaeologists and town and regional planners consult one another. *Moreover, where environmental impact statements are required, these should specifically consider archaeological sites and their settings. In this way, known and suspected sites can be taken into account in developing plans for the project*. Modifications can often be made easily at the planning stage which later would cost a great deal of time and money'. [*Emphasis* added]

[894] Ukraine's Reply, ¶239.

[895] Ukraine's Reply, ¶239.

[896] See the multitude of public sources cited in Counter-Memorial, Chapter 6(I)(D).

Infrastructure Projects beyond their now-disproven belief that they were not subject to any EIA, and some separate brief remarks, made in the passing.[897]

645. Still, taking into account the considerable volume of these materials, and the threat of military attacks by Ukraine, as already was the case with the Kerch Bridge, the Russian Federation committed itself to provide excerpts of the actual EIAs that are sufficient to evidence their existence and scope. Again, Ukraine chose to simply refuse to engage with these materials and participate in anything resembling more specific and reasoned discussion.

646. The Russian Federation nonetheless provides with the Rejoinder an expert evaluation of the magnitude of impacts that could have been expected from the Gas Pipeline and Power Cables and their actual EIAs.

647. [redacted] explains that '[i]t has been generally well established by the scientific community that environmental impacts intrinsic to underwater pipeline projects *are relatively low*.'[898] [*Emphasis* added]. Further, the OSPAR guidelines on offshore gas activities characterise the potential impact of an undersea pipeline as 'insignificant'.[899] As [redacted] explains, this is so because the impact (i) is highly confined, especially when it comes to buried pipelines; (ii) in areas with soft sediments – as in the case of the Kerch Strait – benthic communities will recover substantially faster than in less favourable areas.[900]

648. This impact is even smaller when it comes to the Power Cables, which occupy and affect much less space,[901] as is acknowledged in several key documents produced by the United

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[897] Second [redacted] Report, ¶57.

[898] Second [redacted] Report, ¶64. [*Emphasis* added]

[899] OSPAR Comission, Assessment of impacts of offshore oil and gas activities in the North-East Atlantic, 2009, Publication No. 453/2009, p.28, available at: https://www.ospar.org/documents?v=7154 (**RU-745**).

[900] Second [redacted] Report, ¶64: '… according to [the relevant OSPAR guidelines], *in areas with soft sediments, as in the case of the Kerch Strait, benthic communities will recover in a year or two*. This is compared to the up to 10 years that it takes for them to re-colonise areas with hard substrate in deeper and colder conditions, which is not relevant to the Strait. The OSPAR guidelines also indicate that the impact *is confined to a 10 – 20 m wide stripe along the pipeline at maximum.* Once pipeline is laid, "it can be assumed for the majority of pipelines that… the impact on the environment *does not extend beyond the area directly beneath the pipeline itself. For those that are buried the impact is less*"'. [*Emphasis* added]

[901] Second [redacted] Report, ¶65.

Nations.[902] Existing scientific data characterises the potential impacts as generally short-termed, 'low' or 'negligible' in magnitude and in some cases highly uncertain.[903]

649. Nonetheless, [redacted] explains that each of these projects involved a thorough and proper EIA[904] that passed a stringent state review. <<[redacted]7>>

650. These proper EIAs were accompanied by impact prevention and mitigation measures that [redacted] evaluates as 'detailed' and 'impressive'.[908] For instance, the Gas Pipeline EIA offered detailed restrictions for vessels and aircrafts engaged in the pipeline laying to ensure nil or minimal acoustic impact on biota[909] and also carefully regulated wastewater treatment and disposal.[910] The Power Cables EIA arranged all construction

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[902] Second [redacted] Report, ¶65, referring to United Nations General Assembly, Oceans and the Law of the Sea, Report of the Secretary-General, 30 March 2015, U.N. Doc. A/70/74, p. 17, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/093/76/PDF/N1509376.pdf?OpenElement (**RU-746**): 'Submarine cables themselves are considered to have a low-carbon footprint and a small relative impact on the environment… ' ; United Nations Environment Programme, The First Global Integrated Marine Assessment: World Ocean Assessment I, 2016, p. 6, available at: https://www.unep.org/resources/report/first-global-integrated-marine-assessment-world-ocean-assessment-i (**RU-777**): 'Submarine cables have very limited environmental impacts, since they are very slim (typically 25 – 40 millimetres wide in the deep sea) … '.

[903] Second [redacted] Report, ¶66.

[904] Second [redacted] Report, ¶68.

[905] <<[redacted] (**Confidential Exhibit**).>>; [redacted]) (**Confidential Exhibit**).>>

[906] Second [redacted] Report, ¶¶66, 69.

[907] Second [redacted] Report, ¶75.

[908] Second [redacted] Report, ¶¶70, 73..

[909] [redacted]

[910] *Ibid.*

works in accordance with the fish species' life cycles: in particular, works were prohibited during periods of spawning, development of fish eggs, larvae, and active fish migration.[911]

651. [redacted] especially highlights the compensatory measures for these projects, which included the hatching and release of juvenile fish, including (i) 1,447,836 species of Russian Sturgeon, 25,738 species of Carp, and 62,655 species of Black Sea Salmon in the case of the Gas Pipeline and (ii) 800,000 species of Russian Sturgeon for the Power Cables.[912]

652. It is clear from the above that all possible impacts pertaining to the Gas Pipeline and Power Cables were carefully studied, evaluated and mitigated. Ukraine thus has no opportunities left to argue that these projects were not subject to an appropriate and effective EIA, or that they posed any 'substantial environmental risks'.

(3) Ukraine's Claims Concerning the Availability and Adequacy of Baseline Data for the Kerch Bridge EIA are Erroneous

653. Ukraine and its expert [redacted] wrongly accuse the Russian Federation of using insufficient and/or inaccurate baseline data for the Kerch Strait Bridge EIA.[913] As [redacted] has explained previously[914] and confirms in his second report, there was an abundance of baseline data to work with that provided for the required temporal and spatial coverage.[915]

654. [redacted] also explained in his first report that the maritime area surrounding the Kerch Strait Bridge had already been extensively studied prior to the construction commencement,[916] which facilitated the EIA process and provided the necessary contextual depth for further review.[917] [redacted] twists the words, suggesting that

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[911] [redacted]

[912] Second [redacted] Report, ¶¶70, 73.

[913] Ukraine's Reply, ¶240; Second [redacted] Report, ¶54.

[914] First [redacted] Report, ¶40.

[915] Second [redacted] Report, ¶69, Chapter III(F).

[916] First [redacted] Report, ¶20.

[917] Second [redacted] Report, ¶105.

historical data was used as a 'substitute' for contemporaneous measurements.[918] This is wrong. In fact, [redacted] explicitly described in his first report the studies conducted specifically for the purposes of the Kerch Strait Bridge EIA.[919]

655. Furthermore, [redacted] opportunistic disregard of historical data as an 'impermissible short-cut[]'[920] in relation to the Russian Federation's EIA in question is to the opposite of [redacted] praise of the use of historical data for his own EIA that allowed it to be prepared and approved within 'just seven weeks from start to finish',[921] as discussed below.[922] Thus, [redacted] remarks in this respect are flawed and should be disregarded.

656. [redacted] also explains in detail how the EIA conducted by the Russian Federation allowed for sufficient spatial and temporal coverage. As [redacted] explains,[923]

a. The major field campaigns were conducted at the seasonal scale, as is usually done in the regions where seasonable variability is dominant, such as the Kerch Strait.

b. The data of all principal hydrographic parameters were recorded continuously along the future bridge at appropriate sampling rates.

c. As to the spatial coverage, 'the settings selected for the measurements made within the EIA were appropriate for resolving the small scale, the submesoscale, and the mesoscale features relevant to the objectives of the study'. In particular:

> … lythodynamic surveys were conducted at tens of sections across the Kerch Strait, while the current velocity and direction data obtained by a towed Acoustic Doppler Current Profiler (ADCP) had the spatial resolution of the first metres. The main hydrometeorological parameters were further modelled for from tens of points to around 125,000 points in some cases.[924]

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[918] Second [redacted] Report, ¶53.

[919] First [redacted] Report, ¶32-44. Also see Second [redacted] Report, Chapter III(F).

[920] Second [redacted] Report, ¶33.

[921] [redacted]

[922] *See* Rejoinder, ¶¶667.

[923] Second [redacted] Report, ¶¶107-108.

[924] Second [redacted] Report, ¶108.

657. As [redacted] notes, the above was thoroughly described in the baseline data materials,[925] meaning that [redacted] is simply unfamiliar with the documents that he criticises.

658. [redacted] characterisation[926] of the hydrometeorological surveys as insufficient 'spot checks' is also surprising and unwarranted. [redacted] explains that virtually all hydrometeorological and oceanographic measurements are 'spot checks' since they are always confined to a finite number of locations. In the case of the Kerch Bridge, the number of 'spots' and the spacing between them, which is what actually matters, were appropriate[927] – meaning that the measurements provided for a robust and reliable picture of the baseline conditions.

659. Therefore, the baseline data for the Kerch Bridge EIA was collected in the way that corresponded to all the necessary environmental features at all appropriate scales.[928] In this regard, Ukraine's assumption that due to the alleged lack of baseline data the EIA was 'generalized and conclusory'[929] is likewise unfounded and must fail.

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[925] *Ibid.*, citing Federal State Budgetary Institution 'Zubov State Oceanographic Institute', Kerch Bridge Design Documentation, Section 10, Other Documentation Provided for by Federal Law, Part 3, Hydrometeorological Engineering Surveys, Book 1, Modelling of Hydrometeorological Conditions, 12/02-PIR-II3.5 (**RU-749**). Federal State Budgetary Institution 'Zubov State Oceanographic Institute', Kerch Bridge Design Documentation, Section 10, Other Documentation Provided for by Federal Law, Part 3, Hydrometeorological Engineering Surveys, Book 1, Technical Report on the Results of Hydrometeorological Engineering Surveys, Hydrometeorological Conditions of the Kerch Strait, 12/02-PIR-II.3.1, 2015 (**RU-97**). [redacted]

[926] Second [redacted] Report, ¶63.

[927] Second [redacted] Report, ¶109.

[928] Second [redacted] Report, ¶108: 'the settings selected for the measurements made within the EIA were appropriate for resolving the small scale, the submesoscale, and the mesoscale features relevant to the objectives of the study.'

[929] Ukraine's Reply, ¶241.

(4) Ukraine's Claims Regarding 'Rushed' Timetables of the EIAs/SEERs for the Infrastructure Projects Are Without Merit

660. In the Reply, Ukraine maintains its complaints regarding the pace of the EIA/SEER process, now taking issue, unlike previously, with all relevant Infrastructure Projects.[930] As a preliminary note, it is telling that both Ukraine and [redacted] advance two conflicting and contradictory arguments: first, that the Kerch Bridge, the Gas Pipeline and the Power Cables projects were *not* subject to any EIA at all,[931] and second, that the EIA procedure was in any case 'rushed'.[932]

661. Be that as it may, Ukraine's allegations as to 'rushed' timetables are strikingly ill-founded. As will be demonstrated, the evidence used by Ukraine and its experts is inappropriate, manipulative and internally inconsistent. Its case is still entirely based on misrepresentation of matters of fact and law.

662. Ukraine's expert [redacted] insists that the EIAs conducted by the Russian Federation were 'rushed' and thus 'grossly inadequate under any recognized standards' and 'do[] not meet even the standard of a properly-conducted fast-track ESIA'.[933] However, he does not ascertain or explain what 'standards' he refers to. In fact, as [redacted] explains, such 'standards' simply do not appear to exist.[934] [redacted] appeal to 'standards' appears to rely solely on 'the modern rules of the Overseas Private Investment Corporation'[935] that his project supposedly incorporated, without even specifying the said rules or their relevance. As [redacted] notes, this does not amount to any relevant and mandatory standard in the Russian Federation or internationally.[936]

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[930] Ukraine's Reply, ¶245.

[931] Ukraine's Revised Memorial, ¶194.

[932] Ukraine's Reply, ¶¶ 237-238.

[933] Second [redacted] Report, ¶¶29, 32.

[934] Second [redacted] Report, ¶42.

[935] U.S. International Development Finance Corporation, Overview, 2 December 2013, available at: https://www.dfc.gov/who-we-are/overview (**RU-750**).

[936] Second [redacted] Report, ¶37.

663. [redacted] also rests his criticism of the allegedly 'rushed' procedure on his professed '20 years of [experience in] conducting ESIAs in Russia and the CIS',[937] yet he refers to only one specific example – namely, his work for an EIA under the [redacted] project.[938] Both in his CV for this Arbitration and in his an article of his, [redacted] praises the fact that the whole process of preparing and approving the EIA took 'just seven weeks from start to finish',[939] for what [redacted] himself designates as a 'major EIA effort'.[940] To compare, the time allocated for approving the Infrastructure Projects' EIAs by the statute was about the same – 45 days,[941] while the preparation of the Kerch Bridge EIA, or the Gas Pipeline and Power Cables EIAs to be so approved had taken many months.[942] It is plain that the 'seven weeks from start to finish' are simply unfathomable based on [redacted] own demands for 'at least two years' of EIA[943] that Ukraine relies upon,[944] not to say his larger estimate of approximately 3.4 years 'for projects of all sizes, large and small'.[945] Even more so, as [redacted] notes, the list of 'major EIA efforts' recounted by [redacted] and allegedly conducted for his exemplary EIA[946] is not even close to the extensive diverse EIAs of the Infrastructure Projects.[947]

664. [redacted] article attributes the notable expedience of his EIA to the use of historical data and even 'existing Russian EIA (OVOS) and supporting documents'. By contrast, when it comes to the Russian Federation's Infrastructure Projects in dispute, [redacted] surprisingly adopts a drastically opposite approach and calls the use of such historical data an 'impermissible short-cut[]' and disregards its importance

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[937] Second [redacted] Report, ¶27.

[938] Second [redacted] Report, ¶28.

[939] [redacted]

[940] First [redacted] Report, Annex 1, p. 11: 'The project was completed successfully *in 7 weeks from start to finish, most rapid performance on a major EIA effort.*' [*Emphasis* added].

[941] Counter-Memorial, ¶¶351-354.

[942] Second [redacted] Report, ¶36; Counter-Memorial, Chapter 6(I)(D).

[943] First [redacted] Report, ¶151.

[944] Ukraine's Reply, ¶247.

[945] First [redacted] Report, ¶151.

[946] Second [redacted] Report, ¶28.

[947] Second [redacted] Report, ¶40.

altogether.[948] Same concerns [redacted] denial to take into account that the Gas Pipeline EIA, in addition to the baseline data gathered specifically for this project, also made use of the multitude of such data produced for the Kerch Bridge.[949] As [redacted] aptly notes,

> I see no reason why the conduct of four interconnected Infrastructure Projects in a very well-researched locale should be treated differently, especially considering that their EIAs took exponentially longer.[950]

665. As is clear from the above, [redacted] comments are framed in such a way as to create the mere appearance of substantive criticism, since they are not backed by any evidence.

666. [redacted] states the obvious – the duration of an EIA process is not what dictates its quality:

> [A] long duration of the EIA process does not equal to its high quality, and *vice versa*. What matters is the essence of the EIA process, the quality of the studies, data and analysis involved.[951]

667. In any case, his overall expert opinion of the Infrastructure Projects' EIAs speaks for itself:

> As I opined in my First Report with respect to the Kerch Bridge, and maintain in the present Report with respect to all Infrastructure Projects (with the exception of the Communication Cable, where the EIA was not required), the EIAs conducted were not only adequate but represent high-quality environmental assessments.[952]

668. Ukraine attempts to downplay the timing of the Kerch Bridge EIA with incorrect reference to its materials, suggesting that [redacted] reference to September 2014 is wrong.[953] However, [redacted] took this date directly from the baseline materials for the Kerch Bridge, which were appropriately laid down before, and as the basis for, the

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[948] Second [redacted] Report, ¶33

[949] Counter-Memorial, ¶¶434-436

[950] Second [redacted] Report, ¶106.

[951] Second [redacted] Report, ¶43.

[952] Second [redacted] Report, ¶43.

[953] Ukraine's Reply, ¶246.

impact assessment proper.[954] Moreover, as [redacted] notes, the Kerch Strait Bridge EIA process actually began even earlier, which is evident from the feasibility study that summarised the baseline data gathered up to that point.[955] The study began after the appointment of the responsible organisation on 27 March 2014,[956] meaning that the EIA process must have continued at least from March or April 2014 until 19 November 2015 (when it was approved by Rosprirodnadzor's SEER), *i.e.* almost 20 months in total – far from [redacted] estimate of 'less than a year'[957] and close to his desirable estimate of two years.[958]

669. [redacted] also clarifies that [redacted] non-inclusion[959] of the timing for the SEER into his timetabling estimates for the Infrastructure Projects is entirely artificial. <<[redacted].[961]>>

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[954] Witness Statement of [redacted], 22 August 2022 ('[redacted] Statement'), ¶14, referring, to STG-ECO, Kerch Bridge Design Documentation, Part 4, Environmental Engineering Surveys, Book 1, Technical Report Following Environmental Engineering Surveys, 12/02-PIR-II4.1, 2015 (RU-89).

[955] Second [redacted] Report, ¶49.

[956] Russian Highways State Company, *Engineering Surveys and Feasibility Studies for the Construction of the Transport Crossing Through the Kerch Strait Will Be Developed by Giprotransmost OJSC* (27 March 2014), available at: https://www.russianhighways ru/press/news/56736/ (**RU-759**)

[957] Second [redacted] Report, ¶30.

[958] First [redacted] Report, ¶151.

[959] Second [redacted] Report, ¶¶30-31.

[960] See e.g. <<[redacted] (**Confidential Exhibit**)>> Also see <<[redacted] (**Confidential Exhibit**)>>; [redacted] (**Confidential Exhibit**).>>

[961] [redacted]

670. Ukraine's attempt[962] to discredit and dismiss [redacted] evidence is rash and disingenuous. [redacted] joined the Taman Highways Administration just in time for the start of the baseline's evaluation in the context of possible impacts, so her testimony is indeed highly relevant.[963] Notably, Ukraine and [redacted] make a concerted effort to refer to [redacted] as an 'engineer',[964] apparently suggesting that she has no competence in the matter. This is plain manipulation: [redacted] unambiguously provides that she was a 'leading *environmental* engineer' for the Kerch Bridge project,[965] i.e. the environmental specialist responsible, *inter alia*, for the EIA of a given project[966] – to put it simply, [redacted] peer. Finally, the fact that the Russian Federation has provided excerpts of the EIA has no bearing on [redacted] competence or the quality of her testimony; thus, Ukraine's demand for the Arbitral Tribunal to 'give no weight' to her testimony is ill-founded and should be disregarded.

671. Ukraine also makes a curious yet erroneous argument that 'Russia does not contest [redacted] estimate that an adequate EIA … of the Kerch Strait Bridge would have taken at least two years, and realistically longer.'[967] In fact, as [redacted] highlights, an EIA should be evaluated on a case-by-case basis, taking into account all the conditions of the project and the resources allocated, which is exactly what SEER is meant to accomplish.[968] Indeed, as [redacted] amply points out:

> … [redacted] has demonstrated that EIAs can indeed be completed quite swiftly when there are appropriate resources. I find no reason to doubt that Russia's high-profile and state-prioritised Infrastructure Projects had all the required resources – especially given the quality and scope of the resulting materials that I was shown.[969]

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[962] Ukraine's Reply, ¶246.

[963] [redacted] Statement, ¶13.

[964] Ukraine's Reply, ¶¶246-247; Second [redacted] Report, ¶ 40, also referring to [redacted] as an 'engineer', with no mention of her specialty.

[965] [redacted] Statement, ¶2. Also provided in Counter-Memorial, ¶167.

[966] Carrer Explorer, What does an environmental engineer do?, 3 december 2023, available at: https://www.careerexplorer.com/careers/environmental-engineer/ (**RU-745**)

[967] Ukraine's Reply, ¶247.

[968] Second [redacted] Report, ¶¶43, 46.

[969] Second [redacted] Report, ¶46.

672. By its positive opinion (SEER), Rosprirodnadzor certified that the EIA of the Kerch Strait Bridge was full and appropriate under all pertinent requirements.[970] Thus, it is the Russian Federation's firm position that the EIA of the Kerch Bridge was supposed to take, and indeed took, exactly as long as it should have. Ukraine's continued conspiratorial and politicised assertions in this respect have no bearing on the case and do not deserve consideration altogether.[971] [redacted] summarises that it is just impossible to 'agree with [redacted] position that the EIAs for the Infrastructure Projects were 'rushed'… [redacted] personal opinion can [not] amount to an established and reliable standard, whether in Russia or abroad'.[972]

673. The same is true for Ukraine's allegations as to the length of the public consultations. As the Russian Federation has demonstrated in its Counter-Memorial,[973] open public hearings and consultations were held with respect to the Infrastructure Projects. The Russian Federation notes that Ukraine and [redacted] concede that such consultations did take place, their only concern, once again, relates to their scheduling and timing.[974] There is no merit to Ukraine's contentions. The public hearings held were not 'rushed' or conducted in a 'hastily manner'. They were held in full compliance with applicable Russian law in force at the time and served their ultimate goal – to collect feedback of the public.

674. [redacted] and Ukraine take issue with the 30-day period assigned for the provision of the public's comments to the EIA materials.[975] They claim that a longer period ought to be provided for submitting comments. However, the public consultations were conducted exactly how they were supposed to under the relevant provisions of the Russian law, including those concerning their length.[976] In fact, Ukraine's submissions

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[970] [redacted] (**RU-108**).

[971] Ukraine's Reply, ¶250.

[972] Second [redacted] Report, ¶51.

[973] Counter-Memorial, ¶¶366-371.

[974] *See* Ukraine's Reply, ¶¶248-249; Second [redacted] Report, ¶46.

[975] Second [redacted] Report, ¶46; Ukraine's Reply, ¶258.

[976] State Committee of the Russian Federation for Environmental Protection, Order No. 372 'On Approving the Regulation on the Assessment of Environmental Impact of the Proposed Economic and Other Activities in the Russian Federation', 16 May 2000, Sec. 4.10 (**RU-101**).

expressly confirm this.[977] Therefore, Ukraine's case is one of general dissatisfaction with Russian law. Such remarks are irrelevant. It is telling that [redacted] fails to provide any support to his suggestion that 30 days are insufficient to familiarise oneself with the materials and submit comments.

675. Both Ukraine and [redacted] criticise the Russian Federation's public consultations for their allegedly short length, but fail to identify any substantive flaw with them. In fact, as shown in the Counter-Memorial, both Ukraine and its expert [redacted] have displayed demonstrable misunderstanding and mischaracterisation of the applicable Russian regulations, including in relation to public consultations.[978] Thus, Ukraine's and [redacted] speculations are manifestly unfounded as bald accusations not based on evidence.

676. As regards the SEER process, Ukraine continues to mislead the Arbitral Tribunal by misrepresenting the Russian legislation. It argues that:

> 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. 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.'[979]

677. First, the suggestion about the parallel State review of the design documentation (by Glavgosekspertiza, which reviews the technical aspect of the project[980]) and SEER review (by Rosprirodnadzor, which reviews the EIA) is manifestly misplaced. [redacted] explains that the design documentation was only submitted to Glavgosekspertiza on 16 October 2015, that is, *after* the EIA process was finished and submitted for SEER on 7 September 2015.[981] The same concerns the preparatory construction works as they were only allowed to commence after this submission.[982]

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[977] Ukraine's Reply, fn. 573.

[978] See Counter-Memorial, ¶353.

[979] Ukraine's Reply, ¶252.

[980] Counter-Memorial, ¶343.

[981] Counter-Memorial, ¶¶343-344; [redacted] Statement, ¶¶60, 71.

[982] [redacted] Statement, ¶71.

The review by Glavgosekspertiza could not be completed before a positive SEER opinion was released, and was in fact only completed in February 2016 – some three months after the positive SEER opinion on the EIA was issued in November 2015.[983]

678. Second, it is irrelevant whether Glavgosekspertiza, which is not an environmental authority, could undertake its review in parallel with the preparatory works. As demonstrated in the Counter-Memorial, this was typical for significant infrastructure projects even before the adoption of the Federal Law No. 221-FZ.[984] It is further inapposite because, again, the preparatory construction works commenced only *after* the EIA was completed. Ukraine's assertion serves only to distract from that fact. [redacted] remarks regarding the nature of the preparatory works[985] are thus also irrelevant.[986]

679. Third, Ukraine tries to convince the Tribunal that the SEER timing set for the Kerch Strait Bridge project was some sort of *sui generis* timetable.[987] This is not the case. As with the parallel Glavgosekspertiza review and preparatory works, a 45-day period for SEER (effectively equal to two months) was typical for such large-scale construction projects.[988]

680. Reduction of SEER timeframes and the possibility to parallelise these procedures reflect the general trend of modifying the Russian environmental legislation to make the

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[983] Counter-Memorial, ¶¶348-350.

[984] Counter-Memorial, ¶ 352, [redacted] Statement, ¶64. Parliament of the Russian Federation, Federal Law No. 93-FZ 'On the Organisation of a Meeting Involving Heads of State and Government of the Member Countries of the 'Asia-Pacific Economic Cooperation Forum' in 2012, the Development of Vladivostok as the Centre of International Cooperation in the Asia-Pacific Region, and on Amending Certain Legislative Acts of the Russian Federation', 8 May 2009, Article 5 part 2 (**RU-110**). Parliament of the Russian Federation, Federal Law No. 310-FZ 'On the Organisation and Holding of the 22nd Winter Olympic Games and the 11th Winter Paralympic Games in Sochi in 2014, the Development of Sochi as a Mountain Climate Resort, and on Amending Certain Legislative Acts of the Russian Federation', 1 December 2007, Article 14 part 12.2 (**RU-111**). Parliament of the Russian Federation, Federal Law No. 16-FZ "On the Special Economic Zone in the Kaliningrad Region and on Amending Certain Legislative Acts of the Russian Federation', 10 January 2006 (**RU-404**). Parliament of the Russian Federation, Article 19.2(2); Federal Law No. 473-FZ 'On Priority Social and Economic Development Areas in the Russian Federation', 29 December 201, Article 27(2) (**RU-405**). Parliament of the Russian Federation, Federal Law No. 108-FZ 'On the Preparation and Holding of the 2018 FIFA World Cup, the 2017 FIFA Confederations Cup in the Russian Federation, and on Amending Certain Legislative Acts of the Russian Federation', 7 June 2013, Article 29 part 2 (**RU-112**).

[985] Second [redacted] Report, ¶¶36-42.

[986] Second [redacted] Report, ¶54.

[987] Ukraine's Reply, ¶¶251-252.

[988] *See* the laws cited in Rejoinder, fn. 988.

environmental procedure more efficient. In 2016, the State Environmental Council decided to shorten the SEER period from three to two months, as in practice this procedure never took more than that.[989] Thus, the two-month period for SEER was implemented into Russian law as a general requirement in 2018.[990] In 2023, yet further changes were made, implementing the parallel SEER and design review by Glavgosekspertiza ('one window' system) as a standard, permanent and more efficient review system for all construction projects[991] that optimises the review term by simply synchronising the two previously separate (Glavgosekspertiza and SEER) review procedures.[992]

681. That Ukraine's claims are artificial is perfectly illustrated by the fact that its own environmental review system would not satisfy them. First, prior to 2017, the general SEER period under the Ukrainian law was the same – 45 days, or two months.[993] Current Ukrainian legislation also provides for a 60-day period for design documentation to receive authorisation.[994] Assuming that the competent authority would only begin its review after the completion of public consultations and completion

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[989] Transcript of the Discussion of the Draft Law No 522262-7, Session 158, 6 November 2018; Session 172, 13 December 2018, available at: https://sozd.duma.gov ru/bill/522262-7 (**RU-755**).

[990] Federal Law No. 174-FZ 'On Environmental Expert Review', 23 November 1995 (as amended on 25 December 2018) (excerpts), Article 14 part 4 (**RU-756**).

[991] Parliament of the Russian Federation, Federal Law No. 174-FZ 'On Environmental Expert Review', 23 November 1995 (as amended on 10 July 2023) (excerpts), Article 14(4) (**RU-756**); Glavgosekspertiza, *A 'one-window view': state and environmental impact assessments are now conducted simultaneously*, 20 September 2020, available at: https://gge ru/press-center/massmedia/stroygaz-ru-vid-iz-odnogo-okna-gosudarstvennaya-i-ekologicheskaya-ekspertizy-stali-provoditsya-odnov/ (**RU-757**). Parliamentary discussions of this system provide that the reduction of timeframes is only an optimisation, not a simplification of the SEER procedure, and the parallel review of documentation would not violate either public debate, citizens' rights or the rights of participants; *See* Ministry of Natural Resources and Environment, *No more than 42 days: the Russian State Duma passed amendments to the law on environmental impact assessment in the first reading*, 28 September 2023, available at https://www.mnr.gov ru/press/news/ne_bolee_42_dney_gosduma_rossii_v_pervom_chtenii_prinyala_izmeneniya_v_zakon_ob_ekologicheskoy_ekspe/index.php (**RU-758**); Transcript of the Discussion of the Draft Law No № 416487-8, Session 152, 28 September 2023, available at: http://api.duma.gov ru/api/transcript/416487-8 (**RU-759**).

[992] Glavgosekspertiza, Annual report of 2022, Simultaneous state review of design documentation and state environmental expert review under the "one window" principle, (26 June 2023), available at: https://gge.ru/upload/iblock/39b/27t6qht7on3rgjp1jrs1aagto9la2ki5/%D0%93%D0%BE%D0%B4%D0%BE%D0%B2%D0%BE%D0%B9%20%D0%BE%D1%82%D1%87%D0%B5%D1%82%202022.pdf (**RU-757**).

[993] Verkhovnaya Rada, Law No 45/95-VR, 'On Environmental Expert Review', 9 February 1995 (as amended) (excerpts), Article 38, available at: https://zakon.rada.gov.ua/laws/show/en/45/95-%D0%B2%D1%80/ed20171218?lang=uk#Text (**RU-744**).

[994] Verkhovnaya Rada, Law No 2059-VIII 'On Environmental Impact Assessment', 27 May 2017 (as amended on 7 September 2023) (excerpts), Articles 7 part 6,, 8 part 1, 9 part, available at: https://zakon rada.gov.ua/laws/show/en/2059-19/ed20230907?lang=uk#Text. (**RU-761**)

of the EIA, this reduces the period to 25 days. The most recent amendments to Ukraine's law 'On Environment Impact Assessment', which are due to come into force on 29 December 2023, envisage that the SEER will last from 40 (if the competent authority carries out SEER in parallel with public consultations) to 15 days (if these 2 stages are separate, which appears to be more plausible)[995] – meaning that this system would utterly fail to comply with Ukraine's own demands asserted in this Arbitration.

682. In any case, the reform of Ukrainian legislation in 2017 was not motivated by Ukraine's desire to fulfil its obligations under the Article 206 of the UNCLOS. The Committee on Environmental Policy of the Verkhovnaya Rada stated in its note that this draft law was aimed at the implementation of the Espoo Convention and EU Directives[996] - meaning that when this Arbitration already commenced, Ukraine found the 45-day SEER term to be perfectly in line with Article 206 of UNCLOS.

b. Conducting an EIA for the Communication Cable Was Not Necessary

683. The Parties are in disagreement as to whether an EIA was necessary with respect to the laying of the Communication Cable. As a preliminary note, the Russian Federation contends that such claims are inadmissible as new claims (***1***). Second, the Russian Federation will show that even if the Arbitral Tribunal were to admit Ukraine's new claims, the laying of the Communication Cable did not require an EIA (***2***).

(1) Ukraine's Claims on the Laying of the Communication Cable are Inadmissible as New Claims

684. As discussed above,[997] Ukraine has introduced a number of new claims in its Revised Memorial in breach of Article 13(5) of the Rules of Procedure. As the Russian Federation pointed out in its Counter-Memorial, [998] one them relates to the laying of the Communication Cable.

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[995] Verkhovnaya Rada, Law No 2059-VIII 'On Environmental Impact Assessment', 27 May 2017 (revision on 29 December 2023) (excerpts), Articles 7 part 6, 8 part1, 9 part 6, available at: https://zakon rada.gov.ua/laws/show/en/2059-19/ed20231229#Text (**RU-762**).

[996] Verkhovnaya Rada of Ukraine, Conclusion of the Committee on Environmental Policy on the draft law 'On environmental impact assessment', 18 February 2016, available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=58257&pf35401=385358 (**RU-763**).

[997] *See* Rejoinder, Chapter I(X).

[998] Counter-Memorial, ¶441.

685. In the Reply, Ukraine does not deny that such claims were absent in its Notification and original Memorial. Despite the information on the laying of the Communication Cable being in the public domain as early as April 2014[999] and therefore available to Ukraine, it decided not to include these claims into its Memorial. Now it attempts to defend its tactic of presenting belated claims by arguing that these claims are not 'new' and do not 'transform the subject-matter of the dispute'.[1000] This is abusive and wrong, and Ukraine's claims are inadmissible for the following reasons.

686. As explained above with reference to well-known authorities, claims based on facts known to Ukraine at the moment of the filing of the Memorial but not included therein, are outside the permissible scope of the amendment of the case.

687. The situation with Ukraine's claim concerning the laying of the Communication Cable is very similar to that considered by the ICJ in *Diallo,* cited above. While Ukraine alleges the same legal basis (Article 206) for its claims concerning the Communication Cable, this is essentially an entirely new case, brought belatedly. It entails a completely separate legal analysis (the Russian Federation's position is that, as opposed to other projects, an EIA is not necessary with respect to fibre optic cables), and an entirely different set of facts to be analysed.

688. While Ukraine tries to argue that this claim is similar to or arises directly out of what it initially claimed under Article 206, there is simply no basis for such an assertion. The claim is completely new and expands the subject-matter of the dispute originally brought by Ukraine. Outside of the (non-existent) legal basis in Article 206, Ukraine does not demonstrate that the claim concerning the laying of the Communication Cable is 'implicit in' or 'arises directly out of' any of its original claims. Moreover, like in *Diallo*, nothing prevented Ukraine from raising 'concerns' regarding the laying of the Communication Cable – a public fact – in the Memorial, yet it did not. Thus, Ukraine tries to rectify its own omission by circumventing the Arbitral Tribunal's instructions and introducing new claims.

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[999] Rostelecom Launches Fibre Link to Crimea, Telecompaper (25 April 2014) (**UA-630**); RT, *Russia-Crimea underwater telecom cable ready, as Ukraine crisis intensifies* (14 April 2014), available at: https://www.rt.com/business/russia-crimea-rostelcom-telecom-372/ (**RU-746**). Notably, the laying of the cable was an urgent matter, given the threats from Ukraine's side to cut off Internet access from Ukraine.

[1000] Ukraine's Reply, ¶226.

689. Ukraine's approach is untenable and unsupported. Were it to be accepted, this would enable all applicant States to uncontrollably expand their case throughout the proceedings. This would run contrary to the fair administration of justice and put the Russian Federation in this case and future respondent States generally in a disadvantageous position, forcing them to defend against an ever-growing list of accusations. Accordingly, Ukraine's claims concerning the laying of the Communication Cable are 'new claims' and should not be admitted.

(2) In Any Event, There Was No Obligation to Conduct an Environmental Impact Assessment Before the Laying of the Communication Cable

690. Should the Arbitral Tribunal admit Ukraine's new claims concerning the laying of the Communication Cable, there is still no merit to them. As the Russian Federation has shown, there were no reasonable grounds to believe that the laying of the Communication Cable may cause substantial pollution of or significant harmful changes to the marine environment, and such EIA is not required under Russia's domestic legislation.[1001]

691. The starting point is the ordinary meaning of Article 206. As discussed above, it vests the State with substantial discretion in determining the standards applicable for conducting an EIA within its jurisdiction. Ukraine's appeal to the word 'may' used in Article 206 as allegedly setting 'a low threshold of foreseeable risk'[1002] is inapposite. First, it is plain on the face of Article 206 that it concerns not every hypothetical risk for the environment but only those risks that 'may cause *substantial* pollution of or *significant* and harmful changes to the marine environment' (*emphasis* added). In this respect, scholarly literature stresses that 'the international EIA obligation is confined to instances of potentially significant harm'.[1003]

692. Second, that Article 206 purports to set a threshold of foreseeability further demonstrates that not all activities would call for an EIA. Where it is clear and well-accepted, as it is here, that no substantial pollution (or none at all) is to be expected, then there is no 'foreseeable risk' to be assessed in the first place.

[1001] Counter-Memorial, ¶¶443-447.

[1002] Ukraine's Reply, ¶220.

[1003] E. Blitza, *Article 204. Monitoring of the risks or effects of pollution* in A. Proelss (ed.), PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT IN UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Nomos Verlagsgesellschaft, 2017), p. 1367 (**RUL-200**).

693. Finally, Ukraine's attempt at expansive reading of Article 206 is not only aimed at gutting it of the well-recognised limitations as to significance of harm and its foreseeability identified above,[1004] but it also presumes that even the off chance of a most miniscule impact would call for an EIA,[1005] effectively erasing any element of reasonable discretion embodied by the provision.

694. In any case, as the Russian Federation has already established that submarine cables in general are believed to have very limited environmental impacts.[1006] [redacted] confirms that, when it comes to submarine fibre optic cables specifically, there is a widely accepted and substantiated volume of scientific opinion that the laying and operation of such cables does not generally carry any substantial harm to the environment.[1007] Just to name a few examples, in addition to the United Nations sources already provided:[1008]

a. According to a report on submarine cables under the United Nations Environment Programme, 'the weight of evidence shows that the environmental impact of fibre-optic cables is neutral to minor.'[1009]

b. The 2016 UN World Ocean Assessment also noted that 'submarine cables have very limited environmental impacts, since they are very slim (typically 25 – 40 millimetres wide in the deep sea), and since their routes are usually chosen to avoid, where possible, areas that may cause problems from bottom trawling and ships' anchors'.[1010]

[1004] See also A. Boyle, C. Redgwell (eds), BIRNIE, BOYLE & REDGWELL'S INTERNATIONAL LAW AND THE ENVIRONMENT (4th ed, OUP, 2021) p. 195 (**RUL-105**).

[1005] See e.g. Ukraine's Reply, ¶333.

[1006] *See* Rejoinder, ¶652.

[1007] Second [redacted] Report, Chapter III(E)(iii)(a).

[1008] United Nations General Assembly, Oceans and the Law of the Sea, Report of the Secretary-General, 30 March 2015, U.N. Doc. A/70/74, p. 17, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/093/76/PDF/N1509376.pdf?OpenElement (**RU-746**); United Nations Environment Programme, The First Global Integrated Marine Assessment: World Ocean Assessment I, 2016, p. 6, available at: https://www.unep.org/resources/report/first-global-integrated-marine-assessment-world-ocean-assessment-i (**RU-747**).

[1009] I. Carter, D. Burnet et al., Submarine Cables and the Ocean Connecting the World, *UNEP-WCMC Biodiversity Series*, 2009, Issue 31, No.31, 2009, p. 54 (**RU-479**). [*Emphasis* added] *See* International Cable Protection Committee, Submarine Cables and BBNJ, 29 August 2016, available at: https://www.un.org/depts/los/biodiversity/prepcom_files/ICC_Submarine_Cables_&_BBNJ_August_2016.pdf: 'The UNEP-WCMC Report is *based on a review of 191 cited peer reviewed scientific, academic, industry and government studies, and vetted by 18 external reviewers*' (**RU-481**) [*Emphasis* added]

[1010] The First Global Integrated Marine Assessment: World Ocean Assessment I, 2016, p. 6, available at: https://www.unep.org/resources/report/first-global-integrated-marine-assessment-world-ocean-assessment-i:

c. One of the authorities on the subject provides: '[a] substantial peer-reviewed literature shows conclusively that submarine telecommunication cables have nil to minimal impact on the marine benthic environment.'[1011]

d. The European Investment Bank, when specifically discussing the planned laying of a submarine cable system in the Black Sea (from the EU to Armenia and Georgia), states that: 'in general, the deployment of telecommunication infrastructures have limited environmental effects, apart from minor disturbances during construction, which can be properly mitigated by applying industry-standard measures'.[1012]

695. Ukraine's only response has been that one of the Russian Federation's sources represents 'self-serving views of the industry stakeholders', referring to the International Cable Protection Committee ('ICPC').[1013] However, Ukraine fails to substantively disprove that evidence and show that the laying of fibre optic cables carries substantial environmental harm. In any case, Ukraine's contention has no bearing on the other numerous other sources exhibited by the Russian Federation. It is hard to imagine, for instance, that the UN Secretary General could have any stake in this matter.

696. In his second report, [redacted] explains why the laying of communication cables is so non-intrusive:

> The size of communication cables typically ranges from 17-21 mm to 50 mm in diameter – no thicker than a garden hose. *Thus, the physical footprint of such a cable is very slim.* It is either laid directly on the seabed (in deeper waters, more than 1,500 m) or protected by way of its burying under the seabed (for shallower waters), either by plough or by water jet. This process disturbs the seabed along a narrow corridor of 2 – 8 m wide. Disturbed seabed recovers quickly, 'with *no long lasting impact on the biota'*. [*Emphasis* added].

697. Ukraine's reference to 'nearfield effects on benthos and other marine organisms' suggested by [redacted] is also misplaced.[1014] As [redacted] explains:

'Submarine cables have very limited environmental impacts, since they are very slim (typically 25 – 40 millimetres wide in the deep sea)… ' (**RU-747**).

[1011] D. Burnett, *Coastal State Encroachment on High Seas Submarine Cable Freedoms* in M.Kotzur, N. Matz-Lück et al. (eds.) SUSTAINABLE OCEAN RESOURCE GOVERNANCE: DEEP SEA MINING, MARINE ENERGY, AND SUBMARINE CABLES (Brill | Nijhoff, 2018), p. 269 (**RUL-201**).

[1012] European Investment Bank, Black Sea Digital Connectivity, 14 March 2023, available at: https://www.eib.org/en/projects/pipelines/all/20210614 (**RU-767**).

[1013] Ukraine's Reply, ¶223.

[1014] Ukraine's Reply, ¶221; First [redacted] Report, ¶153.

> The keyword in this statement is "*nearfield*". This term conventionally refers to distances that are comparable to the linear dimensions of the obstacle, i.e., the possible impact on hydrodynamics and erosion of the sea floor is restricted to the distance of centimetres to first tens of centimetres from the underwater cable. The nearfield impact from the laying of a communication cable, with its very slim profile, as discussed above, could only be highly confined and localised, and would have little or no significance at the ecosystem level.[1015]

698. As regards the alleged risk of turbidity asserted by [redacted],[1016] [redacted] clarifies that, due to the cable's slim profile, 'the *laying* of the Communication Cable could only have caused insignificant and brief turbidity in its immediate vicinity' [*emphasis* added] that would not be noticeable against the naturally high turbidity in the Kerch Strait and could not have affected its well-adjusted resident species.[1017]

699. At the same time, the *operation* of such cables after installation is virtually risk-free. As [redacted] elaborates:

> While … submarine power cables may generate a magnetic field or emit certain amounts of heat, fibre optic communication cables do not produce such impacts as they do not carry any current, but rather transmit data through fast pulses of light.'[1018]
>
> Communication cables are *encased in marine-grade chemically inert polyethylene*, and thus *do not emit any harmful chemicals … [W]hen a communication cable is damaged, the environment suffers no harm, since there is no spill or other release of hazardous materials*[1019] [*Emphasis* added].

700. Ukraine and its experts do not offer a comprehensive denial of this lack of impact, or any other reasonable grounds why substantial pollution should have been expected. They tender no scientific evidence to support their sweeping assertions. [redacted] evidence also remains unsupported by scientific research.

701. Tellingly, while [redacted] asserts that '[s]ubmarine fiber optic cable projects in general have the potential to cause a number of environmental risks' and list such alleged risks,[1020] in his second report he does not go as far as to characterise such risks as capable

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[1015] Second [redacted] Report, ¶82.

[1016] Second [redacted] Report, ¶71.

[1017] Second [redacted] Report, ¶93.

[1018] Second [redacted] Report, ¶78.

[1019] Second [redacted] Report, ¶79.

[1020] Second [redacted] Report, ¶9.

of causing any 'substantial pollution' or 'significant and harmful changes' to the marine environment, as envisaged by Article 206.

702. Both Ukraine and [redacted] substantially rest their position on the suggestion that 'it is standard international practice, reflected in well-established international standards, that an EIA is required for a submarine fibre optic cable.'[1021] This suggestion is not only false, but asserted with almost zero substantiation.

703. [redacted] offers just one example of what he calls 'multiple real-world assessments,' an EIA of a submarine fibre optic cable in the Caribbean region[1022] that considered such measures as route selection and hand-laying to avoid coral reefs, impacts on turtle nesting, etc.[1023] Not only is this single example of [redacted] isolated, it is, as [redacted] explains, 'of only remote, if any, relevance… because the conditions of the Caribbean Sea, where the relevant cable was laid, and the Kerch Strait are quite different'.[1024] In the Caribbean Sea, coral reefs constitute one of the various particularly vulnerable and already endangered residing species. While the Caribbean is among the 'very high impact regions' in terms of vulnerability to human activity, the Azov-Black Sea Basin is nowhere near that, as [redacted] notes.[1025]

704. [redacted] explains that, in reality, the Kerch Strait is a 'resilient ecosystem'.[1026] It is also 'an inarguably much more versatile environment' as it does not contain any coral reefs, sea turtles or other comparable fragile species and organisms, involves much less species in general, and has a more rigid and resistant seabed, providing for much less pronounced potential impacts.[1027] Thus, even if an EIA may have potentially been warranted in the Caribbean region, there was no compelling ground for conducting one in the present case.

[1021] Ukraine's Reply, ¶221; Second [redacted] Report, ¶10.

[1022] Second [redacted] Report, ¶12, referring to Digicel Group, Environmental and Social Impact Assessment (ESIA) for the Caribbean Regional Communications Infrastructure Program (CARCIP), Installation of a Subsea Fiber Optic Cable Between St. Vincent and The Grenadines and Grenada, April 2019, (**UA-879**).

[1023] Second [redacted] Report, ¶12.

[1024] Second [redacted] Report, ¶88.

[1025] Second [redacted] Report, ¶¶88-90, 278.

[1026] Second [redacted] Report, Chapter IV(L); First [redacted] Report, ¶53.

[1027] Second [redacted] Report, ¶88-90, 278.

705. As to the 'well-established international standards',[1028] [redacted] tellingly fails to demonstrate anything of this sort, only referring to the 2007 International Financial Corporation's guidelines. These were issued under, and exclusively concern, as he himself admits, projects conducted with the involvement of the World Bank Group organisations.[1029] As [redacted] notes,[1030] this cannot amount to anything resembling a 'widely-accepted requirement',[1031] not to mention any uniform standard or practice. [redacted] thus simply repeats his trait of posing individual documents or guidelines of doubtful importance as some widely-accepted international standards.

706. Strikingly, it appears that the actual reason why an EIA was conducted in the case above was due to the involvement of the World Bank Group.[1032] As noted in [redacted] own source, neither Saint Vincent and the Grenadines nor Grenada 'list cable laying or associated developments related to such activity as requiring an EIA.'[1033] In fact, the said EIA itself describes in detail that the assessed project was deemed to have only minor environmental impacts.[1034]

707. In its bid to come up with anything to rebut the Russian Federation's case, Ukraine asserts that '[w]hile 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.' [*Emphasis* added].[1035] This statement is misleading. First, the OSPAR Commission's guidelines on

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[1028] Second [redacted] Report, ¶8.

[1029] Second [redacted] Report, ¶10, fn. 6: 'The EHS Guidelines apply where "one or more members of the World Bank Group are involved in a project'.

[1030] Second [redacted] Report, ¶91.

[1031] Second [redacted] Report, ¶8.

[1032] Digicel Group, Environmental and Social Impact Assessment (ESIA) for the Caribbean Regional Communications Infrastructure Program (CARCIP), Installation of a Subsea Fiber Optic Cable Between St. Vincent and The Grenadines and Grenada, April 2019, p. 4 (UA-879).

[1033] Digicel Group, Environmental and Social Impact Assessment (ESIA) for the Caribbean Regional Communications Infrastructure Program (CARCIP), Installation of a Subsea Fiber Optic Cable Between St. Vincent and The Grenadines and Grenada, April 2019, p. 15 (UA-879).

[1034] Digicel Group, Environmental and Social Impact Assessment (ESIA) for the Caribbean Regional Communications Infrastructure Program (CARCIP), Installation of a Subsea Fiber Optic Cable Between St. Vincent and The Grenadines and Grenada, April 2019, p. 1: 'Because of the minor disturbance caused by cable laying, no adverse effects to the physical resources of the project area of influence (PAI) are expected' (UA-879).

[1035] Ukraine's Reply, ¶222.

cable laying[1036] do not 'unequivocally require' anything as they merely offer industry *recommendations* – even if they may be useful as a source of environmental information.[1037] Furthermore, the guidelines have no universal applicability as they were designed for a particular water area under the OSPAR Convention, a regional instrument.[1038] Nothing prevents its 16 States parties thereto[1039] from establishing higher and stricter standards or recommendations for themselves than what is generally followed. What Ukraine is unable to respond to, is that pursuant to said guidelines, undersea cables' impact on the environment is insignificant. Therefore, even if parties to the OSPAR Convention decided to establish a higher standard for themselves, this does not alter the UNCLOS provisions enshrined in Article 206.

708. It is also clear that the text cited by Ukraine was aimed first and foremost at power cables, as evidenced by the source's further reliance on impacts that communication cables simply do not produce – such as heat increases and occurrence of electromagnetic fields.[1040] In light of this, it is telling the Guidelines specifically emphasise the need to distinguish communication cables for the purposes of EIA, as the Russian Federation has pointed out.[1041] Ukraine's reference to such risks as chemical contamination, including in operational conditions or due to accidents,[1042] serves only to distract. As [redacted] explains, such risks are not associated with undersea fibre optic cables' operation.[1043]

[1036] OSPAR Commission, Guidelines on Best Environmental Practice (BEP) in Cable Laying and Operation, 2012, pp. 4-6, available at: https://www.gc.noaa.gov/documents/2017/12-02e_agreement_cables_guidelines.pdf (**RUL-109**).

[1037] *See* Rejoinder, ¶651.

[1038] As Ukraine itself concurs, 'OSPAR is the mechanism by which 15 Governments and the European Union cooperate to protect the marine environment of the North-East Atlantic'. *See* Ukraine's Replay, ¶222, ft. 492.

[1039] Namely: Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland. See United Nations Treaty Collection, Convention for the protection of the marine environment of the North-East Atlantic, 22 September 1992, available at: https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280069bb5&clang=_en (**RU-806**).

[1040] OSPAR Commission, *Guidelines on Best Environmental Practice (BEP) in Cable Laying and Operation*, 2012, p. 15-16 (RUL-109).

[1041] Counter Memorial, ¶445, fn. 691 to ¶44.

[1042] Ukraine's Reply, ¶222.

[1043] Second [redacted] Report, Chapter III(E)(iii)(a).

709. In any case, Ukraine's and [redacted] paltry evidence cannot undermine the Russian Federation's position that EIA is not principally, or even typically required for the laying of fibre optic cables. This position is supported by a plethora of State practice: across the globe, such cables are routinely laid without an EIA due to their minimal expected environmental impact. In his analysis, [redacted] notes just some examples:[1044]

a. In 2020, Guyana's Environment Protection Authority pronounced that ExxonMobil's laying of a fibre-optic cable off the country's coast would not require an EIA, as it was not expected to have any significant environmental impact; [1045]

b. The Shanghai authorities expressly stated in a Notice that projects involving 'laying of optical fiber' 'do not need to go through relevant procedures of construction projects EIA'; [1046]

c. Estonia's environmental and regulatory authorities pronounced that the laying of a fibre optic submarine cable system in the Baltic Sea would not require an EIA since it would only have 'minimal impact on the environment'.[1047] The decision explicitly referred e.g. to all the factors outlined above,[1048] including the fact that it 'would not generate electromagnetic fields, heat, sound, vibration or any pollution, nor does it contain lead or other substances that may impact the environment.'[1049]

d. The Chilean Environmental Assessment Service in its Resolution concerning the 'Fibra Óptica Prat' project concluded that the laying of the fibre optic cable is not

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[1044] Second [redacted] Report, ¶86.

[1045] Guyana Standard, No EIA required for Exxon's fibre Optic Cable Project –EPA, 30 November 2020, available at: https://www.guyanastandard.com/2020/11/30/no-eia-required-for-exxons-fibre-optic-cable-project-epa/ (**RU-768**).

[1046] Shanghai Municipal Bureau of Ecology and Environment ,Notice on the Categories of Construction Projects not included in the EIA Management System, available at: http://web.archive.org/web/20210225061659/https://fgw.sh.gov.cn/wcm files/upload/CMSshfgw/201905/20190515160010973.pdf (**RU-768**).

[1047] Consumer Protection and Technical Regulatory Authority of the Republic of Estonia, Commencement of the Procedure for the Issue of a Superficies Licence, 15 March 2019, available at: https://www.ymparisto fi/sites/default/files/documents/Liite_1_Viron_YVA_p%C3%A4%C3%A4t%C3%B6s_muu_otsus_16-7_18-1251-033_ENG%20%281%29.pdf) (**RU-770**)

[1048] *See* Rejoinder, ¶712.

[1049] Consumer Protection and Technical Regulatory Authority of the Republic of Estonia, Commencement of the Procedure for the Issue of a Superficies Licence, 15 March 2019, available at: https://www.ymparisto fi/sites/default/files/documents/Liite_1_Viron_YVA_p%C3%A4%C3%A4t%C3%B6s_muu_otsus_16-7_18-1251-033_ENG%20%281%29.pdf) (**RU-770**).

subject to the requirements of the EIA. The cable runs on the seabed outside the territorial sea.[1050]

e. Spain's State Secretary for Climate Change, analysing the planned submarine fibre optic cable 'Europe India Gateway' concluded that it does not require an EIA since no considerable environmental impact is to be expected.[1051]

f. The United States Federal Communications Commission decided that 'the construction of new submarine cable systems, individually and cumulatively, will not have a significant effect on the environment and therefore should be expressly excluded from… environmental processing requirements'. The proposal did not meet any opposition[1052] Moreover, in 2001, the Federal Communications Commission upheld that approach once again.[1053]

710. In fact, many jurisdictions exclude fibre optic cable laying from their lists of activities requiring EIA. For example, the European Union's EIA directive does not include the laying of the fibre optic cables in its extensive list of activities requiring an EIA.[1054] As regards other jurisdictions, apart from other examples already referred to (including the

[1050] Environmental Assessment Service of the Republic of Chilie, Executive Direction, Resolution on the Relevance of the Consultation on the entry into the Environmental Impact Assessment of the "Fibra Óptica Prat" Project, 22 May 2020, available at: https://pertinencia.sea.gob.cl/sea-pertinence-web/services/public/document/C3E937D4-2929-460E-9E82-AED05EDB0621 (**RU-771**).

[1051] State Secretary of the Kingdom of Spain for Climate Change, Resolution 'On the Environmental Impact Assessment of the Submarine Cable 'Europe India Gateway Fibre Optic', Segment 2 (Spanish waters), 20 January 2010, (excerpts) (**RU-772**).

[1052] Federal Communications Commission, 1998 Biennial Regulatory Review – Review of International Common Carrier Regulations, IB Docket No. 98-118, Report and Order, 18 March 1999, ¶68, available at: https://transition.fcc.gov/Bureaus/International/Orders/1999/fcc99051.pdf (**RU-773**).

[1053] Federal Communications Commission, Order of the Federal Communications Commission FCC 01-319, 5 December 2001, available at: https://docs fcc.gov/public/attachments/FCC-01-319A1.pdf (**RU-774**).

[1054] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) (Text with EEA relevance), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02011L0092-20140515 (**RU-133**).

United States,[1055] Chile[1056], Estonia[1057], Saint Vincent and the Grenadines and Grenada[1058]), an EIA of fibre optic cables is not required, or not principally required, in the United Kingdom,[1059] Norway,[1060] the Netherlands,[1061] Ireland,[1062] Spain,[1063]

[1055] Title 47 of the Code of Federal Regulations of the United States of America, 22 April 1986, §§ 1.1306, available at: https://www.govinfo.gov/content/pkg/CFR-2021-title47-vol1/pdf/CFR-2021-title47-vol1-sec1-1306.pdf. (**RU-775**) According to Note 1, "[t]he provisions of § 1.1307(a) and (b) of this part do not encompass the construction of new submarine cable systems". At the same time, § 1.1307 establishes actions, that require EIA.

[1056] National Congress of the Republic of Chilie, Law No 19,300 'On the General Basis of the Environment', 1 March 1994, Article 10, available at https://www.bcn.cl/leychile/navegar?idNorma=30667 (**RU-776**) Article 10, which establishes projects and activities that are subject to EIA, does not include submarine fiber optic cables. The Environmental Assessment Service confirmed that such cables are not covered by Article 10

[1057] State Assembly of Estonia, Environmental Impact Assessment and Environmental Management System Act, 22 February 2005, Section 6, available at: https://www riigiteataja.ee/en/eli/ee/528122016015/consolide/current. Chapter 2, Subchapter 1, §6, which establishes projects and activities that are subject to EIA, does not include submarine fiber optic cables in this list.

[1058] *See* Rejoinder, ¶710.

[1059] Parliament of the United Kingdom, The Marine Works (Environmental Impact Assessment) Regulations No 1518, 25 May 2007, available at: https://www.legislation.gov.uk/uksi/2007/1518/contents (**RU-778**). Schedules A1 and A2 I these Regulations provide list of activities, which require or may EIA. They do not include submarine fiber optic cables.

[1060] Government of the Kingdom of Norway, Regulations on Impact Assessments No 854, 21 June 2017, available at: https://www regjeringen no/contentassets/0b68c8007fd640ca8af67df07ec5b03d/annex-i.pdf and https://www.regjeringen.no/contentassets/0b68c8007fd640ca8af67df07ec5b03d/annex-ii.pdf (**RU-779**). Annexes I and II of this Regulations provide list of activities, which require or may require EIA. They do not include submarine fiber optic cables.

[1061] King of the Netherlands, Regulation on Environment Impact Assessment of the Kingdom of the Netherlands, 18 December 2020, available at: https://wetten.overheid nl/BWBR0006788/2020-12-18 (**RU-780**). Annex to this Regulation establishes activities, which are subject to EIA. It does not include submarine fiber optic cables.

[1062] Parliament of the Republic of Ireland, Planning and Development Act No 30, 28 August 2000, available at: https://www.irishstatutebook.ie/eli/2000/act/30/enacted/en/print (**RU-781**). According to Articles 172 and 176, the list of activities, which may have significant effects on the environment and, accordingly, are subject to EIA, is established by corresponding Regulation. *See* S.I. No. 600 Planning and Development Regulations of the Republic of Ireland Si No 600, 2001, available at: https://www.irishstatutebook.ie/eli/2001/si/600/made/en/print#. These activities are contained in schedule 5, which does not mention submarine fiber optic cables.

[1063] Parliament of the Kingdom of Spain, Law No. 21/2013 'On Environment impact assessment', 9 December 2013, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2013-12913#ddunica (**RU-782**). Annexes I and II of this Regulations list the activities that require EIA. They do not include submarine fiber optic cable.

France, [1064] Turkiye, [1065] Colombia, [1066] Venezuela, [1067] Paraguay, [1068] Georgia, [1069] Romania,[1070] Albania,[1071] Bulgaria,[1072] Croatia,[1073] Lithuania.[1074] Of the aforementioned States only three (the United States, Colombia and Türkiye) are non-parties to UNCLOS.

[1064] Parliemant of the Republic of France, Environmental Code, 18 September 2000, available at: https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006074220/LEGISCTA000006108640/2023-11-21/?anchor=LEGIARTI000048388448#LEGIARTI000048388448/ (**RU-783**). *See* Annex to Article R122-2 to Annex to Section 1 of Chapter III of Title IX of Book V). Submarine fiber optic cables are excluded from EIA.

[1065] Regulation on Environmental Impact Assessment of the Republic of Türkiye, Official Gazette No. 31907, 29 July 2022, available at: https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=39647&MevzuatTur=7&MevzuatTertip=5 (**RU-784**) Annexes I and II of this Regulations list the activities that require or may require EIA. They do not include submarine fiber optic cables.

[1066] Ministry of Environment and Sustainable Development, Decree of the Republic of Colombia No. 1076 'On Environment and Sustainable Development Sector', 26 May 2015, available at: https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=78153 (**RU-785**). Projects that require an EIA are listed in Articles 2.2.2.3.2.2 and 2.2.2.3.2.3. The lists do not include submarine fiber optic cables.

[1067] President of the Bolivarian Republic of Venezuela 'On Rules on Environmental Assessment of Activities Likely to Degrade the Environment' Decree No. 1.257, 13 March 1996, available at: https://faolex fao.org/docs/pdf/ven17517.pdf (**RU-786**) Article 6, which lays down the activities covered by EIA, does not mention submarine fiber optic cables.

[1068] President of the Republic of Paraguay, Ministry of Agriculture and Livestock, Decree No. 954 On 'Environmental Impact Assessment',18 December 2013 (**RU-787**). Article 2, which sets out the activities covered by EIA, does not mention submarine fiber optic cables.

[1069] Parliament of Georgia, Law No. 890-IIს, Environmental Assessment Code, 21 June 2017, available at: https://matsne.gov.ge/en/document/view/3691981?publication=10 (**RU-788**) Annexes I and II of this Code provide list of activities, which require or may require EIA. The list does not include submarine fiber optic cables.

[1070] Parliament of Romania, Law No. 292/2018 'On the Assessment of Impact of Certain Public and Private Projects on Environment', 3 December 2018, available at: https://legislatie.just ro/Public/DetaliiDocumentAfis/208590 (**RU-789**). Annexes I and II of this Law list activities that require or may require EIA. They do not include submarine fiber optic cables.

[1071] Parliament of the Republic of Albania, No. 10 440 'On environmental Impact Assessment', 7 July 2011, available at: https://turizmi.gov.al/wp-content/uploads/2018/09/ligj-10440-2011-per-vleresimin-e-ndikimit-ne-mjedis.pdf (**RU-790**). Annexes I and II of this Law list the activities that require or may require EIA. They do not include submarine fiber optic cables.

[1072] National Assembly of the Republic of Bulgaria, Environment Protection Act , 25 September 2002, available at: https://www.moew.government.bg/en/environmental-protection-act-7628/ (**RU-791**). Annexes I and II of this Act list the activities that require or may require EIA. They do not include submarine fiber optic cables.

[1073] Regulation amending the Regulation on environmental impact assessment of the Republic of Croatia, 11 January 2017, available at: https://narodne-novine.nn hr/clanci/sluzbeni/2017_01_3_118 html (**RU-792**). Annexes I, II and III of this Act provide a list of activities that require EIA, or may require it upon a preliminary review. They do not include submarine fiber optic cables.

[1074] Seimas of the Republic of Lithuania, Law No. I-1495 'On Environment Impact Assessment of the Proposed Economic Activities', 16 August 1996, available at: https://e-seimasx.lrs.lt/portal/legalAct/lt/TAD/TAIS.30545/asr (**RU-793**). Annexes I and II of this Act list the activities that require or may require EIA. They do not include submarine fiber optic cables.

711. Thus, Ukraine's[1075] and [redacted][1076] assertion that conducting EIAs for the laying of submarine fibre optic cables represents 'standard international practice' has no merit and is simply wrong. If there were any 'standard international practice', it would be to *not* conduct an EIA before laying submarine fibre optic cables.

712. Curiously, Ukraine also tries to downplay the Russian Federation's evidence by stating that '[t]he relevant question is whether an EIA was required in this case, considering the circumstances of the particular environment at issue'.[1077] This contention is an unsatisfactory attempt to walk both sides of the street. First, it contradicts Ukraine's position regarding the need for an 'objective assessment', which it seems to have abandoned in this particular instance, vouching for a case-specific approach instead. Second, apart from the fact that the Russian Federation's examples are much more voluminous in scope and quantity, Ukraine's paltry evidence of an EIA conducted in a vastly different locale is inapposite to its sudden case-specific approach.

713. [redacted] further explains[1078] that no impact on the Azov and Black Sea environment from any of the Infrastructure Projects (including the Communication Cable) has ever materialised, and Ukraine and its experts have provided no evidence in this respect.

714. [redacted] also highlights the glaring inconsistency of Ukraine's current position with its own environmental practice. He notes a series of recent well-publicised dredging works in various Ukrainian ports that reportedly involved replacement of millions of cubic meters of soil from the Black Sea and the Sea of Azov seabed. These projects undoubtedly posed an incomparably greater environmental impact yet there seems to be no evidence that these projects were ever subject to EIA – even in Ukraine's specially designated EIA register.[1079] In fact, as previously noted,[1080] one such project – construction of a navigation approach in the Danube river channel – was the

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[1075] Ukraine's Reply, ¶222.

[1076] Second [redacted] Report, ¶10.

[1077] Ukraine's Reply, ¶224.

[1078] Second [redacted] Report, ¶

[1079] Ministry of Environmental Protection and Natural Resources of Ukraine, Environment Impact Assessment Registry, available at: https://eia.menr.gov.ua/ (**RU-794**).

[1080] *See* Rejoinder, ¶73.

subject of an international scandal due to its undertaking without any EIA in violation of Ukraine's obligations under the Espoo Convention, as recognised by its other members.[1081]

715. To summarise, the Russian Federation's approach is based on overwhelming evidence that shows both the negligible impact that fibre optic cables have on the environment, if any, and ample State practice of laying fibre optic cables without conducting an EIA. In contrast, Ukraine's own evidence is limited to an individual guideline document of limited applicability, and a single connected example of a cable project in the Caribbean Sea that has no relevance to the issue at hand. Thus, contrary to Ukraine's assertions, there is no consistent practice in favour of conducting EIAs before laying fibre optic cables, and it is generally understood that the laying and operation of such cables does not involve any considerable environmental impact, which Ukraine failed to disprove.

iii. Ukraine's Claims Concerning Mitigation of Environmental Risks and Certain Specific Deficiencies of the Russian Federation's EIAs are Unmeritorious

716. Ukraine's case on mitigation rests entirely on hypotheses that never came to reality, and is therefore meritless. As the Russian Federation explained in the Counter-Memorial, the EIA it conducted was thorough and adequate. It was carried out in full compliance with Russian law and satisfies the Russian Federation's obligations under Article 206 of UNCLOS.[1082]

717. Ukraine's environmental experts consistently found their far-reaching claims on dubious 'well-studied risks',[1083] 'well-established facts',[1084] and 'well-documented' notions[1085] – as if those were exempt from the need for substantive corroboration. Much

[1081] Environment, Law, People, War is Not the Reason to Violate the Espoo Convention and Destroy the Environment (6 April 2023), available at: http://epl.org.ua/announces/vijna-ne-pryvid-porushuvaty-konventsiyu-espo-ta-nyshhyty-dovkillya/ (RU-584).

[1082] Counter-Memorial, Chapter 6(I).

[1083] Second [redacted] Report, ¶141.

[1084] Second [redacted] Report, ¶31.

[1085] Second [redacted] Report, ¶¶3, 12.

of these hypothetical risks have proved to be far removed from the most basic knowledge about the Kerch Strait.[1086]

718. In contrast, Ukraine's response to the Russian Federation's scientific[1087] and witness[1088] evidence came down to plain denial, that is, denial of the years of studies and monitoring conducted by the Russian Federation's leading scientific institutions as well as substantial efforts aimed at ensuring minimal or no harm to the marine environment.[1089] Meanwhile, Ukraine's experts tend not to rely on any specialised and systemic research, or any scientific literature to back their far-reaching claims.[1090] This is in fact, in [redacted] words, 'the opposite of a sound and objective scientific approach'.[1091]

719. For many of its purported environmental risks, Ukraine relies on a single source – an article by Ukraine's Institute of Water Problems and Land Reclamation.[1092] The article sets out, almost word for word, the main environmental points raised by Ukraine, [redacted] and [redacted], relating to geological conditions, water exchange, temperatures and ice formation. Most perplexingly, it deals with the alleged streamlining of the Russian Federation's environmental law,[1093] and even some issues raised in the context of maritime navigation – aspects that are clearly entirely out of the ambit of environmental studies.[1094] Essentially, much of Ukraine's Revised Memorial is condensed within this single article. It is to be inferred that the article was likely put together specifically for the purposes of this Arbitration.[1095] Just as Ukraine's position in

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[1086] [redacted] names in particular 'the alleged regular and substantive occurrence of ice in the Strait, the "amplification" of negative impacts across the Azov-Black Sea Basin, or the suggestion that the Kerch Bridge may desalinate the Sea of Azov that has actually been subject to increasing salinisation in the passing decades.' See Second [redacted] Report, ¶15.

[1087] First [redacted] Report; First [redacted] Report.

[1088] [redacted] Statement.

[1089] First [redacted] Report, ¶¶10-17; First [redacted] Report, ¶¶ 7-14.

[1090] Second [redacted] Report, ¶¶14.

[1091] Second [redacted] Report, ¶¶14.

[1092] *See* Ukraine's Revised Memorial, fn. 305 to ¶153 and fn. 455 to ¶213, citing M. Ivanovych, M. Vasylovych, About Some Environmental Consequences of Kerch Strait Bridge Construction, *Hydrology*, 2018, Vol. 6, No. 1, pp. 6-8 (**UA-220**), which is a copy of the same publication.

[1093] *Ibid*, p. 3.

[1094] *Ibid*, p. 1.

[1095] The article was submitted on 29 November 2017 and published on 16 January 2018 – just one month before the submission of Ukraine's original Memorial on 19 February 2018. The article's abstract explicitly states that

these proceedings, the article is largely dominated by 'what ifs' and not any concrete data, so its evidentiary value is in any event negligible, even if it were treated as an independent piece of scientific evidence, which it simply cannot be.

720. Other evidentiary strategies deployed by Ukraine include misrepresenting the testimony of the Russian Federation's experts;[1096] unfounded assaults on the credibility of its witnesses;[1097] misquotations of sources[1098] or references to facts in a wrong context or entirely out of context;[1099] and making fallacious claims by ignoring the evidence already supplied.[1100] These attempts are there only to distract and should not be tolerated.

721. Not much is there behind this façade of Ukraine's opportunistic allegations. Several years[1101] have passed since the construction of the Kerch Bridge, and seven years have passed since the initiation of these proceedings, and yet Ukraine and its experts still cannot identify a single environmental risk that has materialised. As [redacted] notes, had any of the dire environmental consequences feared by Ukraine and its experts materialised, this would have become evident and incapable of concealment.[1102]

722. [redacted], who has personally studied water pollution in the Kerch Strait after the construction of the Kerch Bridge, explains that there has been no increase of pollution, nor even signs of any other hypothetical harm asserted by Ukraine and its experts.[1103] Such are the unappealable results of contemporaneous monitoring and research. He states that the functioning of the Kerch Strait ecosystem can be described as 'business as

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'An expert evaluation was conducted [for, e.g.] the gathering of evidence upon violations of Ukrainian and international legislation for further consideration in international courts.' See M. Ivanovych, M. Vasylovych, About Some Environmental Consequences of Kerch Strait Bridge Construction, *Hydrology*, 2018, Vol. 6, No. 1, p. 1 (**UA-220**).

[1096] See e.g. Second [redacted] Report, ¶¶104, 162-163, 219, 268, 282.

[1097] *See* Rejoinder, ¶¶674.

[1098] Counter-Memorial, ¶351.

[1099] See e.g. Second [redacted] Report, ¶¶185, 191, 229, 234-235; First [redacted] Report, ¶¶327, fn. 137.

[1100] Second [redacted] Report, ¶¶113, 134, 170, 172, 191, 237, 252.

[1101] To be exact, more than five and a half years (the motorway bridge) and close to four years (the railway bridge) have passed since Rostekhnadzor issued its Statements of Compliance in April 2018 and December 2019 respectively, marking the full realisation of the Kerch Bridge project in accordance with the design documentation – see RCM, para. 406.

[1102] Second [redacted] Report, ¶22.

[1103] Second [redacted] Report, ¶169.

usual',[1104] and 'all principal indicators remain continuous and smooth, consistent with the environmental trends observed prior to the construction'.[1105] There can hardly be any better indication of both the unfoundedness of Ukraine's case, and the quality of the Russian Federation's respective EIA, mitigation and monitoring efforts.

723. [redacted] concludes that

> Of course, large-scale construction projects are often associated with certain potential impacts. In this case, however, *due to the careful project design of the Kerch Bridge and the efficient EIA performed prior to its construction, it is my opinion that these effects could only have been minor, brief, and localised mainly in the immediate vicinity of the Bridge's structure.*[1106] [*Emphasis* added]

724. This is a simple fact that Ukraine and its experts have entirely failed to disprove. Below the Russian Federation will respond to the specific allegations regarding the alleged impacts that Ukraine still maintains, conclusively demonstrating their unfounded and manipulative character.

a. Increased Surface and Particulate Disturbance

725. As [redacted] explains, the Kerch Strait is known for being naturally subjected to high turbidity due to strong winds, storms, high waves, changing currents and other hydrometeorological conditions.[1107] In turn, Ukraine and Mr [redacted] wrongly attempt to attach this natural and regular trend existing in the Kerch Strait to the Bridge construction.[1108]

726. [redacted] and Ukraine's case continues to superficially conflate mere possibility of some impacts, relying on a single image.[1109] It is clear from said image[1110] that none of the observed turbidity patches originate from the Kerch Bridge construction.[1111] This

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[1104] Second [redacted] Report, ¶25.

[1105] Second [redacted] Report, ¶¶23.

[1106] Second [redacted] Report, ¶¶24.

[1107] First [redacted] Report, ¶¶78-85; Second [redacted] Report, Chapter IV(B).

[1108] Ukraine's Reply, ¶¶271-274; Second [redacted] Report, ¶¶74-78.

[1109] Second [redacted] Report, ¶78.

[1110] First [redacted] Report, Figure 13; Second [redacted] Report, Figure 7.

[1111] Second [redacted] Report, ¶¶74-78.

image only depicts what is usual for the Kerch Strait[1112] as is overwhelmingly evidenced by daily satellite observations.[1113] Ukraine's and [redacted] attempts to skirt around this are unconvincing.

727. To conclusively demonstrate this, [redacted] also notes that the quantitative comparison of turbidity values (as expressed by suspended matter concentration in sea water) before the beginning of construction work (1990-2008, 2001-2014) and after its completion (2019-2021), show neither an increase of the net turbidity nor any alteration of its spatial pattern.[1114] [redacted] concludes that '[t]his is not a speculative risk assessment statement, but ground truth, substantiated by both *in situ* and remote sensing measurements.'[1115]

728. All species living in the Kerch Strait are well accustomed to that natural trait of this marine area by virtue of their living there.[1116] Consequently, the Kerch Bridge construction, which effect on turbidity could only have been minimal and hardly noticeable against this general trend, could not have had any noticeable impact whatsoever.[1117]

729. In the end, [redacted] has to settle for further speculations. He tries to evade [redacted] analysis by suggesting that it 'is certainly not a substitute for the detailed sedimentological monitoring and modelling that was warranted here'[1118] since:

> [I]t is well-accepted in the industry that bridge and highway construction across shallow waters… often result in sedimental deposition and erosion, disturbance, resuspension, and general disruption, leading to an increase in suspended solids.[1119]

730. This misses the mark. The risks of bottom erosion or sediment deposition have been fully addressed in the EIA, in particular, by means of numerical modelling. The expected

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[1112] Second [redacted] Report, para. 152: '[t]he Strait's high currents act as a "highway" for sediments from the Strait's shores, and between the Sea of Azov and the Black Sea, depending on the current's direction – not to mention the various existing local anthropogenic sources, such as a number of seaports and soil dumping sites.'

[1113] Second [redacted] Report, Figures 8-10.

[1114] Second [redacted] Report, ¶145.

[1115] Second [redacted] Report, ¶¶145.

[1116] First [redacted] Report, ¶79; Second [redacted] Report, ¶156.

[1117] First [redacted] Report, ¶82; Second [redacted] Report, ¶93.

[1118] Second [redacted] Report, ¶77.

[1119] Second [redacted] Report, ¶78.

alterations of the bottom level were actually calculated for the Bridge and showed only insignificant change.[1120] Meanwhile, with respect to the 'general disruption' of the flow, a modelling study conducted by a group of Zubov Institute scientists demonstrated that the simulated disturbances were only marginal and confined to a very limited area.[1121]

731. [redacted] explained in his first report[1122] that the Russian Federation has, in fact, properly monitored turbidity and sediments - before, during, and after the Kerch Bridge construction.[1123] This is evident from the monitoring programme[1124] and reports, which thoroughly and extensively analyse sediment monitoring.[1125] This includes a publication that [redacted] himself cited.[1126] [redacted] explained how the monitoring was conducted, and even included detailed maps of sampling points distributed along the Kerch Strait Bridge,[1127] and [redacted] directly addressed this in his first report.[1128] Ukraine and its experts have simply chosen to ignore all this evidence, which is telling.

[1120] *See* Second [redacted] Report, ¶159: *'The simulated changes were moderate, namely, on average, 2.4±0.6 m locally in the near field (i.e., direct vicinity of the piles at the distances comparable with the pile size), and close to zero elsewhere'*, referring to [redacted]

[1121] Second [redacted] Report, ¶¶160-161.

[1122] First [redacted] Report, ¶83.

[1123] [redacted] Statement, ¶¶105-122; STG-ECO, Kerch Bridge Design Documentation, Section 7, Environmental Protection, Part 6, Industrial Environmental Control (Monitoring) Programme, Book 1, 12/02-PIR-OOS6.1, 2015, pp. 103-107, (**RU-133**).

[1124] This program was conducted with the participation of leading institutions in the field – VNIRO and the Azov Research Institute of Fisheries. *See* STG-ECO, Kerch Bridge Design Documentation, Section 7, Environmental Protection, Part 6, Industrial Environmental Control (Monitoring) Programme, Book 1, 12/02-PIR-OOS6.1, 2015, pp. 103-107, (**RU-133**).

[1125] Institute of Land-Use Ecology, First quarter 2017 Report on Environmental Monitoring of the Kerch Strait Bridge Construction, p. 91-102 (**RU-142**); Institute of Land-Use Ecology, Second quarter 2017 Report on Environmental Monitoring of the Kerch Strait Bridge Construction, p. 55 (**RU-139**); Institute of Land-Use Ecology, Third quarter 2017 Report on Environmental Monitoring of the Kerch Strait Bridge Construction, p. 23 (**RU-143**); Institute of Land-Use Ecology, Institute of Land-Use Ecology, Fourth quarter 2017 Report on Environmental Monitoring of the Kerch Strait Bridge construction, p. 361 (**RU-290**).

[1126] First [redacted] Report, ¶213, referring to Russian Federal Highways Administration, Comparative Analysis of Environmental Monitoring Findings in Relation to the Crimea Bridge Construction Site for 2016 Quarter 4 against Previous Periods (21 February 2017): 'Concentrations of suspended substances increased through the year compared to the early spring period'(**UA-756**).

[1127] [redacted] Statement, ¶20.

[1128] First [redacted] Report, ¶226.

732. As a final remark, [redacted] use of the Kerch Bridge EIA to support his 'hypothetical effects' theory is striking. Evidently, instead of treating the Bridge project's EIA as genuine EIA materials (which would simply be contrary to Ukraine's case), [redacted] uses the EIA as some 'risk analysis' that somehow proves his major points.[1129] [redacted] evades the fact that the evaluations that he repeatedly points at[1130] are features of a thorough and adequate EIA – one that assessed all conceivable risks to ensure that the resulting environmental impact would be minimal, or non-existent. [redacted] new backwards approach is in clear ignorance of the Russian Federation's evidence and defeats the whole purpose of an effective EIA.

b. EIA and Monitoring of Aquatic Bioresources

733. Ukraine's[1131] and [redacted][1132] criticisms regarding the alleged deficiencies of the Kerch Strait Bridge project's EIA in respect of various aquatic bioresources are unfounded, and at times odd. [redacted] suggests that no relevant baseline data was produced, which is simply untrue, as is evident from the EIA materials already submitted.[1133] [redacted] adds that, beyond the baseline data collected specifically for the Bridge project in question, the Kerch Strait has generally been subject of extensive and systematic observations of marine mammals, and thus its conditions in this respect are quite well-established.[1134]

734. [redacted] demonstrated in his first report that the Kerch Strait Bridge's EIA assessed all the possible negative impacts and provided for respective mitigation

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[1129] Second [redacted] Report, ¶75.

[1130] See, e.g., Second [redacted] Report, ¶¶75, 102, 104, 113, 133.

[1131] Ukraine's Reply, ¶240.

[1132] Second [redacted] Report, ¶¶79.

[1133] All relevant studies were performed by the Krasnodar branch of All-Russian Research Institute of Fisheries and Oceanography ("VNIRO"), the leading institution for fisheries research in Russia, founded in 1881. This included studies of the "*habitats, distribution, migration routes, and modern state of biotic components of the environment […] in the construction area of the project*", including marine mammals. *See* Second [redacted] Report, 111, relying on Federal State Budgetary Institution 'Zubov State Oceanographic Institute', Kerch Bridge Design Documentation, Part 4, Environmental Engineering Surveys, Book 6, Technical Report Following Environmental Engineering Surveys Containing YugNIRO and VNIRO Reports on Baseline Data Collection, 12/02-PIR-II4.6, 2015, p. 112 (**RU-90**).

[1134] Federal State Budgetary Institution 'Zubov State Oceanographic Institute', Kerch Bridge Design Documentation, Part 4, Environmental Engineering Surveys, Book 6, Technical Report Following Environmental Engineering Surveys Containing YugNIRO and VNIRO Reports on Baseline Data Collection, 12/02-PIR-II4.6, 2015, p. 112 (**RU-90**).

measures,[1135] while its environmental monitoring programme[1136] provided for the monitoring of all biological aspects named by [redacted], including marine mammals.[1137] However, [redacted] chose to ignore these explanations and materials.

735. For instance, [redacted] asserts that the EIA was focused 'entirely on limited types of dolphins',[1138] when EIA materials provide unequivocally that that all the main local biotic components were studied.[1139] [redacted] more specific criticisms[1140] are also entirely unsubstantiated and often ignore information provided on the same page he cites, or just a single page apart.[1141]

736. [redacted] notes that the EIA generally followed an integrated ecosystem approach: since it is not possible or viable to address individually each and every species, the EIA focused on the key and most vulnerable ones. This is the standard and appropriate approach for such large-scale environmental studies.[1142]

737. One of the most bizarre points repeatedly raised by [redacted] is that the EIA's very logical conclusion that dolphins would avoid irritative or dangerous areas[1143] is 'not acceptable'[1144] and based on mere unsubstantiated 'assumptions' of their intelligence.[1145] [redacted] does not agree:

[1135] First Report, ¶¶86-90.

[1136] STG-ECO, Kerch Bridge Design Documentation, Section 7, Environmental Protection, Part 6, Industrial Environmental Control (Monitoring) Programme, Book 1, 12/02-PIR-OOS6.1, 2015, pp. 119-121, 142-143 (**RU-133**).

[1137] First [redacted] Report, Addendum A.

[1138] Second [redacted] Report, ¶83.

[1139] Second [redacted] Report, ¶119, relying on Federal State Budgetary Institution 'Zubov State Oceanographic Institute', Kerch Bridge Design Documentation, Part 4, Environmental Engineering Surveys, Book 6, Technical Report Following Environmental Engineering Surveys Containing YugNIRO and VNIRO Reports on Baseline Data Collection, 12/02-PIR-II4.6, 2015, p. 112 (**RU-90**).

[1140] Second [redacted] Report, ¶83.

[1141] Second [redacted] Report, 120, relying on STG-ECO, Kerch Bridge Design Documentation, Part 4, Environmental Engineering Surveys, Book 11, Technical Report Following Additional Environmental Engineering Surveys for Dredging, 12/02-PIR-II4.11, 2015, pp. 180-182 (**RU-93**).

[1142] Second [redacted] Report, ¶122.

[1143] STG-ECO, Kerch Bridge Design Documentation, Part 4, Environmental Engineering Surveys, Book 11, Technical Report Following Additional Environmental Engineering Surveys for Dredging, 12/02-PIR-II4.11, 2015, p. 182 (**RU-93**).

[1144] Second [redacted] Report, ¶83.

[1145] Second [redacted] Report, ¶¶65, 82, 129.

> I believed that the dolphins' high intelligence has by now entered the realm of common knowledge. This is, just as the EIA materials note, based on years of studies of their behavioural reactions. For instance, they have been proven to be able to plan, understand causal relations, and correct their behaviour accordingly. This aside, reaction to threats is one of the most basic instincts that guides the survival of even far less intelligent creatures. I find it utterly impossible that dolphins are able to distinguish danger and even provide collective assistance to kin in it, but will not seek to avoid it. Apparently to [redacted] they are also not smart enough to avoid threats, but smart enough to seek out sources rich in prey. This is simply absurd.[1146]

738. Regardless, [redacted] himself admits that the Kerch Strait Bridge construction has resulted in an increase of the local dolphin population,[1147] meaning that the local environmental conditions, including noise and vibration, were comfortable to them.[1148] [redacted] failed to disprove this simple logic.

c. Mitigation of Impact on Aquatic Bioresources

739. [redacted] alleges that the Russian Federation 'appears to have reduced the complex estimated impacts on a variety of organisms into a linear numerical value, i.e., the number of Russian Sturgeon to be artificially reproduced.'[1149] This is false. As [redacted] has explained, three sets of measures were implemented, including (i) measures to reduce the volume of suspended solids making it to the water; (ii) calculation of potential damage due to the 'turbidity zone' and the development of a set of measures aimed at the artificial reproduction of fish (conducted by VNIRO); and (iii) restriction of construction works during the periods of migration and spawning of certain fish.[1150]

740. [redacted] suggestion that only Russian Sturgeon was reproduced ignores the evidence: in fact, while this species is indeed the most vulnerable and key, other species' populations were also boosted, including Roach, Pike-Perch, Zander, Carp, Silver Carp, White Amur, Vimba Bream, Starred Sturgeon, and Sterlet Sturgeon.[1151] This measure

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[1146] Second [redacted] Report, ¶117.

[1147] Second [redacted] Report, ¶126.

[1148] Second [redacted] Report, ¶123.

[1149] Second [redacted] Report, ¶76.

[1150] Second [redacted] Report, ¶136, referring to [redacted] Statement, ¶¶89-94.

[1151] Federal Agency for Fishery, Order No. 676 'On Approval of The Plan of Artificial Reproduction of Aquatic Biological Resources on 2017', 28 October 2016, pp. 5-12 (**RU-254**).

followed internationally adopted recommendations, including those by the Food and Agriculture Organization of the United Nations.[1152]

741. [redacted] explains that, although not the only mitigation measure undertaken, artificial reproduction is crucial due to its most direct effect on endangered species and positive impact on other parts of the local ecosystem, like marine mammals, birds and benthos.[1153]

742. Finally, [redacted] assertion that no 'mitigation monitoring' was undertaken[1154] is simply not true. As noted by [redacted], environmental mitigation was continuously monitored and documented within its own detailed reports. The Russian Federation has produced several reports in that respect,[1155] which both Ukraine and [redacted] appear to have entirely ignored.

d. Pollution and Water Quality

743. As [redacted] demonstrated before,[1156] Ukraine's and [redacted] points on water pollution are entirely speculative and unfounded. They are not supported by the results of long-term studies and monitoring.

744. In his second report, [redacted] simply goes back to his speculations. He undertakes to list every single mechanism through which he thinks the Kerch Bridge construction could theoretically have affected the water quality in the Strait.[1157] This has no added relevance.

[1152] Second [redacted] Report, ¶137.

[1153] Second [redacted] Report, ¶139.

[1154] Second [redacted] Report, ¶152.

[1155] Second [redacted] Report, ¶140, referring to Institute of Land-Use Ecology, Second quarter 2017 Report on Environmental Monitoring of the Compensation Sites (excerpt) (**RU-140**); Institute of Land-Use Ecology, Second quarter 2017 Report on Compensation Measures for the Kerch Bridge Construction (excerpt) (**RU-141**); Institute of Land-Use Ecology, Second quarter 2016 Report on Compensation Measures for the Kerch Bridge Construction (excerpts) (**RU-161**); Institute of Land-Use Ecology, Third quarter 2018 Report on Compensation Measures for the Kerch Bridge Construction (excerpts) (**RU-162**); Institute of Land-Use Ecology, Third quarter 2016 Report on Compensation Measures for the Kerch Bridge Construction (excerpts) (**RU-163**); Institute of Land-Use Ecology, Fourth quarter 2018 Report on Compensation Measures for the Kerch Bridge Construction (excerpts) (**RU-164**); Institute of Land-Use Ecology, Third quarter 2017 Report on Compensation Measures for the Kerch Bridge Construction (excerpts)(**RU-165**); Institute of Land-Use Ecology, First quarter 2017 Report on Environmental Monitoring of Compensation Sites (excerpts) (**RU-166**); Institute of Land-Use Ecology, First quarter 2019 Report on Compensation Measures for the Kerch Bridge Construction (excerpts) (**RU-167**); Institute of Land-Use Ecology, Second quarter 2019 Report on Environmental Monitoring of Compensation Sites (excerpts) (**RU-168**).

[1156] First [redacted] Report, paras. 67-76.

[1157] Second [redacted] Report, ¶¶88-96, 133.

745. Again, Ukraine's point can be easily debunked with reference to the water quality reports published by the Zubov Institute, which include a section dedicated to the Kerch Strait based on *in situ* water sampling.[1158] The published data encompasses tests for broad spectrum of pollutants such as hydrocarbons, metals, major pesticides, detergents, forms of nitrogen and phosphorus, etc. These were simply ignored by [redacted].

746. While [redacted] alleges a 'grave trend of serious pollution levels',[1159] [redacted] clarifies the obvious and well-documented fact – the Kerch Strait has long been the subject of anthropogenic pollution, being a busy navigational route and having large cities located in its vicinity.[1160] The Russian Federal Agency for Fishery confirms that the monitoring data on chemical pollutants gathered throughout the Kerch Bridge construction was generally in line with what has historically been observed in the Strait.[1161] No increase of pollution connected with the Kerch Strait Bridge has been documented: in fact, the post-construction data on some pollutants demonstrated a decrease as compared to the pre-construction times.[1162] [redacted] has personally studied this, and is most qualified to express his professional views on the point.[1163]

747. In his first report, [redacted] has demonstrated how the growth of 'periphyton' communities on the Kerch Bridge structures may actually improve the local water quality, since such species are known for their water filtering properties, including in the Azov-Black Sea Basin. In fact, such communities can be so effective that they are often used in practice for treating polluted water.[1164] [redacted] does not deny this. The Federal Agency for Fishery confirms [redacted] conclusions: it notes that the robust mollusc communities that have grown on the Kerch Bridge structures have indeed formed

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[1158] A. Korshenko (ed.), MARINE WATER QUALITY HYDROCHEMICAL PARAMETERS, ANNUAL REPORT 2015 (Federal Budgetary State Institution 'Zubov State Oceanographic Institute', 2016), (**Appendix-797**); A. Korshenko (ed.), MARINE WATER QUALITY HYDROCHEMICAL PARAMETERS, ANNUAL REPORT 2016 (Federal Budgetary State Institution 'Zubov State Oceanographic Institute', 2017), (**RU-250**); A. Korshenko (ed.), MARINE WATER QUALITY HYDROCHEMICAL PARAMETERS, ANNUAL REPORT 2019 (Federal Budgetary State Institution 'Zubov State Oceanographic Institute', 2020), (**RU-251**). A. Korshenko (ed.), MARINE WATER QUALITY HYDROCHEMICAL PARAMETERS, ANNUAL REPORT 2021 (Federal Budgetary State Institution 'Zubov State Oceanographic Institute', 2023), (**RU-796**).

[1159] Second [redacted] Report, ¶158.

[1160] Second [redacted] Report, ¶¶176.

[1161] Federal Agency for Fishery (Rosrybolovstvo), Letter No. 8813-VS/U04, 28 September 2021 (**RU-798**).

[1162] Second [redacted] Report, ¶174.

[1163] Second [redacted] Report, ¶169.

[1164] Second [redacted] Report, ¶175.

an 'effective biofilter' that improves the water quality and reduces eutrophication in the vicinity of the Bridge, since they are able to process many pollutants, like hydrocarbons, excess nutrients, and turbid sediments.[1165]

748. [redacted] also critisises[1166] [redacted] evidence concerning the storage of treated water in wells in the course of construction,[1167] expressing concerns about potential pollution of groundwater and mistreatment of waste. [redacted] response is that, even if this was in any way logical, groundwater and the water quality in the wells were anyway subject to EIA and environmental monitoring.[1168] Again, [redacted] shows his unfamiliarity with the criticised documents.

749. [redacted] speculation that '[t]here does not appear to have been any specific effort to identify, characterise, quantify, or determine extent or impacts of spills during construction'[1169] simply ignores the actual data on mitigation measures that [redacted] described in great detail,[1170] in particular, the fact that polluted water was collected from floating craft engaged in the construction.[1171] [redacted] notes that, with the Kerch Strait Bridge in place, ferry lines between Crimea and Krasnodar Region have stopped their operation.[1172] This, coupled with the increased traffic control, reduces the probability of accidents with ships, inevitably leading to the improvement of environmental conditions.[1173]

750. To summarise, Ukraine and its experts offer nothing even remotely capable of refuting the fact that the water quality in the Kerch Strait has not decreased, which essentially

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[1165] Agency for Fishery (Rosrybolovstvo), Letter No. 8813-VS/U04, 28 September 2021 (**RU-798**); Federal Agency for Fishery (Rosrybolovstvo), Letter No. 3633-VS/U04, 20 April 2022 (**RU-799**).

[1166] Second [redacted] Report, ¶¶91-92.

[1167] [redacted] Statement, ¶80.

[1168] Second [redacted] Report, ¶173, referring to STG-ECO, Kerch Bridge Design Documentation, Section 7, Environmental Protection, Part 4, Surface and Ground Water Protection. Aquatic Biological Resources Protection, Book 1, 12/02-PIR-OOS4.1, 2015 (excerpts), pp. 56-58 (**RU-93**); STG-ECO, Kerch Bridge Design Documentation, Section 7, Environmental Protection, Part 6, Industrial Environmental Control (Monitoring) Programme, Book 1, 12/02-PIR-OOS6.1, 2015, pp. 111-116, 132-138 (**RU-133**).

[1169] Second [redacted] Report, ¶¶88-96, 133.

[1170] [redacted] Statement, ¶¶74-87.

[1171] [redacted] Statement, ¶¶75-76.

[1172] Second [redacted] Report, ¶178.

[1173] Second [redacted] Report, ¶178.

proves that there was no failure to protect the environment on the Russian Federation's side in this respect.

e. Changes in the Hydrodynamics of the Kerch Strait

751. In the Counter-Memorial,[1174] the Russian Federation has explained why Ukraine's case concerning the alleged 'change of hydrodynamics' in the Kerch Strait due to the Bridge construction is without merit. The Russian Federation has submitted evidence showing that there have been no significant effects on the hydrodynamics in the Kerch Strait, as well as that it put in place adequate and all-encompassing mechanisms to monitor for potential effects.

752. In the Reply, [1175] Ukraine and its experts maintain their hopeless argument by cherry-picking from the Russian Federation's evidence. Specifically, Ukraine attempts to find imperfections in [redacted] analysis but fails to address the crucial point – that the Kerch Strait Bridge did not significantly alter the hydrodynamics within the Strait. Indeed, [redacted] confirms his finding that the impact on the hydrodynamics was 'truly marginal'. [1176] This should bring the matter to an end, but the Russian Federation will nonetheless address the rest of Ukraine's accusations.

753. Ukraine and [redacted] allege that the Russian Federation's documentation recognises 'that creating even a partial impediment to the flow … can change the current velocity'. [1177] This is based on *non sequitur*. As [redacted] explains, the document in question refers to potential effects of a design that was ultimately not implemented, while the real-life evaluation has shown marginal differences in current velocities.[1178]

754. With respect to the scale of the impact, Ukraine criticises [redacted] conclusions, [1179] alleging that his analysis is 'overly simplistic' and is based on insufficiently detailed data. Specifically, Ukraine suggests that maximum changes in

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[1174] Counter-Memorial, ¶¶387-392.

[1175] Ukraine's Reply, ¶¶280-287.

[1176] Second [redacted] Report, ¶183.

[1177] Ukraine's Reply, ¶281; Second [redacted] Report, ¶97.

[1178] Second [redacted] Report, Chapter IV(D).

[1179] Ukraine's Reply, ¶¶282-284.

velocity must be considered. This is wrong. As [redacted] explains, the maximum instantaneous changes induced by the Kerch Strait Bridge may significantly exceed the long-term average values. However, as [redacted] explains, the average perturbation should be compared to the average pre-construction velocity, and the maximum values should be compared to the maximum pre-construction velocity. Hence, given that the mean current speed in the Kerch Strait is 20 to 30 cm/s and the maximum registered speed was over 80 cm/s, therefore it is appropriate to speak of only about 12 to 14% change for both maximum and average values.[1180]

755. Ukraine's attacks at the Bridge supports and their alleged impact[1181] on the environment also miss the point. As [redacted] explains, this is based on ignorance of the Russian Federation's evidence submitted with the Counter-Memorial. Specifically, Zubov Institute's experts have clarified that only 'some 85 supports for each bridge' (i.e. stanchions) stand in water, others being on-shore, and only the front 85 of them actually interact with the flow.[1182] The Zubov Institute Note concludes that, '[s]uch change cannot lead to any significant alteration of circulation processes or any substantial increase in current velocities'.[1183]

756. Ukraine's and [redacted][1184] allegations that the potential hydrodynamic effects of the Kerch Bridge were not properly monitored are also wrong. [redacted] provides that the Zubov Institute calculated the current speeds for the Kerch Bridge proper as part of extensive and exhaustive modelling studies.[1185]

757. Ukraine's suggestions regarding the lack of proper monitoring[1186] are likewise erroneous. Contrary to Ukraine's assertions, [redacted] conclusions are not based on 'counsel instructions' but has reviewed and studied the actual documents that accounted

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[1180] Second [redacted] Report, ¶188.

[1181] Ukraine's Reply, ¶285.

[1182] Federal Service for Hydrometeorology and Environmental Monitoring, Letter No. 31-07883/22i, 25 August 2022 forwarding a note of the Zubov State Oceanographic Institute, p.6 (**RU-274**).

[1183] Federal Service for Hydrometeorology and Environmental Monitoring, Letter No. 31-07883/22i, 25 August 2022 forwarding a note of the Zubov State Oceanographic Institute, p.6 (**RU-274**).

[1184] Second [redacted] Report, ¶99.

[1185] Second [redacted] Report, para. 195.

[1186] Ukraine's Reply, ¶¶286-287.

for potential alterations of the hydrodynamics.[1187] Subsequently, [redacted] personally acted as chief scientist in at least 8 field surveys of the Kerch Strait in 2020-2023, and also supervised deployments of 2 long-term continuously working mooring stations equipped with acoustic current meters.[1188]

758. Finally, Ukraine's Expert [redacted] criticises the placement of the monitoring sites and the fact that some data was provided as 'annual averages, maximums and minimums'.[1189] As [redacted] explains, this accusation is a desperate eleventh hour attempt to find a flaw in the Russian Federation's monitoring efforts. In fact, the monitoring sites and settings were placed to allow for monitoring the hydrodynamic features in the entire Strait, including smaller scale processes. The stations collected and analysed data at a much higher temporal resolution ranging from minutes to hours.[1190]

759. Therefore, Ukraine's allegations on 'hydrodynamic changes' should fail.

f. Eutrophication

760. Ukraine's case on eutrophication[1191] is now limited to a hypothetical that 'the Kerch Strait Bridge… could cause increased rates of eutrophication'. Ukraine asserts that 'eutrophication and … loss of oxygen in the Sea of Azov is 'directly tied' to water flow and certain salinity characteristics of the water',[1192] and accuses the Russian Federation of not providing appropriate spatial and temporal studies near the Bridge construction area.

761. [redacted] has explained that Ukraine's concerns are unwarranted, and that there was no risk of eutrophication created by the Bridge.[1193] Because Ukraine has nothing to respond on the substance of [redacted] evidence, it once more resorted to

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[1187] *See*, e.g. [redacted]

[1188] Second [redacted] Report, ¶199.

[1189] Second [redacted] Report, ¶106.

[1190] Second [redacted] Report, ¶106

[1191] Ukraine's Reply, ¶¶288-290.

[1192] Ukraine's Reply, ¶289.

[1193] Second [redacted] Report, ¶106

nitpicky attacks on the excerpts to the sources in which such evidence appears. This is telling of the overall credibility of Ukraine's position.

762. [redacted] [redacted] reaffirms his findings in his second report and concurs with his previous findings that no Bridge-related changes in eutrophication have occurred.[1194] He explains that there are two key factors that may lead to eutrophication: excessive supply of nutrients and change in hydrodynamics. As [redacted] [redacted] has stated in his first report, the excessive supply of nutrients usually comes from the river run-off and local sources of biogenic elements (such as farmlands),[1195] none of which bears even a remote connection to the Bridge.

763. He further explains, referring to a recent 2022 publication, that the Kerch Strait waters are, and have long been, subject to elevated degree of anthropogenic pressure. At the same time, 'no significant deviations from the usual distribution of hydrochemical parameters were found', as compared to earlier studies of 2011-2015.[1196] The Federal Agency for Fishery further confirms these conclusions, stating that all relevant indicators monitored throughout the Kerch Bridge construction were in line with the baseline values.[1197] In fact, as noted above,[1198] the Kerch Bridge may somewhat positively affect the situation since the periphyton communities that have grown on its structures are noted for being able to process excess nutrients and facilitate water aeration, thus counteracting eutrophication processes.[1199]

764. Therefore, there is plainly no merit to Ukraine's case on alleged eutrophication and it must be rejected.

g. Salinity

765. Ukraine's case on salinity is meritless, defies well-developed scientific analysis and common sense. [redacted] has demonstrated in his first report that the assertion

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[1194] Second [redacted] Report, ¶106

[1195] First [redacted] Report, ¶112.

[1196] K.Gurov, Y. Gurova et al,, Formation of the Ecological Risk Zones in the Coastal Water Areas of the Kerch Strait, *Morskoy Gidrofizicheskiy Zhurnal,* 2022, Vol. 38, Issue 6, pp. 628-629 (RU-800).

[1197] Agency for Fishery (Rosrybolovstvo), Letter No. 8813-VS/U04, 28 September 2021, p. 10 (**RU-798**).

[1198] *See* Rejoinder, ¶751.

[1199] Second [redacted] Report, ¶106. It is also confirmed by Federal Agency for Fishery (Rosrybolovstvo), Letter No. 3633-VS/U04, 20 April 2022 (**RU-79**).

that the Kerch Bridge may restrict outflow of water from the Sea of Azov, with low salinity, and lead to its freshening is a fantastical scenario simply because salinity has actually been rising in the region for the last 20 years.[1200] Even if the Kerch Bridge could restrict hydrodynamics to any considerable degree, which is a fable in itself, such change would be negligible against this general pronounced trend.[1201]

766. [redacted] does not attempt to disprove this simple and scientifically proven (and still ongoing) trend. Rising salinity is a wider natural trend that has been observed in the entire Azov-Black Sea Basin, as scrutinized in previously submitted literature,[1202] recognised and discussed in 2016 by the RUC,[1203] and even acknowledged by Ukraine's other expert, [redacted].[1204] [redacted], however, continues to deny this, suggesting that, if not in the Kerch Strait, a salinity decrease may still be noticeable (though none is) in the Black Sea and the Sea of Azov, where the salinity level is apparently 'relatively stable'.[1205]

767. As [redacted] further asserts that '[t]hree full years (2017-19) of data collected after the construction began is insufficient to conclude anything about the trend in salinity levels'. This suggestion is curious, as it seems to imply, without any explanation whatsoever, that the Kerch Strait Bridge may all of a sudden begin affecting the salinity far past its construction, though it did not do so in the preceding years.[1206] In any event, the more recent data for 2020 and 2021, studied by [redacted], likewise confirms that the Bridge has had no impact on salinity regime in the Strait.[1207]

[1200] First [redacted] Report, ¶107-110.

[1201] *Ibid*., Second [redacted] Report, Chapter IV(F).

[1202] *See* A.I. Ginzburg, A.G. Kostianoy *et al*., "Climate Change in the Hydrometeorological Parameters of the Black and Azov Seas (1980–2020)", *Oceanology*, 2021, Vol. 61, (**RU-272**); P. Balykin, L. Kutsun *et al*., Changes in Salinity and Species Composition of Ichthyofauna in the Sea of Azov, *Oceanology*, 2019, Vol. 59 (**UA-907**).

[1203] Minutes of the 28th Session of the Ukrainian-Russian Commission on Fisheries in the Sea of Azov, 17-20 October 2016, ¶5.1 (**RU-385**).

[1204] *See* Second [redacted] Report, fn. 30 to ¶17, referencing this trend as regards the Sea of Azov. *See* also P. Balykin, L. Kutsun *et al*., Changes in Salinity and Species Composition of Ichthyofauna in the Sea of Azov, *Oceanology*, 2019, Vol. 59 (**UA-907**).

[1205] Second [redacted] Report, ¶116.

[1206] Second [redacted] Report, ¶215.

[1207] Korshenko (ed.), Marine Water Quality Hydrochemical Parameters, Annual Report 2021 (Federal Budgetary State Institution 'Zubov State Oceanographic Institute', 2023), p. 65 (**RU-796**).

768. [redacted] also adopts his usual thrust at the baseline data for the Kerch Bridge, suggesting that the State monitoring results referred to by [redacted] were not proximate enough to offer an adequate baseline.[1208] However, the data criticised by [redacted] is not part of the EIA materials (which is in itself telling of [redacted] approach), while the Kerch Bridge EIA made use of robust and adequate baseline data not amenable to [redacted] criticisms.[1209]

769. Finally, [redacted] makes another odd remark, suggesting that stenohaline (i.e. low salinity tolerance) species in the Kerch Strait may be affected by the Bridge.[1210] Beyond the lack of any actual impact, [redacted] explains that such species have never even been recorded in the Kerch Strait or its adjacent areas exactly because they cannot live where salinity level is so unstable.

770. Therefore, [redacted] has not added anything valuable or even remotely scientific to the discussion of the Bridge's alleged impact on salinity, and Ukraine's case is doomed to fail.

h. Ice Formation and Buildups

771. Ukraine's case regarding ice formation is equally in the realm of science fiction. As the Russian Federation has demonstrated, ice-related risks in the region decrease with each passing year due to the global warming processes.[1211] No contrary signs have been noted by [redacted] in response,[1212] thus rendering Ukraine's concerns moot. As before, Ukraine only refers to 'potential impacts', as opposed to any real-world events.

772. In essence, Ukraine's case continues to rely entirely on one brief instance of ice formation in February 2017 – in an area that has generally been free of ice over the last decade.[1213] As [redacted] has explained in his first report, the brief accumulation of ice observed on that occasion had nothing to do with the Kerch Strait Bridge, and was caused

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[1208] Second [redacted] Report, ¶115.

[1209] Second [redacted] Report, ¶165, 216, Chapter III(F).

[1210] Second [redacted] Report, ¶116.

[1211] Counter-Memorial, ¶423.

[1212] Second [redacted] Report, ¶¶117-119.

[1213] Ukraine's Reply, ¶293.

by many dense auxiliary structures used for construction, which was in its early stages.[1214] These structures were removed upon the completion of the Bridge construction, rendering [redacted] evidence irrelevant.[1215] He disregards this completely, and still goes on to theorise about potential similar impact.

773. [redacted] approach is flawed. He picks out a citation from an abstract of a paper that appears to serve his position that the Kerch Strait Bridge will still strongly affect the ice conditions.[1216] However, the paper's conclusions are at odds with this, providing that the authors are actually unaware whether this is going to be the case.[1217] The obvious reason is that the paper came out that same year, in 2017, and the authors did not have the opportunity to consider the differences between the cause of the ice accumulation – the auxiliary structures – and the Kerch Strait Bridge upon its completion, or indeed to observe the trend over a certain period of time. [redacted], however, had this opportunity, and stresses that their impacts are incomparable. Being unable to challenge this, [redacted] simply settled for picking a citation out of context.

774. [redacted] also takes issue with [redacted] conclusion regarding the ordinary nature of such ice accumulation to this particular area of the Kerch Strait,[1218] relying on the same scarce satellite imagery. Even his general suggestion that 'ice floes… would normally have been free flowing through the Kerch Strait'[1219] is clearly erroneous and not based on his own imagery. [redacted] compares it with imagery from other ice seasons, which clearly evidences that, when there is ice, the Kerch Strait's complicated geography still often leads to ice hampering within it, rendering it unable to leave the Strait.[1220]

775. Another windmill that [redacted] attacks is, perplexingly, the 'general premise that the world is getting warmer'.[1221] He does not agree that ice-related risks decrease, with no

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[1214] First [redacted] Report, ¶¶125-126; First [redacted] Report, ¶231.

[1215] Second [redacted] Report, ¶¶117-119.

[1216] Ukraine's Reply, ¶294.

[1217] *Ibid.*, emphasis added.

[1218] Second [redacted] Report, ¶119.

[1219] Second [redacted] Report, ¶117.

[1220] Second [redacted] Report, ¶¶239-242.

[1221] Second [redacted] Report, fn. 166.

substantiation beside a brief reference to the irrelevant phenomenon of 'polar vortices', which are one-off stratospheric phenomena that do not usually occur in the Kerch Strait region and can hardly affect ice formation, and by no means offset the general global warming process.[1222] This is despite the fact that [redacted] himself acknowledged the 'modern trend of warming' in his first report.[1223] In any case, [redacted] notes that [redacted] defies the leading authorities on climate change, and the objective local conditions established by decades of hydrometeorological monitoring and studies that are available to the public.[1224] This is not surprising, considering that [redacted] completely sidesteps the Zubov Institute Note that assessed the relevant data in painstaking detail, including the statistics that show the likelihood of icy winters in the Kerch Strait decline year-by-year.[1225]

776. Instead of engaging with this scientific evidence, [redacted] again resorts to misciting: now by attaching [redacted] words about an 'existing trend' directed at the trend of warming to his erroneous claim that 'at least two to four months of ice cover still occurs',[1226] when this was transparently not in the original text:

> [redacted] briefly noted a *modern trend of warming* in the Strait, but maintained that 'at least two to four months of ice cover still occurs'. *This trend does exist*, but its implications have proven far more impactful than [redacted] admitted.[1227] [*Emphasis* added]

777. Most baffling is that this is actually [redacted] second blunt attempt to impose this exact suggestion out of context – first time by citing a source that had nothing to say on the actual Kerch Strait,[1228] which [redacted] noted in his first report.[1229]

[1222] Second [redacted] Report, ¶223.

[1223] First [redacted] Report, ¶112: '…the average annual ice cover has been reported to be decreasing due to higher baseline temperatures over recent years…'

[1224] Second [redacted] Report, ¶224.

[1225] Federal Service for Hydrometeorology and Environmental Monitoring, Letter No. 31-07883/22i, 25 August 2022 forwarding a note of the Zubov State Oceanographic Institute, pp.7-12 (**RU-274**).

[1226] Second [redacted] Report, ¶220.

[1227] First [redacted] Report, ¶116.

[1228] A.Mizyuk, O.Puzina, Sea Ice Modeling in the Sea of Azov for a Study of Long-Term Variability, *International Young Scientists School and Conference on Computational Information Technologies for Environmental Sciences*, 2019, Vol. 386 (**UA-733**).

[1229] First [redacted] Report, ¶137.

778. [redacted] also suggests that 'the risk of the impact [on ice]' was not assessed under the EIA and monitored,[1230] which is not true, and as usual ignores the provided evidence: the Counter-Memorial describes how the EIA extensively studied the local ice conditions (e.g. through *in-situ* research and tests, numerical modelling),[1231] as well as the thorough ice monitoring regulations and management (mitigation) efforts that were developed and adopted in case ice ever appears.[1232] [redacted] also referred to the latter documents in his first report.[1233]

779. Ukraine's last straw of hope for this argument – the suggestion that Kerch Strait Bridge would impede the income of warmer waters from the Black Sea during cold seasons[1234] – does not hold water. As [redacted] explains, this is entirely speculative and contradicts the scientific data collected between 2017 and 2020, demonstrating a steady increase of sea temperature in the Kerch Strait during this time period, including the cold seasons,[1235] fully consistent with the general warming trend.

780. To summarise, Ukraine's case on ice formation continues to be unfounded, resting on a single isolated and unrelated episode, and is thus simply undefendable.

i. Migration Patterns

781. In the Counter-Memorial, the Russian Federation has thoroughly explained that the construction of the Bridge did not have any effect on the migration patterns.[1236] Ukraine has chosen to disregard the Russian Federation's evidence and continues to insist on its case of potential impacts that the Bridge allegedly could cause.[1237] Specifically, Ukraine focuses on potential impacts caused by ice and light, as well as current velocity changes.

[1230] Second [redacted] Report, ¶120.

[1231] Russia's Counter-Memorial, Chapter 6(C)(4)(iii)(b).

[1232] Russia's Counter-Memorial, Chapter 6(C)(4)(iii)(c).

[1233] First [redacted] Report, ¶128 referring to MTSM-Service LLC, 'Ice Monitoring Regulations' (**RU-280**) and Stroygazmontazh LLC, Ice Management Efforts in the Kerch Strait for the Period of Construction. 2016-2017 ice season, 2017 (**RU-279**).

[1234] Ukraine's Reply, ¶295. See also Second [redacted] Report, ¶118, fn. 168.

[1235] A.I. Ginzburg, A.G. Kostianoy *et al*., "Climate Change in the Hydrometeorological Parameters of the Black and Azov Seas (1980–2020)", *Oceanology*, 2021, Vol. 61, (**RU-272**)

[1236] Russia's Counter-Memorial, ¶398.

[1237] Ukraine's Reply, ¶296-298.

782. None of Ukraine's hypothetical concerns have any merit to them. First, it is worth noting once again that Ukraine's concerns remain just that – hypotheticals. By the end of 2023 it is safe to confidently state that the Kerch Strait Bridge had no effect on migration patterns.

783. Assuming, *arguendo*, that there was any truth to Ukraine's hypothetical suggested impact, there are in fact no reasons for concern. [redacted] explains that during the winter seasons (when ice could theoretically form), the migration of fish species simply does not occur.[1238] In line with their normal migration patterns, they do not traverse the Strait in winter.

784. As a matter of fact, virtually none of the species mentioned by Ukraine or its experts inhabit the Kerch Strait or migrate through it in the first place.[1239] As regards the particular species that do migrate, the monitoring found that the construction did not at all affect this process – in fact, some species may have even shown somewhat larger migration than usual, as evidenced e.g. by their increased fishery statistics for that period.[1240]

785. Ukraine also alleges the impact of current velocity change.[1241] In this respect, [redacted] opines that a background current may only affect migration pattern of fish species, if the current speed exceeds or at least is comparable with the fish's behavioural swimming velocity. [1242]

786. Since Ukraine's complaints are limited to the anchovies, whose swimming velocity is estimated to be about 50 cm/s, the latter parameter must be measured against the current speed. As the Russian Federation has explained, the mild increase in current velocity, if one occurred, would still bring the current velocity below 35 cm/s, well within the range allowing for anchovies' migration.[1243]

[1238] Second [redacted] Report, Section IV(H).

[1239] *See*, for instance, Federal Agency for Fishery (Rosrybolovstvo), Letter No. 3633-VS/U04, 20 April 2022 (**RU-799**).

[1240] Federal Agency for Fishery (Rosrybolovstvo), Letter No. 8813-VS/U04, 28 September 2021 (**RU-798**).

[1241] Ukraine's Reply, ¶281.

[1242] Second [redacted] Report, ¶254.

[1243] Rejoinder, Section VI(A)(iii)(e).

787. With respect to alleged effects of lighting, Ukraine's expert [redacted] refers to a potential impact on flight patterns of bats. However, according to recent *in situ* data studied by [redacted], bats are very adaptive in migration, and in most cases their migratory flights take place at altitudes between 300 and 800 m and even up to 1250 m,[1244] which is anyway much higher than the height of the Kerch Bridge. This makes any influence of the Bridge on the bats' flight patterns highly unlikely.

788. [redacted] further notes that the possible impact on birds was assessed and mitigation measures were accordingly developed, including construction of rafts, feeders and artificial nesting sites. The monitoring demonstrated that, accordingly, the populations of many bird species increased, including endangered ones, and the construction area maintained its status as a migration hub for birds.[1245] Thus, the Kerch Strait Bridge construction did not disturb bird nesting or migration and [redacted] hypothetical risks have again not materialised.

j. The 'Attractive Nuisances' Effect

789. Ukraine and [redacted] point out that the Kerch Bridge may constitute an 'attractive nuisance' and ultimately lead to the depletion of dolphins and fish.[1246] This assertion is speculative and misses the point. [redacted] highlights [redacted] unwillingness to even consider alternative factors that are supported by scientific evidence[1247] and were envisaged by the EIA materials,[1248] namely, the growth of 'periphyton' (algae and mollusc) communities on the Kerch Bridge structures. This 'reef effect' provides an additional food source to the local biota, facilitating the growth of local fish and dolphin populations.[1249] These communities are also known for their water filtering properties, meaning a positive effect on the water quality.[1250] [redacted] conclusions are substantiated by both academic research and on-site State

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[1244] Second [redacted] Report, ¶251.

[1245] Second [redacted] Report, ¶252.

[1246] Ukraine's Reply, ¶281; First [redacted] Report, ¶106.

[1247] First [redacted] Report, ¶¶137-144

[1248] STG-ECO, Kerch Bridge Design Documentation, Part 4, Environmental Engineering Surveys, Book 11, Technical Report Following Additional Environmental Engineering Surveys for Dredging, 12/02-PIR-II4.11, 2015, pp. 180-182 (**RU-93**).

[1249] Second [redacted] Report, ¶¶116, 126-129.

[1250] *See* Rejoinder, ¶751.

monitoring results, as the 'reef effect' has actually led to an increase in local fish stock, and thus also contributed to the growth of the local bottlenose dolphin population.[1251] The Federal Agency for Fishery further confirms this, observing that a substantial biocommunity has indeed formed on the Kerch Bridge structures that attracts a variety of fish and birds as an additional food source.[1252]

790. Being unable to substantively protest these conclusions, [redacted] conceded that 'the attraction itself is not necessarily an issue'.[1253] He now only insists on appropriate study and monitoring, which have indeed been conducted.

791. [redacted] also disagrees[1254] with [redacted] conclusion[1255] that there is no heightened risk of injury for dolphins due to the traffic regulations in the Kerch Strait. However, it was [redacted] own suggestion that traffic regulation is an effective protective measure for marine mammals.[1256] In any case, the existing data on vessel collisions with marine animals provides not a single incident involving Black Sea white-sided dolphins or the Black Sea bottlenose dolphins, i.e., the principal dolphin species inhabiting the Kerch Strait. While not all cases may be reported, this information is telling.[1257]

k. Emergency Response

792. Furthermore, Ukraine speculatively criticises the Russian Federation's 'emergency response' capabilities.[1258] This critique is meritless and absurd.

793. First, it is common ground that there have been no major accidents during the years following the commencement of the Bridge construction. However, even smaller accidents have been taken care of, with the Russian Federation undertaking necessary

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[1251] Second [redacted] Report, ¶¶116, 126-129.

[1252] Federal Agency for Fishery (Rosrybolovstvo), Letter No. 8813-VS/U04, 28 September 2021 (**RU-798**).

[1253] Second [redacted] Report, ¶127.

[1254] Second [redacted] Report, ¶129.

[1255] First [redacted] Report, ¶141-142.

[1256] First [redacted] Report, ¶109.

[1257] Second [redacted] Report, ¶132.

[1258] Ukraine's Reply, 303.

measures at all levels.[1259] The Lyubimovka oil spill incident, on which Ukraine's case in this respect hinges, will be addressed below separately. Second, and in any event, no concrete criticism of the Russian Federation's handling of minor incidents, apart from the Lyubimovka incident, has been provided.

794. Furthermore, the regular and wide-scale training exercises organised by the responsible emergency ministry ('EMERCOM') are fully appropriate for enabling proper response capabilities, and [redacted] criticism in this regard amounts to nothing more than nitpicking.[1260] Ukraine and [redacted] also completely disregarded the diverse measures taken by the Russian Federation to ensure that these competent services are appropriately stationed, modernised, and have the infrastructure and facilities needed for a quick and effective response.[1261]

l. Risk of Failure of the Kerch Bridge

795. In the Reply, Ukraine has the audacity to maintain its outrageous claim that there is a 'risk of failure of the Kerch Strait Bridge'.[1262] In essence, there is no need to respond to Ukraine's speculations. They fall flat in light of Ukraine's own attacks against the Bridge, which the latter withstood without collapsing. Therefore, Ukraine's case is objectively debunked by reality.

796. However, even its feeble attempts to sustain it must fail. They are not backed by any credible sources and have no objective support. [redacted] agrees and likewise sees no risk of the Bridge's collapse.[1263]

797. It is impossible to take Ukraine's case seriously and believe that the Bridge would suddenly collapse by itself, having survived Ukraine's targeted attacks directed specifically at it.

798. The absurdity of this argument encapsulates its entire argument on Article 206. There is no merit to any of Ukraine's accusations, as they are based on misrepresentations of fact

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[1259] [redacted] Statement, ¶¶101-103.

[1260] Second [redacted] Report, ¶135.

[1261] Counter-Memorial, ¶¶417-418.

[1262] Ukraine's Reply, ¶306-311.

[1263] Second [redacted] Report, ¶261-263.

and speculations. The Russian Federation has adequately accounted for all potential environmental risks and successfully avoided them. Therefore, Ukraine failed to show that the Russian Federation violated Article 206.

B. THE RUSSIAN FEDERATION DID NOT VIOLATE ARTICLES 204 AND 205 OF UNCLOS

799. In its Reply, Ukraine once again accuses the Russian Federation of breaching Articles 204 and 205 of UNCLOS by allegedly not monitoring the risks or effects of pollution and failing to communicate its results.[1264] These accusations are totally misplaced. As will be demonstrated in this sub-section, Ukraine misconstrues Articles 204 and 205 of UNCLOS, having failed also to rebut the extensive evidence of the Russian Federation's developed monitoring efforts and their duly published results.

i. Ukraine's Interpretation of Article 204 of UNCLOS is Incorrect

800. Ukraine asserts that the Russian Federation 'attempt[s] to empty Article 204 obligation of any meaningful content'.[1265] This is a misleading interpretation of the Russian Federation's position. The Russian Federation's argument is that Article 204 of UNCLOS is a safeguard to ensure that States 'endeavour, as far as practicable' to monitor 'the risks or effects of pollution'.[1266]

801. When addressing the issue of environmental monitoring under Article 204 of UNCLOS, Ukraine purports to invent and impose on the Russian Federation an unreasonably heightened standard. Ukraine alleges that in order to satisfy the requirements under Article 204 of UNCLOS, one has to 'answer the specific question at issue: whether, how and to what extent [a State's activity] impacted the marine environment.'[1267] Such interpretation is unmeritorious and not supported by any authorities.

802. As Ukraine accepts,[1268] Article 204 of UNCLOS envisages two separate obligations in Sections 1 and 2. Importantly, these two sections are different in their object:

[1264] Ukraine's Reply, Chapter Four (III).

[1265] Ukraine's Reply, ¶313.

[1266] *See* Counter-Memorial, ¶¶450; RUL-115, p. 1362, ¶17. A. Proelss (ed.), *Protection and Preservation of the Marine Environment* in C.H. Beck, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY, (München: Nomos Verlagsgesellschaft, 2017), p. 1357 (**RUL-115)**

[1267] Ukraine's Reply, ¶318.

[1268] Ukraine's Reply, ¶313.

> Whereas Art. 204 (1) aims at generating knowledge on the effects and risks of pollution to the marine environment as a whole, Art. 204 (2) narrows down the focus by requiring States to particularly keep activities under their control under surveillance.[1269]

803. It is clear from the plain text of Article 204(1) that it requires only certain *conduct*, not result.[1270] As the Russian Federation highlighted in its Counter-Memorial, the words 'endeavour' and 'as far as practicable' are highly indicative of the 'best effort' character of obligation under Article 204(1).[1271] Accordingly, contrary to Ukraine's unmeritorious allegations, Article 204(1) does not require to accomplish result or 'answer the specific question', but rather requires certain conduct from a State.

804. Further, Ukraine's reference to the fact that the qualifier 'as far as possible' was proposed by Kenya 'in order to avoid excessive burden for developing States'[1272] is to no avail. The source cited by Ukraine still does not support its interpretation:

> Proposed by Kenya in order to avoid excessive burdens for developing States, it *provides for some flexibility* and adds to the fact that the duty in *Art. 204 may be regarded as rather weak*.[1273] [*Emphasis* added]

805. As Ukraine correctly notes,[1274] Article 204(2) indeed does not contain the qualifiers discussed above, however, its wording clearly indicates that a State is only required to keep under surveillance any activities to determine the *likeliness* of marine environment pollution. No doubt, seeing 'whether [the State's activities] are likely to pollute the marine environment'[1275] is far from analysing 'whether, how and to what extent [State's activities] have impacted the marine environment.'[1276]

[1269] E. Blitza, *Article 204. Monitoring of the risks or effects of pollution* in A. Proelss (ed.), PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT IN UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Nomos Verlagsgesellschaft, 2017), p. 1360 (**RUL-200**).

[1270] E. Blitza, *Article 204. Monitoring of the risks or effects of pollution* in A. Proelss (ed.), PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT IN UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Nomos Verlagsgesellschaft, 2017), p. 1360 (**RUL-200**).

[1271] See Counter-Memorial, ¶449.

[1272] Ukraine's Reply, ¶314.

[1273] E. Blitza, *Article 204. Monitoring of the risks or effects of pollution* in A. Proelss (ed.), PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT IN UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Nomos Verlagsgesellschaft, 2017), p. 1362 (**RUL-200**).

[1274] Ukraine's Reply, ¶313.

[1275] UNCLOS, Article 204(2).

[1276] Ukraine's Reply, ¶318.

806. It follows that Article 204 of UNCLOS, being general in nature, allows significant discretion to the State when performing its monitoring obligations. The State's monitoring efforts are *per se* sufficient to meet the standard under Article 204.

807. Having failed to rebut the Russian Federation's extensive coverage of its compliance with the monitoring obligations, Ukraine tries to attack the Russian Federation's evidence for being 'thinly excerpted' or 'limited'.[1277] Ukraine does not even bother to explain what specific details are missing in the excerpts, confining itself to the said general complaint, and evidently making use of the fact that such large volumes of information[1278] would inevitably have to be excerpted.

808. The unreasonableness and unspecificity of Ukraine's attacks aside, its remarks regarding the 'adequacy' of the volume or contents of the information submitted are irrelevant for establishing compliance with Article 204.

809. Nevertheless, in order to balance its security concerns described above with the necessity to establish its case, the Russian Federation has provided the Arbitral Tribunal with the volume of information needed to conclusively establish its compliance with Article 204, *i.e.* that the Russian Federation observed, measured, evaluated and analysed, as far as practicable and by recognised scientific methods, the risks or effects of pollution of the marine environment in general and that it kept under surveillance the effects of its Infrastructure Projects.

810. It should also be repeated that the Russian Federation's conservative approach towards disclosure of documents relating to the Infrastructure Projects has been informed by Ukraine's own continued treats and repeated military attacks against the Infrastructure Projects, and particularly the Kerch Bridge, damaging its structures and killing civilians. These threats and attacks have been ongoing until this day, and their scale has been increasing. Namely, such attacks have been carried out in different locations, even beyond the Kerch Strait. Information contained in the monitoring reports, including technical details, descriptions of sampling processes and their locations, graphical materials and the like, could be used by Ukraine to implement further attacks against the national security of the Russian Federation and its citizens.

[1277] Ukraine's Reply, ¶¶316-317.

[1278] Ukraine's Reply, ¶316.

ii. The Russian Federation Did Not Violate Article 204 of UNCLOS with Respect to the Kerch Strait Bridge

811. As regards the Kerch Strait Bridge, Ukraine claims that '[a] single year's monitoring results … do not provide an adequate basis to assess the adequacy of Russia's monitoring efforts'.[1279] This point is wrong and contradicts Ukraine's own pleadings. In fact, Ukraine has itself already admitted in its Revised Memorial that 'the Russian Federal Highways Administration published approximately twenty-five reports … on a quarterly basis starting in the third quarter of 2015.'[1280] All of them followed the same monitoring programme,[1281] and any year's monitoring reports would be as demonstrative of the Russian Federation's efforts as any other.

812. Ukraine also criticises the Russian Federation for using Maximum Allowable Concentrations ('MACs') as indicators in its monitoring reports instead of relying on baseline data:

> 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. 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 Project have impacted the marine environment.[1282]

813. First, as explained above, in doing so, Ukraine attempts to invent and impose upon the Russian Federation a completely extraneous standard inapplicable under Article 204. The notion of baseline data, allegedly necessary for a proper monitoring, may be appropriate for the purposes of EIA under Article 206, but not for the purposes of long-lasting continuing monitoring under Article 204. Second, the suggestion itself is plainly incorrect. As the Russian Federation has conclusively demonstrated, there was an abundance of baseline data collected[1283] that the monitoring indeed used.[1284] The

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[1279] Ukraine's Reply, ¶317.

[1280] Ukraine's Revised Memorial, ¶233.

[1281] Ukraine's Reply, ¶318

[1282] Ukraine's Reply, ¶318.

[1283] See Rejoinder, ¶318, summarizing [redacted] assessment of the baseline data gathered.

[1284] Counter-Memorial, ¶465.

monitoring reports offer many such examples,[1285] which Ukraine and [redacted] have simply preferred to skim over. [redacted] labelling of Russia's monitoring as 'after-the-fact'[1286] is thus deceptive.[1287]

814. Regardless, Ukraine has not, and cannot refute that the environmental indicators used in the monitoring process, such as MACs and the hydrochemical index of water pollution ('WPI'), represent fundamental scientific standards and methods generally recognised in many countries worldwide.[1288] As such, they are entirely appropriate and apposite for the purposes of Article 204. In fact, Ukraine itself adopts these scientific methodologies.[1289] Such incoherence in approach is not surprising, considering that Ukraine's expert has failed to show basic knowledge of the Russian Federation's environmental standards and regulations.[1290]

815. Ukraine follows this with an unwarranted attack against the responsible Russian scientific institutions[1291] that again lacks coherence.[1292] Ukraine sidesteps the fact that for the Kerch Bridge environmental monitoring, the Russian Federation engaged not just any organisations, but its leading scientific institutions in the respective fields of study and the very institutions responsible for monitoring its seas.[1293] Whether Ukraine likes it or

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[1285] For instance, Counter-Memorial, ¶465 referred to Institute of Land-Use Ecology, First quarter 2017 Report on Environmental Monitoring of the Kerch Strait Bridge Construction, p. 11 (**RU-142**), as an illustration. In fact, myriads of examples can be offered: as another example, Institute of Land-Use Ecology, Institute of Land-Use Ecology, Fourth quarter 2017 Report on Environmental Monitoring of the Kerch Strait Bridge construction, pp. 363-364 (**RU-290**). discusses how the qualitative and quantitative parameters of plankton communities in the fourth quarter of 2017 reflected the seasonal and annual values typical in the relevant water areas – i.e., their baseline.

[1286] Second [redacted] Report, ¶156.

[1287] Second [redacted] Report, Section IV(K).

[1288] See Counter-Memorial, ¶¶469; First [redacted] Report, ¶72. *See* also S. Kovalenko, R. Ponomarenko *et al*., Analysis of Known Methods of Determining of the Water Quality Index Suitable for Predicting the Environmental State of Surface Water Bodies, *Technogenic and Ecological Safety*, 2023, Vol. 13, Issue 1, p. 69 (**RU-801**).

[1289] *Ibid.*, pp. 68-69.

[1290] Counter-Memorial, ¶¶468-471.

[1291] Ukraine's Reply, ¶322.

[1292] Tellingly, even the Ukraine's basic reasoning is misplaced. [redacted] is in fact a senior manager at the Institute of Land-Use Ecology LLC, the contractor for the Kerch Bridge environmental monitoring, not an employee at any of the scientific institutions that she describes and that were involved in its conduct. See Counter-Memorial, ¶456. Cf. Ukraine's Reply, ¶322.

[1293] Counter-Memorial, fn.708: 'For instance, for the monitoring of the aquatic area, the Institute of Ecology sub-contracted VNIRO (the main research institute of the fishing industry in Russia) and AzNIIRKh (the main research institute of Russia in studying the Sea of Azov and Black Sea basins).'; First [redacted] Report, ¶¶20, 32; Second

not, this is a simple and easily verifiable fact. These institutions are among those not just following the recognised scientific methods but also developing them.[1294] Ukraine's largely unsupported dissatisfaction with their monitoring in contrast seems patently unconvincing, since it does not even attempt any substantive critique of the institutions' competence or offer any alternative institutions – as it just dismisses them straight away.

816. Ukraine further wrongly relies[1295] on [redacted] personal opinions regarding the proper structure and content of monitoring reports. [redacted] contentions in this respect are in fact immaterial and filled with misleading assertions.[1296] For instance, he suggests that meteorological and oceanographic conditions were not monitored,[1297] which is simply not true – a significant part of the quarterly reports was dedicated to these aspects.[1298] Contrary to [redacted] assertions, [redacted] never 'confirmed' anything of this sort. In fact, he addressed these aspects in his first report, describing the continuing monitoring performed both at the Kerch Bridge site and throughout the Strait.[1299]

817. The same can be said regarding [redacted] assertion that the monitoring efforts were incomplete since they did not include 'compliance monitoring' and 'mitigation monitoring', and concern 'impact monitoring' 'at best'.[1300] This allegation is entirely false and demonstrates [redacted] unfamiliarity with the monitoring materials that he

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[redacted] Report, ¶¶272-276: [redacted] Statement, ¶5: 'For example, VNIRO is the main research institute of the fishing industry in Russia. AzNIIRKh, as a branch of VNIRO, is the main research institute of Russia in studying the Sea of Azov and Black Sea basins. These institutes employ prominent specialists who have studied the water and aquatic biological resources of the Sea of Azov and Black Sea for many years.

[1294] E.g., Zubov Institute has been a key responsible institute in the framework of the EMBLAS scientific international project, undertaken under the auspices of the Black Sea Commission: see Federal Service for Hydrometeorology and Environmental Monitoring, Letter No. 31-07883/22i, 25 August 2022 forwarding a note of the Zubov State Oceanographic Institute, pp. 1-3 (**RU-274**). For more general information regarding the relevant institutes see All-Russian Research Institute of Fisheries and Oceanography, *History of the Azov Black Sea Branch of FGBNU VNIRO*, available at: https://azniirkh.vniro.ru/content/read/page/history (**RU-808**); Food and Agriculture Organization of the United Nation, *Russian Federal Research Institute of Fisheries and Oceanography*, available at: https://www.fao.org/agris/data-provider/russian-federal-research-institute-fisheries-and-oceanography (**RU-809**); Zubov Institute Website, *About the Institute*, available at: http://гоин.рф/company (**RU-810**).

[1295] Ukraine's Reply, ¶¶323-324.

[1296] Second [redacted] Report, Section IV(K).

[1297] Second [redacted] Report, ¶154.

[1298] See e.g. Institute of Land-Use Ecology, First quarter 2017 Report on Environmental Monitoring of the Kerch Strait Bridge Construction, p. 82-90 (**RU-142**).

[1299] First [redacted] Report, Addendum A.

[1300] Second [redacted] Report, ¶152;

criticises.[1301] As noted before, mitigation measures were the subject of entire separate reports; [1302] meanwhile, [redacted] also demonstrates that 'compliance monitoring' as described in [redacted] source[1303] was also undertaken.[1304]

818. [redacted] further notes that [redacted] statement that 'the impact assessments [were] largely premised on the planned implementation of certain mitigation activities'[1305] is conceptually incorrect – the mitigation measures responded to the assessed impacts, and not the other way around.[1306]

819. [redacted] criticises [redacted] alleged focus on the parameters of the monitoring reports, concurring that they 'may capture all the required parameters but still lead to irrelevant or unreliable results depending for instance on the data and methods used'.[1307] First, [redacted] responses were to [redacted] own criticisms, so this attack is unwarranted. Second, [redacted] does not elaborate his vague suggestion with any concrete criticisms of the quarterly reports.[1308] As [redacted] explains, the Kerch Bridge monitoring programme has been carefully designed and implemented.[1309] [redacted] has been unable to demonstrate the contrary. [redacted] also opines that 'the methodologies and the equipment used for monitoring, described in detail in the monitoring reports, were state-of-the-art.'[1310]

[1301] Second [redacted] Report, ¶266.

[1302] Second [redacted] Report, ¶70. Giprogazcenter, [redacted] See Azov-Black Sea Federal Fishery Agency, Act of release of aquatic biological resources into a water body of fishery significance, 23 November 2016 (**Second [redacted] Report, Appendix E**); See Azov-Black Sea Federal Fishery Agency, Statement of release of aquatic biological resources into a water body of fishery significance, 30 August 2017 (**Second [redacted] Report, Appendix F**); See Azov-Black Sea Federal Fishery Agency, Statement of release of aquatic biological resources into a water body of fishery significance, 13 October 2017 (**Second [redacted] Report, Appendix G**).

[1303] H. Abaza, R. Bisset *et. al*, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach (UNEP 2004), p. 60 (**UA-644**).

[1304] Second [redacted] Report, ¶266.

[1305] *Ibid*., ¶152.

[1306] *Ibid*., ¶267.

[1307] *Ibid*., ¶155.

[1308] *Ibid*., ¶269.

[1309] *Ibid*.

[1310] *Ibid*., ¶271.

820. Ukraine relies on [redacted] opinion in an attempt to dismiss the monitoring reports' evaluation of the observed exceeding concentrations as 'explaining away' – apparently for the sole reason that the results generally do not fit with its position.[1311] This brass remark is simply untrue, because when impacts from the construction were observed, the reports duly noted this.[1312] It is also ironic and telling that the claim was made without the slightest attempt by [redacted] to actually analyse and refute the scientific conclusions that he disagrees with.[1313]

821. Ukraine also points[1314] to an alleged 'grave trend of serious pollution levels' alleged by [redacted][1315] with reference to only *two* occasions where high concentrations were found in bottom sediments 'at or near' the construction sites[1316] – which in both instances turns out to be the same Dzhardzhava River that runs on the Kerch shore.[1317] This is grasping for straws. No attempt has been made by Ukraine or [redacted] to establish any actual, not just assumed, connection of the pollutions referred to with the Kerch Bridge construction. In fact, the only thing that Ukraine has successfully established here is the legitimate and detailed on-site monitoring conducted by the Russian Federation.

iii. <u>The Russian Federation Did Not Violate Article 204 of UNCLOS With Respect to the Gas Pipeline and Power Cables</u>

822. Ukraine and its expert [redacted] direct particular ire at monitoring reports in respect of the Gas Pipeline and Power Cables,[1318] dismissing those outright without any attempt

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[1311] Ukraine's Reply, ¶319; Second [redacted] Report, ¶157.

[1312] See, for instance, Institute of Land-Use Ecology, Second quarter 2017 Report on Environmental Monitoring of the Kerch Strait Bridge Construction, p. 131: '[g]iven a decreased lead concentration in the second quarter 2017, one can conclude that the motor traffic load in the right-of-way decreased and the increased concentration of heavy metals can be linked precisely to the intensification of construction processes' (**RU-139**); Institute of Land-Use Ecology, Fourth quarter 2017 Report on Environmental Monitoring of the Kerch Strait Bridge construction, p. 363: '[a] local increase in the suspended solid content and BOD level in the area of the right-of-way of the project "Construction of the Transport Crossing across the Kerch Strait" can be caused by construction works in the surveyed water area' (**RU-290**).

[1313] Second [redacted] Report, ¶176.

[1314] Ukraine's Reply, ¶320.

[1315] Second [redacted] Report, ¶158.

[1316] Ukraine's Reply, ¶320.

[1317] Second [redacted] Report, ¶¶158-161.

[1318] 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**).

at substantive analysis. They do so in unison under the pretext of the documents allegedly being 'thinly excerpted'.[1319] Again, this question is immaterial to demonstrating the State's compliance with its monitoring obligation under Article 204 of UNCLOS.[1320] These criticisms are all the more curious and self-contradictory, considering that previously Ukraine only stated that it 'was not aware' of any monitoring reports,[1321] and no substantive comments were offered for rebuttal, even by [redacted].

823. As Ukraine itself concurs, the full volume of the reports is quite large, containing hundreds of pages.[1322] It is also clear from the titles that these are only summary reports, and not even representative of the entire scope of the monitoring documentation. Nonetheless, [redacted] confirms that the disclosed monitoring materials provide sufficient evidence as to the substance and scope of the Russian Federation's respective efforts.[1323] All the necessary parameters were in fact assessed.[1324] Therefore, the Russian Federation duly complied with its obligation of conduct under Article 204.

824. [redacted] also confirms that the monitoring reports demonstrate exhaustive studies conducted using modern and appropriate scientific methodologies.[1325] In support, the Russian Federation exhibits with this submission additional ample materials describing the process and exact methodology of these monitoring efforts.[1326] Thus, the Russian Federation's compliance with Article 204 of UNCLOS as regards the Gas Pipeline and Power Cables is evident and undeniable.

[1319] Ukraine's Reply, ¶316; Second [redacted] Report, ¶149.

[1320] *See* Rejoinder, ¶811.

[1321] Ukraine's Revised Memorial, ¶232.

[1322] Ukraine's Reply, ¶316.

[1323] Second [redacted] Report, Section III(C).

[1324] *Ibid*.

[1325] Second [redacted] Report, ¶¶271-276.

[1326] [redacted]

iv. The Russian Federation's State-Sponsored Monitoring Efforts Leave No Space for Denying the Russian Federation's Compliance with Article 204 of UNCLOS

825. The Russian Federation provided in the Counter-Memorial that, beside its tailored monitoring programme designed and undertaken specifically for the Kerch Bridge, Gas Pipeline and Power Cables, it has always maintained a system of State environmental monitoring of the Kerch Strait area.[1327] This monitoring is conducted by the Russian Federation's leading scientific institutes in the respective fields of study.

826. In particular, the State Directorates for Hydrometeorology and Monitoring of Environment conduct general environmental monitoring, including that of water quality, which is processed and reported by Zubov Institute,[1328] while the Azov Research Institute of Fisheries ('AzNIIRKh') monitors the state of the Russian Federation's aquatic bioresources.[1329] Zubov Institute additionally monitored the Kerch Strait environment under the aegis of the European Union and the United Nations Development Programme as part of the "EMBLAS-II Project", where Ukraine as well participated.[1330] As [redacted] notes, this provided for the necessary context and larger spatial coverage and has had no bearing on the fact that impacts have also been monitored directly on-site.[1331]

827. In fact, for their expertise both Zubov Institute and AzNIIRKh were engaged in the Kerch Bridge project on all levels: from collecting baseline data[1332] to assessing possible impacts[1333] and conducting dedicated on-site monitoring.[1334] This contributed to a single and concentrated effort to assess and monitor the environment in a properly

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[1327] Counter-Memorial, ¶476.

[1328] Counter-Memorial, ¶¶477-478.

[1329] Counter-Memorial, ¶¶481-484.

[1330] Counter-Memorial, ¶¶479-480.

[1331] Second [redacted] Report, ¶272: 'I find the following obvious, but I want to repeat that these monitoring efforts have no bearing on the existence or quality of the water quality monitoring conducted specifically under the Kerch Bridge project. On the contrary, they provide for the necessary context and larger spatial coverage. Same is true for the monitoring of aquatic biological resources conducted by AzNIIRKh, which [redacted] disregards on a similar faulty basis.'

[1332] Zubov State Oceanographic Institute', Kerch Bridge Design Documentation, Part 4, Environmental Engineering Surveys, Book 6, Technical Report Following Environmental Engineering Surveys Containing YugNIRO and VNIRO Reports on Baseline Data Collection, 12/02-PIR-II4.6, 2015, p. 112 (**RU-90**).

[1333] Counter-Memorial, fn. 706.

[1334] Counter-Memorial, ¶¶431, 461.

contextualised manner, with on-site monitoring undivided from the study and observation of the Kerch Strait ecosystem as a whole.

828. Thus, these most crucial and concentrated efforts cannot be simply neglected. They form the very foundation of the environmental monitoring system in the Russian Federation and are an integral and indivisible part of its impact monitoring generally, and for the purposes of Article 204. The exact purpose of State monitoring is to keep under surveillance the quality and condition of the marine environment, meaning any and all 'risks or effects of pollution'.

829. Ukraine's attempts to paint these efforts as allegedly not proximate enough to monitor specific impacts are thus meaningless. [redacted] notes that, although he does not agree with [redacted]' opinion that 'environmental impact [in the Kerch Strait] can be amplified throughout the broader Basin',[1335] he fully agrees with him that any significant pollution would have propagated beyond the Kerch Strait and would thus have been noticed by the competent State agencies and institutions.[1336] However, no considerable impact from any of the Infrastructure Projects has ever been noted.[1337] Nor has such impact been identified by Ukraine or its experts [redacted] and [redacted].

830. Ukraine still makes a manipulative attempt to sideline the Russian Federation's crucial monitoring efforts. Parroting [redacted],[1338] Ukraine picks out a letter from the Zubov Institute referring to the absence of any degradation of water quality in the Kerch Strait,[1339] so as to taunt its length and alleged baselessness.[1340] In its perhaps most plain and unashamed swindle, Ukraine sweeps under the rug the detailed analytical note by the same Zubov Institute that thoroughly described the monitoring efforts leading to the said conclusion.[1341] [redacted] relied on this note extensively in his First Report,[1342]

[1335] Second [redacted] Report, ¶5.

[1336] Second [redacted] Report, ¶168.

[1337] *Ibid.*, ¶168-169.

[1338] Second [redacted] Report, ¶166.

[1339] Letter from the Zubov State Oceanographic Institute to the Ministry of Foreign Affairs of the Russian Federation, No. 956 (23 December 2021) (**RU-487**).

[1340] Ukraine's Reply, ¶326.

[1341] Zubov State Oceanographic Institute, Letter No. 956, 23 December 2021 (**RU-487).**

[1342] First [redacted] Report, fns. 142, 144, 158, 163, 221; Second [redacted] Report, ¶170.

and it could not have escaped [redacted] and Ukraine's attention.[1343] Both Ukraine and [redacted] also ignored the tables with environmental raw data that informed the letter's conclusions,[1344] not to mention excerpts from the Zubov Institute's public yearly reports that allowed for an easy comparison.[1345]

831. Therefore, Ukraine's attempts to discredit and disregard the Russian Federations monitoring efforts are petty and unsatisfactory. The Russian Federation's monitoring efforts indeed do not only satisfy but go above and beyond the 'best effort' requirements of Article 204 of UNCLOS.

v. <u>The Russian Federation Did Not Violate Article 205 of UNCLOS</u>

832. Ukraine correctly notes[1346] that the Russian Federation does not deny the existence of a strict obligation under Article 205 of UNCLOS to publish the reports of the results of its monitoring activities conducted under Article 204 of UNCLOS. However, Ukraine's expansive reading of this obligation is without merit, and its attempts to disregard the Russian Federation's relevant efforts are misplaced.

833. Ukraine refers to the existence of a 'standard set under Article 205',[1347] which is unsupported by any source. Article 205 of UNCLOS, however, does not specify any requirements as to the content of the reports to be published thereunder. The Convention's drafters used the word 'shall' in Article 205 of UNCLOS to indicate the strict character of the publication obligation, while they failed to include a single qualifier of such a stringent obligation into the text. This entails that the drafters deliberately avoided adding any content specifics of the reports under Article 205 of UNCLOS to mitigate the stringency of the obligation *per se*. As Proelss notes in his Commentary,

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[1343] Second [redacted] Report, fn. 291. Federal Service for Hydrometeorology and Environmental Monitoring, Letter No. 31-07883/22i, 25 August 2022 forwarding a note of the Zubov State Oceanographic Institute **(RU-274)** was also referred to numerous times by the Russian Federation, in particular, in fns. 558, 641, 649, 650 and 770 of Counter-Memorial.

[1344] *See* Counter-Memorial, ¶478. For illustration, tables for 2017 were presented: Table on the results of the Zubov Institute's 2017 monitoring in the Kerch Strait (**RU-485**); Table on the results of the Zubov Institute's monitoring in the Kerch Strait carried out from 25 April 2017 to 3 May 2017 (**RU-486**).

[1345] *See* Counter-Memorial, ¶477; Zubov State Oceanographic Institute, 2016 Report on Marine Water Pollution (**RU-250**), p. 67; Zubov State Oceanographic Institute, 2019 Report on Marine Water Pollution (**RU-251**), p. 71.

[1346] Ukraine's Reply, ¶327.

[1347] Ukraine's Reply, ¶329.

'[t]he fact that Art. 205 is silent on the content of the reports to be published, may however mitigate its stringency.'[1348]

834. As mentioned above, two sections of Article 204 contain different and separate obligations, which is particularly important for the purpose of the publishing requirement under Article 205 of UNCLOS:

> While measurements conducted in order to fulfill paragraph 1 undoubtedly aim at generating 'results', this seems at least questionable in view of the surveillance activities required by Art. 204(2). Even if it is possible to gather results from surveillance activities, the purpose pursued with this kind of monitoring is primarily preventive and not knowledge-generating in nature.[1349]

835. Importantly, this conclusion is supported by *travaux preparatoires* of the Convention. First drafts of Article 205 covered only reporting in relation to risks and effects of pollution: A/CONF/62/WP.10/Rev.1

> States shall disseminate, as soon as possible, the data and information obtained on the risks and effects of pollution of the marine environment.[1350]

836. As the *Virginia Commentary* notes, the reference to Article 204 of UNCLOS was inserted into the draft text of Article 205 as a minor and unsubstantial amendment.[1351]

837. It is therefore noteworthy that the publishing obligation under Article 205 relates solely to Article 204(1) of UNCLOS, which is general and not case-specific in nature. Indeed, properly interpreted, Article 205 does not require that States 'issue reports in order to prove their implementation of Article 204, but rather to exchange information on the marine environment.'[1352] In light of this, and in addition to what was already provided, bare allegations of Ukraine's and its experts to the effect that 'existing environmental

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[1348] E. Blitza, *Article 204. Monitoring of the risks or effects of pollution* in A. Proelss (ed.), PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT IN UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Nomos Verlagsgesellschaft, 2017), p. 1367 (**RUL-200**).

[1349] E. Blitza, *Article 204. Monitoring of the risks or effects of pollution* in A. Proelss (ed.), PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT IN UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Nomos Verlagsgesellschaft, 2017), p. 1367 (**RUL-200**).

[1350] A.CONF.62/WP.10/Rev.1 (ICNT/Rev.1, 1979, mimeo.), article 206. Cited in M. Nordquist (ed.), *United Nations Convention on the Law of the Sea*, *1982*: *A Commentary*, Vol. IV, Nijhoff, 2002, p. 118 (**RUL-162**).

[1351] E. Blitza, *Article 204. Monitoring of the risks or effects of pollution* in A. Proelss (ed.), PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT IN UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Nomos Verlagsgesellschaft, 2017), p. 1367 (**RUL-200**).

[1352] *Ibid*., p. 1365-1366.

monitoring system in the Kerch Strait area… is not specifically designed to capture the impacts of the Construction Project'[1353] are untenable.

838. As the Russian Federations stated in the Counter-Memorial, 'the results of environmental monitoring have been published in the format of EM Summaries, in the annual reports of the Zubov Institute and EMBLAS-II reports', and communicated within the framework of the Ukrainian-Russian Commission on the Issues of Fisheries in the Azov Sea ('RUC') [1354] when it comes to the results of the state monitoring of aquatic bioresources.[1355] Ukraine has failed to present any convincing critique of these efforts.

839. Ukraine's RUC-related comments are disingenuous and immaterial. The 2019 RUC protocol referred to by Ukraine[1356] points back to the 2016 protocol cited by the Russian Federation, which unequivocally provides that its delegation shared detailed results of the State aquatic bioresources monitoring conducted in the Azov-Black Sea Basin.[1357] Ukraine tries to make it seem like nothing was communicated, which is evidently false – the Russian Federation simply expressed its 'willingness' to provide additional information on the above monitoring if requested.[1358] Ukraine instead requested information on the results of environmental monitoring conducted within the Kerch Bridge project, which, as has been repeatedly established, was in the public domain.[1359] Thus, Ukraine was informed of, and had access to, the results of all relevant monitoring efforts.

840. As to the Kerch Bridge quarterly monitoring, Ukraine is trying to twist words.[1360] It is unnecessary to repeat that Article 205 of UNCLOS requires States to publish 'reports of the results' of environmental monitoring.[1361] This is exactly what has been done.

[1353] Ukraine's Reply, ¶325.

[1354] Referred to by Ukraine as 'URC'.

[1355] Counter-Memorial, ¶491.

[1356] Ukranian-Russian Commission of the Issues of Fisheries in the Azov Sea, Minutes of the XXX Session (October 2018) (**UA-837**).

[1357] Azov Research Institute of Fisheries, Report on 2020 State Monitoring of Aquatic Biological Resources (**RU-489**).

[1358] Ukranian-Russian Commission of the Issues of Fisheries in the Azov Sea, Minutes of the 28th Session, ¶5.6 (**RU-385**).

[1359] See *e.g* Ukraine's Revised Memorial, 233¶, Counter-Memorial, ¶¶463, 491.

[1360] Ukraine's Reply, ¶329.

[1361] Counter-Memorial, ¶490.

Publications have been made to report the results of the said monitoring efforts to the public.

841. Being 'reports of results', these publications were not meant and were not required by Article 205 of UNCLOS to include all comprehensive information gathered.[1362] Indeed, as explained above, Article 205 requires precisely that – as opposed to imposing an onerous obligation of engaging in the meaningless and irrational exercise of publishing magnitudes of environmental materials, including myriads of sophisticated technical documents, for all sorts of observations and activities produced pursuant to Article 204.

842. The same concerns the results of the State environmental monitoring results published by the Zubov Institute.[1363] Its annual reports review the hydrochemical state and pollution of marine waters and bottom sediments in the Russian seas with year-by-year comparisons. These always include a separate section dedicated exclusively to the Kerch Strait.[1364] While the Zubov Institute regularly publishes its detailed and thorough reports, it also maintains an open public database of the raw monitoring data produced by the responsible laboratory.[1365] In this respect, the Russian Federation went far beyond what is required under Article 205 of UNCLOS.

843. Ukraine and its experts completely ignore the relevant evidence, provided in the Zubov Institute Note.[1366] This also concerns the monitoring performed under the EMBLAS-II project.[1367] The data was not just published in Zubov Institute's reports – Ukraine itself was actually the party responsible for receiving and processing all the relevant data, as

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[1362] Counter-Memorial, ¶¶462-472.

[1363] Zubov state Ocean Institute, Yearbooks of Marine water quality, available at: http://www.oceanography.institute/index.php/2020-11-08-17-54-32/2020-11-08-18-07-11 (**RU-815**).

[1364] A. Korshenko (ed.), MARINE WATER QUALITY HYDROCHEMICAL PARAMETERS, ANNUAL REPORT 2015 (Federal Budgetary State Institution 'Zubov State Oceanographic Institute', 2016) (**RU-797**); A. Korshenko (ed.), MARINE WATER QUALITY HYDROCHEMICAL PARAMETERS, ANNUAL REPORT 2016 (Federal Budgetary State Institution 'Zubov State Oceanographic Institute', 2017) (**RU-250**); A. Korshenko (ed.), MARINE WATER QUALITY HYDROCHEMICAL PARAMETERS, ANNUAL REPORT 2019 (Federal Budgetary State Institution 'Zubov State Oceanographic Institute', 2020) (**RU-251**). A. Korshenko (ed.), MARINE WATER QUALITY HYDROCHEMICAL PARAMETERS, ANNUAL REPORT 2021 (Federal Budgetary State Institution 'Zubov State Oceanographic Institute', 2023) (**RU-796**).

[1365] Federal Service for Hydrometeorology and Environmental Monitoring, Letter No. 31-07883/22i, 25 August 2022 forwarding a note of the Zubov State Oceanographic Institute, p.1 (**RU-274**).

[1366] *Ibid*.

[1367] Counter-Memorial, ¶¶479-480.

the Black Sea Commission's database is located in Odessa.[1368] Again, Ukraine chose to remain silent on the matter.

844. Ukraine is equally disingenuous when it comes to environmental cooperation and the sharing of information, circling around its own undermining of such. For instance, as provided in the Counter-Memorial,[1369] Ukraine consistently and brazenly demanded that the Russian Federation be prohibited from sharing its environmental monitoring information in the framework of the Black Sea Commission.[1370] Ukraine does not deny this – even more so, it absurdly declares that the Russian Federation was supposed to concede and seek out some other opportunities to do so.[1371] Ukraine's appeal to the issue of sovereignty[1372] serves only to mislead – when the Russian Federation approached it bilaterally, Ukraine also denied cooperation on the same absurd pretence.[1373]

845. Ukraine cannot (and does not) deny the fact that since February 2016, it simply blocked all good faith attempts by the Russian Federation to establish environmental cooperation and exchange information on the activities in the Black Sea and the Sea of Azov. These attempts were numerous.[1374] To repeat Ukraine's response in June 2016:

> The Russian Side's response and its proposed agenda related to *cooperation in exploitation of biological resources and marine environment protection would not provide an opportunity to discuss serious and continuing violations of international law referred to by Ukraine*.[1375] [*Emphasis* added]

846. Thus, characteristically, Ukraine turned the environmental cooperation into a question of sovereignty, which is beyond what this arbitration is supposed to consider.[1376]

[1368] Federal Service for Hydrometeorology and Environmental Monitoring, Letter No. 31-07883/22i, 25 August 2022 forwarding a note of the Zubov State Oceanographic Institute, Pp. 2-3 (**RU-274**).

[1369] Counter-Memorial, ¶497.

[1370] Note Verbale of the Ministry of Foreign Affairs of Ukraine to the Permanent Secretariat of the Commission on the Protection of the Black Sea Against Pollution Istanbul No 51/23-010-2404, 7 July 2017 (**RU-508**); Note Verbale of the Ministry of Foreign Affairs of Ukraine No 61318/51-207/1-1197, 4 October 2016 (**RU-509**).

[1371] Ukraine's Reply, ¶344.

[1372] Ukraine's Reply, ¶344.

[1373] Note Verbale of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-194/510-1409, 15 June 2016 (**RU-507**).

[1374] Counter-Memorial, ¶494-495, 498.

[1375] Note Verbale of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-194/510-1409, 15 June 2016 (**RU-507**).

[1376] Counter-Memorial, ¶495.

847. Ukraine's assertion that the Russian Federation was required to seek out its condescension despite the absence of reciprocity (which Ukraine falsely reduces to the issue of 'requests'), and is at fault for it, is woefully cynical and beyond any notion of good faith. In any case, in this unilateral position, the Russian Federation disseminated environmental information as it usually did to the extent that it was still possible, sound, and appropriate.

848. In this light, Ukraine's ultimate contention that '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'[1377] is plainly false. Despite its current cynical assertions, Ukraine arbitrarily blocked or denied all alternative attempts at, and avenues of, environmental cooperation and information sharing. It not only denied the Russian Federation's numerous bilateral approaches, but actively undercut its multilateral commitments undertaken in the name of all Black Sea States.

849. As it has been indicated earlier, when Ukraine did make its request in July 2017,[1378] it obviously only did so against the backdrop of (and with the eye to) preparing its Memorial in this Arbitration.[1379] Meanwhile, just one week before that, Ukraine had again demanded that the Permanent Secretariat of the Black Sea Commission block the Russian Federation's submission of the relevant monitoring data.[1380] This attitude could not have been any more disingenuous and self-serving.

850. In this context, Ukraine's claims cannot be seen as anything other than an attempt to back-handedly tarnish the Russian Federation's efforts under Article 205 of UNCLOS.

[1377] Ukraine's Reply, ¶344.

[1378] 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**).

[1379] Counter-Memorial, ¶496.

[1380] Note Verbale of the Ministry of Foreign Affairs of Ukraine to the Permanent Secretariat of the Commission on the Protection of the Black Sea Against Pollution Istanbul No 51/23-010-2404, 7 July 2017 (**RU-508**).

C. RUSSIA DID NOT VIOLATE UNCLOS WITH REGARD TO THE ALLEGED OIL SPILL IN SEVASTOPOL

851. Ukraine also maintains its case regarding the alleged spill of hydrocarbons discovered on 8 May 2016 in the vicinity of Sevastopol.[1381] Although its current position is quite brief and vague, reduced to just two paragraphs without any substantive legal or factual analysis,[1382] it seems to have retained the overall narrative that the Russian Federation allegedly failed to notify and cooperate with Ukraine regarding this event.[1383] Notably, although Ukraine still purports to illustrate the alleged long-term impacts of the Kerch Bridge with this episode, its leftover criticisms have visibly lost any sense of relevance to this subject.

852. As the Russian Federation demonstrated in the Counter-Memorial, Ukraine's argument in this respect has no merit. It has been convincingly demonstrated by the Russian Federation's expert, [redacted][1384] and not challenged by Ukraine,[1385] that the residuals of hydrocarbons on the Sevastopol beach were in reality 'most likely downwelling-related [i.e. of natural origin], rather than caused by an oil spill' from a vessel.[1386] They were also so small in volume (no more than several dozen litres)[1387] and brief (not noticeable already in the water area on images from 9 May 2016)[1388] that there were, from the scientific perspective, no reasonable grounds to believe that Ukraine could be affected by this minor, localised and short-term occurrence.[1389] [redacted] has confirmed his conclusions in his second report.[1390]

[1381] Ukraine's Reply, ¶¶301-305; Ukraine's Revised Memorial, ¶253.

[1382] Ukraine's Reply, ¶¶304-305.

[1383] Ukraine's Revised Memorial, ¶252.

[1384] Expert Report of [redacted] dated 22 August 2022 (the 'First [redacted] Report').

[1385] Ukraine states specifically that it puts '[t]he validity of this [redacted] assessment aside' but fails to rebut it in any material respect. No substantive criticism is likewise voiced by Ukraine's expert [redacted], *see* Second [redacted] Report, ¶138.

[1386] Counter-Memorial, ¶512; *see* also First [redacted] Report, ¶¶15-48. As [redacted] explains, downwelling is a natural process whereby warm surface waters reach the seabed after colliding with the coast and melt oil products on the seabed, see First [redacted] Report, ¶¶18-22.

[1387] First [redacted] Report, ¶¶39-42. *See* also Regnum, *Coastal Belt in a Sevastopol District Contaminated with Mazut* (11 May 2016) (**RU-510**); FlashCrimea, *Oil-Polluted Sand is Removed from Sevastopol Beaches* (12 May 2016) (**RU-511**).

[1388] First [redacted] Report, ¶¶43, 47.

[1389] First [redacted] Report, ¶46.

[1390] Second Expert Report of Dr [redacted].

853. As [redacted] has explained in detail in his first report, downwelling is the natural process when 'surface water layers, heated up by a seasonal increase in temperature, collide with the coast under the influence of currents and sink to the bottom… Reaching the seafloor, the warm water heats up natural or anthropogenic hydrocarbons that may lay there (e.g. hydrocarbon fuel from a sunken ship). This causes them to melt and surface.'[1391] The expert's conclusions are backed by scientific data showing that these exact patterns had been noted prior to the oil surfacing and the regular previous occurrence of such downwelling-related slicks in the Black Sea, including the area near Sevastopol.[1392]

854. [redacted] convincingly explained in his expert reports that the scale of the pollution was not substantial – and clearly not significant enough so as to create any reasonable risks for Ukraine's areas in the Black Sea.[1393] In fact, a hydrocarbon slick of such small volume would not have been able to reach this far, since it would quickly partly evaporate, dissolve and settle on the seabed.[1394] Satellite evidence proves that the slick indeed disappeared by the next day.[1395]

855. In the Reply, Ukraine has not disputed any of these conclusions. Ukraine rather focuses its scant residual criticisms on such alleged defect of the First [redacted] Report as it being *ex post facto* evidence and erroneously suggests that no prior investigations or studies were conducted by the Russian Federation at the time.[1396] This is manifestly wrong.

856. First of all, when alleging an 'apparent failure to take any steps for nearly six years',[1397] Ukraine clearly ignores that the competent Russian authorities did investigate the pollution in question promptly and in due course. Even Ukraine's own sources refer directly to the concurrent investigation.[1398]

[1391] First [redacted] Report, ¶¶7-8; See also Counter-Memorial, ¶¶508-509.

[1392] Counter-Memorial, ¶¶509-511; [redacted] Report, ¶¶15-18, 25-28, 31-36.

[1393] First [redacted] Report, ¶¶45-48; Second [redacted] Report, ¶21.

[1394] First [redacted] Report, ¶46.

[1395] First [redacted] Report, ¶¶43, 47.

[1396] Ukraine's Reply, ¶305; Second [redacted] Report, ¶138.

[1397] Ukraine's Reply, ¶305.

[1398] Second [redacted] Report, ¶30, referring to VTS Kerch, Information on vessel traffic via KYC from Ukrainian ports in the Sea of Azov for 2007-2021 (**UA-224)**; VTS Kerch, Information on vessel traffic via KYC to Ukrainian ports in the Sea of Azov for 2007-2021 (electronic form only) (**UA-225)**.

857. As [redacted] elaborates in his Second Report, on 10 May 2016, Rosprirodnadzor's territorial department carried out field inspections of the Black Sea coast near the beaches where hydrocarbons were identified.[1399] Rosprirodnadzor's environmental specialists took photographs of the washed-up oil, gathered and subsequently examined samples of contaminated soil and seawater.[1400] An administrative investigation was opened on the same day and enquiries were made to responsible authorities and organisations whose vessels were in that location at the time of the pollution to see if it could originate from a ship.[1401] However, the investigation did not confirm the initial version concerning an oil spill from a vessel as no delinquent vessel could be identified.[1402]

858. Meanwhile, all contaminated material was removed from the shore and disposed of in a matter of days, 13 May 2016.[1403] Hence, the Russian Federation took swift and appropriate measures to remove the pollution. The amount of the gathered material was indeed minor and fully correspondent with [redacted] own estimates,[1404] no instances of dolphin or seabird mortality were identified,[1405] and the results of Rosprirodnadzor's investigation thus conclusively confirm [redacted] conclusion that the pollution was indeed insubstantial in brief. A further field inspection was carried out in November 2016 and verified that indeed no traces of pollution remained.[1406]

859. Ukraine's assertions regarding the absence of studies of the pollution is also plainly wrong. First, Ukraine misleadingly asserts that the Russian Federation 'relies entirely on the after-the-fact analysis in the expert report of [redacted],' when in fact it is clear on the face of [redacted] first report that he relied on the results of his personal

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[1399] Second [redacted] Report, ¶35. As regards the details of Rosprirodnadzor's investigation, [redacted] relies on the following source: Rosprirodnadzor, Resolution No. 03/50 on Termination of the Administrative Offence Proceedings, 7 July 2016, p. 2 (**RU-645**).

[1400] Second [redacted] Report, ¶35; Rosprirodnadzor, Letter No. RN-03-02-29/28917, 29 December 2017, p. 1 (**RU-644**).

[1401] Second [redacted] Report, ¶¶34, 36.

[1402] Second [redacted] Report, ¶37; Rosprirodnadzor, Letter No. RN-03-02-29/28917, 29 December 2017, p. 2 (**RU-644**); Rosprirodnadzor, Resolution No. 03/50 on Termination of the Administrative Offence Proceedings, 7 July 2016, p. 3 (**RU-645**).

[1403] Second [redacted] Report, ¶38; Rosprirodnadzor, Letter No. RN-03-02-29/28917, 29 December 2017, p. 1 (**RU-644**).

[1404] Second [redacted] Report, ¶39.

[1405] Second [redacted] Report, ¶40; Rosprirodnadzor, Letter No. RN-03-02-29/28917, 29 December 2017, p. 2 (**RU-644)**.

[1406] Second [redacted] Report, ¶42.

study, based on a special May 2019 expedition to the Black Sea to the places where the oil slicks were recorded and that determined their downwelling origin.[1407]

860. Second, [redacted] elaborates in his second report that the phenomenon of hydrocarbons surfacing from various kinds of bottom sources, including in the Black Sea in particular,[1408] and the ability of warm waters to melt them and bring them to sea surface, were well-studied by 2016.[1409] As his first report indicates, similar oil surfacing in warm seasons in that particular area near Sevastopol had been observed before 2016.[1410]

861. Given their asserted qualifications and experience, both [redacted] and [redacted] could not be unaware of these well-known causes of periodic hydrocarbons surfacing in the Black Sea and relevant scientific studies. It is unclear why both of them did not even consider natural causes as the source of the pollution in question.

862. As [redacted] explains, his 2019 research was the first to demonstrate the causal relationship between this phenomenon and downwelling. Until then, the particular mechanism of the recurring pollution in that particular area remained uncertain.[1411] In this light, it was reasonable for Rosprirodnadzor, as it did, to initially assume that the hydrocarbons found near Sevastopol, a major seaport, could originate from a vessel[1412] – the fact that Ukraine's position has largely verged upon.[1413]

863. Thus, Ukraine's allegations about the lack of contemporary investigations or studies of the pollution are unfounded and simply ignore the information already provided in the [redacted] Report and by Ukraine's own sources. In fact, the Russian authorities took all reasonable and sufficient measures to investigate the pollution and reacted to the events promptly and efficiently.

[1407] First [redacted] Report, ¶17 and fn. 5, providing that '[r]esults of our 2019 research are published on the official website of the Marine Hydrophysical Institute of the Russian Academy of Sciences.'

[1408] *See* the many publications cited in 19, 20, 21, 24 footnotes of Second [redacted] Report.

[1409] Second [redacted] Report, ¶24.

[1410] First [redacted] Report, ¶16 and Figures 1-4.

[1411] Second [redacted] Report, ¶24.

[1412] Second [redacted] Report, ¶24.

[1413] Ukraine's Revised Memorial, ¶250; Ukraine's Reply, ¶305.

864. In light of the above and in view of the insignificant quantity of the hydrocarbons that were noted in 2016, the short duration of the pollution, and the fact that the all necessary efforts were made to clean it up promptly, the Russian Federation had no reason to believe that Ukraine was likely to be affected by this naturally-sourced pollution. Consequently, the Russian Federation was not obliged to notify Ukraine thereof and to cooperate with it under Article 198 of the UNCLOS, and thus did not violate this provision. Nor, as explained in the Counter-Memorial,[1414] did the Russian Federation breach Articles 123, 192, 194, 199, 204 and 205.

D. UKRAINE'S CLAIMS CONCERNING THE ALLEGED VIOLATION OF ARTICLES 123, 192, AND 194 OF UNCLOS AND NON-COOPERATION ARE MISCONCEIVED

865. In addition to its unmeritorious claims under Articles 204, 205 and 206 of the Convention, Ukraine continues to maintain that 'Russia's conduct in the Kerch Strait… 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'.[1415] The Russian Federation has demonstrated on the Counter-Memorial that these assertions are meritless.[1416] A few points are worth elaboration.

866. First, Ukraine's claim is based on the wrong and cynical assumption, as explained above, that no EIA was performed by the Russian Federation in respect of the Infrastructure Projects.[1417] As demonstrated in the preceding sub-sections, the Russian Federation complied with the obligations under Article 206 by conducting adequate and sufficient EIAs for the Kerch Strait Bridge, Gas Pipeline and Power Cables within its sovereign discretion, while the Communication Cable project did not require any EIA. Likewise flawed is Ukraine's assertion of failure to communicate the potential environmental risks,[1418] as demonstrated above.

867. Second, Ukraine continues to misinterpret the obligations under Articles 192 and 194 of UNCLOS. The obligations under these provisions are indeed obligations of 'due

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[1414] Counter-Memorial, ¶513.

[1415] Ukraine's Reply, ¶332.

[1416] Counter-Memorial, ¶¶500-502.

[1417] Ukraine's Reply, ¶333.

[1418] *Ibid*., ¶334.

diligence'.[1419] These are obligations of general nature,[1420] and obligations of conduct, meaning they do not require a specific result for a State to comply with them.[1421] The ITLOS noted: 'The notions of obligations "of due diligence" and obligations "of conduct" are connected … An example may be found in article 194, paragraph 2, of the Convention'.[1422]

868. Ukraine does not argue any facts, in excess of its allegations in connection with its claims under Articles 204-206 and claims in relation to the alleged Lyubimovka incident. The Russian Federation has demonstrated in the preceding sub-sections that it has exercised the necessary due diligence required by those provisions, so as to 'protect and preserve the marine environment' and 'all measures… that are necessary to prevent, reduce and control pollution of the marine environment from any source'. While no specific result is required to comply with a 'due diligence' obligation, the lack of negative environmental impact from the Infrastructure Projects and the inability of Ukraine to present anything credible in support of its case are telling. They unequivocally support the Russian Federation's maximum efforts aimed at protecting and preserving the marine environment when implementing the Infrastructure Projects.

869. Third, Ukraine asserts that the Russian Federation breached its obligation to 'to cooperate with Ukraine as a fellow coastal State in the enclosed Black Sea and Sea of Azov in violation of Article 123'.[1423] This assertion is, however, based on the wrong premise of this provision imposing a legal obligation.

[1419] Counter-Memorial, ¶502.

[1420] H. Zhang, *The Obligation of Due Diligence in Regulating the Marine Genetic Resources in Areas beyond National Jurisdiction* in K. Zou, GLOBAL COMMONS AND THE LAW OF THE SEA (Brill, 2018), p. 296.

[1421] *Pulp Mills*, ¶187: 'The Court considers that the obligation laid down in Article 36 is addressed to both Parties and prescribes the specific conduct of co-ordinating the necessary measures through the Commission to avoid changes to the ecological balance. *An obligation to adopt regulatory or administrative measures either individually or jointly and to enforce them is an obligation of conduct*. Both Parties are therefore called upon, under Article 36, to exercise due diligence in acting through the Commission for the necessary measures to preserve the ecological balance of the river'; see also *Bosnian Genocide*, ¶430.

[1422] *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, pp. 41-42, ¶111, 113.

[1423] Ukraine's Revised Memorial, ¶245.

870. In fact, Article 123 is 'considered to be of a non-obligatory nature',[1424] which is manifested by the use of 'should' in its wording. The provision in question was purposefully drafted in weaker terms,[1425] and therefore does not impose immediately binding obligations. As the *Virginia Commentary* observes, during the drafting process, the stricter term 'shall' was replaced by an 'exhortation' – 'should'.[1426] The Chairman of the Second Committee expressly noted that in doing so, he has 'responded to the expressions of dissatisfaction with the provisions in the [ISNT] by *making less mandatory the co-ordination of activities in such seas'*.[1427] [*Emphasis* added]

871. That aside and in any event, as demonstrated in the Counter-Memorial, the Russian Federation made good faith efforts to cooperate with Ukraine in connection with the Kerch Strait Bridge construction as well in connection with the Parties' activities in the Black Sea and the Sea of Azov in exploitation of aquatic biological resources and the marine environment protection. However, Ukraine chose to put its political claims to the fore and made any cooperation with it impossible. [1428]

872. Ukraine wrongly asserts that cooperation obliged the Russian Federation to produce to Ukraine its EIA materials. As demonstrated above in relation to Ukraine's claims under Articles 43 and 44 of the Convention, there is a manifest leap in logic between arguing an obligation to cooperate and extending it to a non-existent duty to produce design documents for the Infrastructure Projects. No support has been adduced by Ukraine for this sweeping and unwarranted assertion. In any event, all EIA materials were publicly available, and Ukraine's representatives were free to familiarise themselves with such materials. Therefore, Ukraine's reliance to Articles 123, 192 and 194 of UNCLOS is meritless. The Russian Federation cannot be held responsible for Ukraine's own ignorance and reluctance to cooperate in good faith.

[1424] I. Winkelmann, *Article 123. Cooperation of States bordering enclosed or semi-enclosed seas* in A. Proelss (ed.), PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT IN UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY (Nomos Verlagsgesellschaft, 2017), p. 88 (**RUL-203**).

[1425] *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, Separate Opinion of Judge Anderson, p. 129.

[1426] N. Nadan, S. Rosenne (eds.), *United Nations Convention on the Law of the Sea*, *1982*: *A Commentary*, Vol. III, Nijhoff, 2002, p. 362 (**RUL-204**).

[1427] N. Nadan, S. Rosenne (eds.), *United Nations Convention on the Law of the Sea*, *1982*: *A Commentary*, Vol. III, Nijhoff, 2002, p. 362 (**RUL-162**). Third United Nations Conference on the Law of the See, 55th meeting on 18 April 1975, A/CONF.62/WP.8/Rev.1/Part II (**RUL-204**)

[1428] Counter-Memorial, ¶¶492-498.

873. For these reasons, Ukraine's case on the alleged violations of the Convention by the Russian Federation with respect to the protection of marine environment are meritless. The Russian Federation did not violate Articles 123, 192, 194, 204, 205 and 206 of the Convention, and Ukraine's claims should be dismissed in their entirety.

VII. THE RUSSIAN FEDERATION COMPLIED WITH ITS OBLIGATION UNDER ARTICLE 303 OF UNCLOS TO PROTECT UNDERWATER CULTURAL HERITAGE

874. Ukraine argues that Russia violated Article 303(1) of UNCLOS by failing to protect various 'objects of an archaeological and historical nature found at sea'.[1429] As the Russian Federation has demonstrated, Ukraine's claims do not fall within the scope of the Arbitral Tribunal's jurisdiction under UNCLOS as the Sea of Azov and the Kerch Strait are internal waters or Russia, which has a historic title to them.[1430] Should the Arbitral Tribunal nevertheless go into the merits of Ukraine's claims, they should be dismissed in their entirety. Ukraine's allegations of 'a broader pattern of cultural theft, the full ramifications of which have become all too apparent over the last year', 'broader project of cultural erasure aimed at non-Russian minorities' and some kind of 'nationalist narrative'[1431] are irrelevant to the present case and plainly unsubstantiated. In any event, Ukraine is in no position to complain, being itself a hotbed of Neo-Nazi ideology, State-sanctioned racial discrimination policies, ultra-nationalism and wide-scale destruction of Russian cultural heritage.

875. In this chapter the Russian Federation will demonstrate that Ukraine's attempt to read obligations arising under other international instruments into Article 303(1) of UNCLOS must be dismissed: the Arbitral Tribunal's jurisdiction *ratione materiae* is limited to alleged breaches of UNCLOS itself. The extraneous instruments, on which Ukraine wrongly relies as allegedly containing universally accepted 'standards' of UCH preservation, cannot incur obligations binding upon the Russian Federation as it never consented to be legally bound by them (**A**).

876. The Russian Federation will also show that even if the 'standards' referred to by Ukraine were applicable, Ukraine distorts their content (**B**). Specifically:

    a. Ukraine now concedes that non-professional divers may participate in the archaeological excavations, but asserts that they may not remove artefacts.[1432] This

[1429] Ukraine's Revised Memorial, Chapter 6 (III); Ukraine's Reply, Chapter 5.

[1430] Counter-Memorial, Chapter 2 (I) and (II); *See* also Rejoinder, Chapter II.

[1431] Ukraine's Reply, ¶346.

[1432] *Ibid*.

approach finds no basis in international regulation. In fact, it is common practice for divers to act under instructions of a professional archaeologist supervisor and they are not prohibited from carrying out manipulations with UCH objects.

b. Ukraine wrongly insists that reference to *in situ* preservation of UCH reflected in the UCH Rules as 'the first option' indicates a 'strong preference' to this kind of preservation.[1433] This is contrary to Ukraine's own authorities, which suggest that '[f]irst option' is not the same as 'only option', or 'preferred option',[1434] and expressly envisage the possibility of *ex situ* preservation of UCH in appropriate circumstances.

877. The Russian Federation will further prove that it has fully complied with its obligations under Article 303(1) of UNCLOS by adopting legislation and effective enforcement mechanisms aimed at the protection of UCH in practice (**C**). Finally, it will show that Ukraine's criticism in relation to particular instances complained of is misconceived (**D**), while Ukraine is precluded from invoking its claims in view of its own careless attitude toward UCH protection (**E**).

A. UKRAINE'S CLAIMS BASED ON INSTRUMENTS OTHER THAN UNCLOS ARE OUTSIDE THE SCOPE OF THE ARBITRAL TRIBUNAL'S JURISDICTION

878. Ukraine is unable to identify a single violation by the Russian Federation of Article 303(1) as it is drafted, and attempts to 'import' into UNCLOS matters from other treaties. In the Reply, Ukraine argues that it does not seek to establish violations of UCH-related treaties but rather interprets the word 'protect' in Article 303(1) of UNCLOS in the light of 'accepted international standards of conduct'.[1435] However, in doing so, Ukraine still devotes considerable attention[1436] to various provisions concerning UCH protection contained in the UNESCO Convention,[1437] the UCH Rules,[1438] and the Valletta

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[1433] *Ibid.*, ¶¶366-367.

[1434] UNESCO, The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage: Frequently Asked Questions, p. 8 (**UA-664**).

[1435] Ukraine's Reply, ¶¶351-352.

[1436] *See* Ukraine's Revised Memorial, ¶¶261, 267-270; Ukraine's Reply, ¶¶363-368.

[1437] Convention on the Protection of Underwater Cultural Heritage, 2562, U.N.T.S. 158, 2 November 2001 (**UA-120**).

[1438] *Ibid.*, Annex: Rules Concerning Activities Directed at Underwater Cultural Heritage (**UA-120**).

Convention.[1439] Ukraine's reliance on these extraneous instruments cannot vest the Arbitral Tribunal with jurisdiction over Ukraine's claims based on them.

879. ***First***, As explained in the Counter-Memorial, while Article 293(1) of UNCLOS allows the Arbitral Tribunal to apply 'other rules of international law', its jurisdiction remains confined pursuant to Article 288(1) to disputes concerning the interpretation or application of the Convention, and extraneous instruments cannot be relied upon to broaden that jurisdiction.[1440] Ukraine, however, seeks to import 'through the back door'[1441] the 'standards' prescribed by extraneous treaties into Article 303 of UNCLOS, which is impermissible. Quite tellingly, in its Reply, Ukraine has not tendered any response to those arguments.

880. It is trite that a tribunal's mandate to establish legal responsibility of a State party under a treaty is confined to the provisions empowering it to resolve the dispute. In this regard, an applicant's allegations as to non-conformity of the respondent State's actions with certain specific practices extraneous to the treaty, irrespective of the State's voluntary acceptance of such practices, cannot form a basis for establishing international responsibility under the given treaty. It remains the State Party's right to choose which particular methodology to follow while performing its obligations under the treaty, so long as that methodology is sufficient for that treaty's purposes. Election of a methodology other than the one that the State had at a certain point of time voluntarily supported at an international forum, without that State taking upon itself any international obligation to follow this particular methodology, cannot *per se* constitute a breach of the obligation of due diligence under the treaty. This precludes Ukraine's references to any instruments extraneous to UNCLOS, be it the UNESCO Convention (together with the UCH Rules), the Valletta Convention, or any other document.

[1439] European Convention on the Protection of the Archaeological Heritage, 1992 (**UA-121**). According to Article 1 of this international instrument, its aim is 'to protect the archaeological heritage as a source of *European collective memory* and as an instrument of historical and scientific study' [*Emphasis* added]. Therefore, it is highly dubious that the regional treaty could have a universal character. This approach aligns with Article 11 of the Valletta Convention, which explicitly stipulates that: '*Nothing in this (revised) Convention shall affect existing or future bilateral or multilateral treaties between Parties*, concerning the illicit circulation of elements of the archaeological heritage or their restitution to the rightful owner' [*Emphasis* added]. The Russian Federation has been a formal party to the Valletta Convention since 2012, following its ratification in accordance with Article 15(2) of the Convention, and is also in full compliance with all its obligations under the Convention.

[1440] Counter-Memorial, ¶¶523-527.

[1441] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, Separate Opinion of Judge Buergenthal, p. 281, ¶28 (**RUL-122**).

881. ***Second***, the language employed in Article 303(1) of the Convention does not envisage incorporation of external 'standards'. Ukraine attempts to claim the opposite approach, however, without any reasoning.[1442] As aptly noted in the scholarly literature, it is hardly possible to deduce from the wording of Article 303(1) of UNCLOS, read in context with the text of the article as a whole, any specific measures that a State is obliged to take to 'protect' cultural heritage, including the alleged obligation to preserve UCH object *in situ* as Ukraine claims:

> *[I]t is impossible to infer, by any stretch of the imagination, an obligation to protect* in situ *the 'archaeological and historical objects found at sea' to which the provisions of Article 303 refer*. Although paragraph 1 recalls that 'States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose,' paragraph 3 contradicts the possible in situ preservation of such objects the moment it accepts that *the generic obligation contained in the first paragraph* does not affect 'the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.[1443] [*Emphasis* added]

882. Being unable to substantiate its frivolous interpretation of Article 303(1) with case law, Ukraine resorts to referencing jurisprudence on interpretation of rules concerning protection of maritime environment, which are by far different in scope and nature from those relating to UCH protection. This is evident by the plain fact that UCH is not included in UNCLOS, Part XII 'Protection and Preservation of the Marine Environment'.

883. Be as it may, even those authorities do not support Ukraine's case. In the *Iron Rhine Railway Arbitration*, the tribunal, while acknowledging the possibility to interpret the treaty in question by taking into account current principles of environmental law, ultimately concluded that the 'mere invocation of such matters does not, of course, provide the answers in this arbitration to what may or may not be done, where, by whom and at whose costs'.[1444] This confirms that the interpretation of a treaty through another treaty or other sources of international law does not allow to replace the content of the treaty under construction.

[1442] Ukraine's Reply, ¶¶354-356.

[1443] M. Aznar, In Situ Preservation of Underwater Cultural Heritage as an International Legal Principle, *Journal of Maritime Archaeology*, 2018, Vol. 13, Issue 1, p. 75 (**RUL-128**). On the author, *see*: Icuch.icomos.org, *Mariano Aznar* (2022), available at: https://icuch.icomos.org/member/mariano-aznar/ (**RU-723**).

[1444] *Iron Rhine Railway Arbitration (Belgium v. Netherlands)*, Award of 24 May 2005, 27 UNRIAA 35, ¶¶57-60 (**RUL-190**). [*Emphasis* added]

884. Accordingly, Ukraine's approach of reading into Article 303(1) of UNCLOS certain highly detailed standards envisaged by extraneous legal instruments goes far beyond mere treaty interpretation and represents a covert attempt to import extraneous norms into UNCLOS 'through the back door'.[1445]

885. Moreover, the approach advocated by Ukraine is also rejected by the judicial authorities on which Ukraine itself relies, especially the *Pulp Mills* and *Gabčíkovo-Nagymaros* cases.[1446] The quotations from these cases offered by Ukraine are selective and, read in context, provide no basis for Ukraine's approach.

886. In its judgment in the *Gabčíkovo-Nagymaros* case, the ICJ stated that in the light of current standards the parties are under a general obligation to take preventive measures for the protection of the environment, and not UCH.[1447] However, transboundary environmental harm is an entirely different subject-matter, as illustrated, for example, by the ILC's work in that field, which did not encompass protection of archaeological heritage.[1448] Furthermore, the Court did not impose on the parties to the dispute any obligation to take such measures in a specific manner.

887. In the *Pulp Mills* case, the ICJ was faced with an argument that the scope of the EIA in question required under the Statute of the River Uruguay should be determined according to existing international practice.[1449] While interpreting the Statute, the Court refused to import any rules from international instruments, including even those guidelines of an international technical body that, in the view of the Court, 'ha[d] to be taken into account by each Party'.[1450] The Court ultimately held that the specificities of the EIA should be regulated by national law:

> The Court observes that neither the 1975 Statute nor general international law specify the scope and content of an environmental impact assessment…

[1445] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, Separate Opinion of Judge Buergenthal, p. 281, ¶28 (**RUL-122**).

[1446] *See* Ukraine's Revised Memorial, ¶262, fn. 554; Ukraine's Reply, ¶¶352, 360.

[1447] *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. CJ. Reports 1997, pp. 77-78, ¶140 (**UAL-201**).

[1448] See, *i.a.,* Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, Yearbook of the International Law Commission, 2001, Vol. II, Part 2 (**RUL-186**).

[1449] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 82, ¶203 (**UAL-152**).

[1450] *Ibid.*, p. 83, ¶205.

> Consequently, it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case...[1451]

888. This is in sharp contrast with Ukraine's position. As described above, Ukraine actually tries to replace Article 303 of UNCLOS by extraneous legal norms, including by the rules of other treaties. Evidently, the Court in the *Pulp Mills* case did not apply such a far-reaching approach. Therefore, Ukraine's position finds no support in the ICJ case law.

889. Finally, Ukraine's line of argumentation is also contrary to the rules of treaty interpretation. What Ukraine calls an analysis of the 'ordinary meaning' of Article 303(1) of the Convention[1452] is in fact an attempt to interpret the UNCLOS through extraneous legal instruments as provided by Article 31(3)(c) of the VCLT. But one important limitation of this technique is that it is only available where relevant rules of international law are 'applicable in the relations between the parties'. This is clearly not the case with respect to the UCH Rules, which Ukraine invites the Tribunal to apply as 'recognized international standards':[1453]

a. As affirmed by UNESCO, the UNESCO Convention is 'independent of any other treaty', including UNCLOS.[1454] The UCH Rules annexed to the UNESCO Convention, according to its Article 33, 'form an integral part of it and, unless expressly provided otherwise, a reference to th[e] Convention includes a reference to the Rules'.

b. The provisions of the UNESCO Convention and the UCH Rules as its integral part only apply to the States that have ratified the UNESCO Convention. This understanding is confirmed by UNESCO itself, which states that 'the 2001 Convention… only applies to States that become party to it'[1455] and lists the

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[1451] *Ibid.*

[1452] Ukraine's Revised Memorial, ¶¶258-262, 267-268; Ukraine's Reply, ¶352.

[1453] *Ibid.*

[1454] UNESCO, The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage: Frequently Asked Questions, p. 16 (**UA-664**).

[1455] UNESCO, The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage: Frequently Asked Questions, p. 17 (**UA-664**). This approach is supported by authorities referred to by Ukraine. *See* J.-M. Panayotopoulos, The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage: Main Controversies in Ana Filipa Vrdoljak and Francesco Francioni (eds.), The Illicit Traffic of Cultural Objects in the

application of the UCH Rules as a 'benefit' that a State may acquire *from* (*i.e.*, after) ratifying the UNESCO Convention.[1456]

c. The Russian Federation has not consented to the application of the UNESCO Convention and the UCH Rules. On the contrary, during the 31st Session of the UNESCO General Conference which Ukraine refers to, the Russia explicitly stated that in its view the UNESCO Convention is not compatible with UNCLOS and that it cannot bind non-parties.[1457] Many other States expressly noted that the UNESCO Convention must not apply to the States that have not ratified it.[1458] This of course encompasses the entirely of the Convention, including the UCH Rules as its Annex – as per Article 33 of the Convention. In fact, as noted by the commentators cited by Ukraine, 'ratification [of the UNESCO Convention] has been slow amongst major maritime powers'.[1459] Therefore, there is no 'consensus' in applying the UNESCO Convention and the UCH Rules.

d. Those States which did not ratify the UNESCO Convention but nevertheless intended to apply its Annex (the UCH Rules), made explicit statements to this effect. For example, Norway directly stated that it is 'aiming at unilateral application of the rules set out in the annex'.[1460] Russia made no such statement. In any event, expression of

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Mediterranean (2009), p. 57 (**UA-660**): 'as every new multilateral agreement in international law, the UNESCO Convention's rules are only applicable to the States parties to it'.

[1456] UNESCO, The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage: Frequently Asked Questions, p. 18-19 (**UA-664**): '*What benefits can States derive from ratifying?.. The 2001 Convention provides practical guidelines on how to research underwater cultural heritage.* The Annex of the 2001 Convention provides archaeologists and national authorities worldwide very reliable guidelines on how to work on underwater cultural heritage sites and what to consider when doing so'. [*Emphasis* added].

[1457] United Nations Educational, Scientific and Cultural Organization, the 31st Session, Twentieth plenary meeting, 2001, Report of Commission IV: Resolutions and Recommendations, p. 555, ¶15.40, available at: https://webarchive.unesco.org/web/20170128100102/http://unesdoc.unesco.org/images/0012/001289/128966m.pdf (**RU-816)**: 'The Russian Federation and Norway voted against on the grounds that the text was not compatible with the United Nations Convention on the Law of the Sea and noted that the new convention could not bind non-Parties'.

[1458] United Nations Educational, Scientific and Cultural Organization, the 31st Session, Twentieth plenary meeting, 2001, Report of Commission IV: Resolutions and Recommendations, p. 560, ¶15.48, available at: https://webarchive.unesco.org/web/20170128100102/http://unesdoc.unesco.org/images/0012/001289/128966m.pdf (**RU-816**): 'Israel, which also abstained, believed that, with more time, a consensus could have been reached and stated that the convention would apply only to States Parties. These views were also shared by Sweden, Turkey, United Kingdom, Norway, Russian Federation and United States, as observer'.

[1459] H. Roberts, The British Ratification of the Underwater Heritage Convention; Problems and Prospects*, Int'l & Comp. L.Q.*, 2018, Vol. 67, Issue 4, p. 834 (**UA-659**).

[1460] United Nations General Assembly, Fifty-Sixth Session, 65th Plenary Meeting, UN Doc. A/56/PV.65 (27 November 2001), p. 23 (**UA-662**).

intent to voluntarily apply UCH Rules, in whatever form, cannot be construed as a binding obligation capable of giving rise to international responsibility, either by itself or in the context of another treaty.

Therefore, the UNESCO Convention and the UCH Rules are not binding on the Russian Federation. Neither is Russia a State party to that treaty, nor do the provisions of those instruments reflect customary international law.[1461]

890. In any event, it would contrary to the principle of systemic interpretation under Article 31(3)(c) to interpret a universal convention such as UNCLOS in light of another instrument, such as the Valletta Convention being a regional treaty, with different State parties to it. Indeed, such systemic interpretation can only be justified where 'any interpretation of the treaty's provisions imposes consistent obligations on *all* the parties to it.'[1462] The contrary approach would erode the whole regulatory framework of the Convention and would 'run the risk of potentially inconsistent interpretation decisions dependent upon the happenstance of the particular treaty partners in dispute'.[1463] It would essentially allow to interpret UNCLOS, 'a Constitution for the oceans',[1464] in each case in an arbitrary way depending on who the parties to that case are, which is nonsensical.

891. ***Third***, unlike other provisions of UNCLOS that envisage importation of certain external standards, Article 303(1) contains no such reference. This is in clear contrast with, for instance, Article 207 or Article 208, which expressly provide such references. It is submitted that, had the drafters of UNCLOS intended a reference to 'international standards', as advocated by Ukraine, in Article 303(1), they would have included it, like they did in other Articles.

892. What is more, Article 303(4) specifically states that Article 303 generally 'is *without prejudice to other international agreements and rules of international law* regarding the protection of objects of an archaeological and historical nature'. It has been noted in this respect, that 'UNCLOS allows the drafting of more specific treaty regimes which can

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[1461] Counter-Memorial, ¶526.

[1462] C. McLachlan, The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention, *The International and Comparative Law Quarterly*, 2005, Vol. 54, No. 2, p. 315 (**RUL-220**).

[1463] *Ibid*., p. 314.

[1464] T. Koh, A CONSTITUTION FOR THE OCEANS (1982), p. 1 (**UAL-108**).

ensure better protection of underwater cultural heritage.'[1465] It does not, however, entail that such elaborated treaty regimes should inform the interpretation of Article 303:

> Article 303 begins by creating a general duty: 'States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.' *There is nothing to indicate what has to be done to satisfy this duty. The way it has been left means that anyone can read into it their own interpretation of what action has to be taken*.'[1466] [*Emphasis* added].

893. In the light of the above, Ukraine's interpretation of Article 303 of UNCLOS is wrong and would lead to an unacceptable expansion of the Arbitral Tribunal's jurisdiction outside the limits prescribed by Article 288(1) of UNCLOS. In any event, as will be demonstrated below, the Russian Federation did not violate neither its obligations under Article 303 of UNCLOS, nor any provisions of other international instruments, such as the UNESCO Convention and the Valetta Convention.

B. UKRAINE MISREPRESENTS THE 'STANDARDS' OF THE UCH PROTECTION

894. As explained in the Counter-Memorial, Article 303(1) of UNCLOS contains a 'due diligence' obligation and not an obligation of result. To establish a violation of Article 303(1), Ukraine must prove that Russia failed to take diligent efforts in protecting UCH, namely, to introduce framework capable of preventing or minimizing the risk of damage to UCH.[1467]

895. Ukraine has not managed to bear that *onus*. Instead, it relies to extraneous legal instruments (that, as explained above, fall outside of the Arbitral Tribunal's jurisdiction) to allege that the UCH protection 'standards' envisaged by those instruments were violated by the Russian Federation in four standalone episodes. While the following Sections deal with the merits of Ukraine's claims on the facts, this Section explains that even if the instruments, to which Ukraine refers, were applicable in this case, Ukraine has grossly distorted their content to save its hopeless case on UCH protection.

[1465] T. Scovazzi, *Article 303* in Alexander Proelss (ed.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA - A COMMENTARY (2017), p. 1960 (**UAL-197**).

[1466] P. O'Keefe, *Underwater Cultural Heritage*, in F. Francioni, A. Vrdoljak (eds.), THE OXFORD HANDBOOK OF INTERNATIONAL CULTURAL HERITAGE LAW (OUP, 2020), p. 299 (**RUL-127**).

[1467] Counter-Memorial, ¶¶519-521.

i. Ukraine Misinterprets the 'Standard' Concerning Participation of Divers in Underwater Archaeology Expeditions

896. Ukraine initially denied the possibility of divers' involvement in archaeological expeditions,[1468] however, it now accepts in the Reply that divers can indeed participate in expeditions under the supervision of an archaeologist and in so far as divers do not remove objects from the seabed.[1469] This refined approach is nonetheless equally flawed.

897. While it is true that, under the UCH Rules, supervision of a qualified archaeologist is essential,[1470] this neither implies that only archaeologists can remove UCH objects, nor that the role of non-archaeologist divers is limited under Article 2(10) of UCH Convention to the mere 'observation' of sites, as Ukraine alleges.[1471] In fact, Article 2(10) does not even regulate the conduct of archaeological expeditions. Instead, as its title suggests, it only sets the 'objectives and general principles' and addresses the issue of the general public's access to UCH[1472] rather than the composition of archaeological expedition teams and the division of roles among their members.[1473]

898. The above conclusion is also supported by interpreting Article 2(10) together with other provisions of the UCH Rules. Rule 23 – to which Ukraine itself refers[1474] – states that

> [a]ll persons on the project team shall be qualified and have demonstrated competence *appropriate to their roles* in the project. [*Emphasis* added]

899. Expedition participants must in other words be suited for their respective roles in which they have been engaged. It cannot be reasonably inferred from the above provision, taken

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[1468] Ukraine's Revised Memorial, ¶¶274, 281.

[1469] Ukraine's Reply, ¶¶364-365.

[1470] UCH Rules, Rule 22. *See* 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**).

[1471] Ukraine's Reply, ¶365, fn. 811.

[1472] S. Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, 2003, Vol. 18, No. 1, pp. 67-68 (**RUL-191**): 'Provision is also made for public access, for the raising of public awareness, and for the establishment or reinforcement of 'competent authorities.' However, *this provision is in very general terms and does little more than reiterate the archaeological principle that the public should have access to the cultural heritage except where such access is incompatible with its protection*.' [*Emphasis* added; footnotes omitted]

[1473] Convention on the Protection of the Underwater Cultural Heritage, 2562 U.N.T.S. 158 (2 November 2001), Article 2(10) (**UA-120**): 'Responsible 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.'

[1474] Ukraine's Reply, ¶365, fn. 812.

together with the requirement of supervision by an archaeologist,[1475] that divers cannot remove UCH objects.

900. This is confirmed by Rule 5 of the UNESCO Code of Ethics for Diving on Submerged Archaeological Sites which states that the relocation or removal of an object ought not to be done without the '*supervision* of a professional archaeologist authorized by the competent authorities' [*emphasis* added].[1476] Accordingly, divers are not prohibited from carrying out the manipulations with the UCH objects, provided that the necessary guidance and supervision by a professional archaeologist is assured.

901. As explained in the expert report of professional underwater archaeologists, [redacted] and [redacted],[1477] usually only a small part of an archaeological expedition team consists of professional archaeologists, whose main task is to supervise the works at the site and coordinate the team.[1478] The rest of the team comprises other professionals, including persons with specific diver qualifications,[1479] who receive basic archaeological training from the leading archaeologist before the expedition begins.[1480] Accordingly, subject to such prior training, the participation of volunteer divers is justified.[1481] Moreover, involvement of divers is all the more necessary where the characteristics of the archaeological site, such as considerable depth underwater of 50 to 100 metres, render it unavailable for persons without special diving skills.[1482] In the course of archaeological works, the expedition leader guides and controls the activities of the team.[1483]

902. The valuable contribution of volunteer divers to underwater archaeology has been explicitly recognised by the UNESCO in the following terms:

[1475] *Ibid*.

[1476] UNESCO Code of Ethics for Diving on Submerged Archaeological Sites (**RUL-125**).

[1477] Expert report of [redacted] and [redacted] dated 8 December 2023 ('[redacted] Report').

[1478] *Ibid.*, ¶65.

[1479] *Ibid.*, ¶64.

[1480] *Ibid.*, ¶66.

[1481] *Ibid.*, ¶67.

[1482] *Ibid.*, ¶70.

[1483] *Ibid.*, ¶68. *See* also G. Bass, ARCHAEOLOGY UNDER WATER (Frederick A. Praeger, 1966), pp. 32-33 ([redacted] Report, Appendix AO); A. Bowens (ed.), UNDERWATER ARCHAEOLOGY: THE NAS GUIDE TO PRINCIPLES AND PRACTICE (2nd ed., Blackwell Publishing, 2009), p. 149 (**RU-656**).

> Avocational team members are a valuable potential resource to professional archaeologists and successful projects have been run in many places around the world using avocational staff. One of the best-known projects in which large numbers of non-archaeologists participated was the excavation between 1979 and 1982 of the Tudor warship, the *Mary Rose* in Portsmouth in the United Kingdom.[1484]

903. Finally, Ukraine's approach also contradicts international practice. For example, the famous Phoenician Shipwreck Project devoted to a shipwreck off Gozo is claimed to be the 'first ever archaeological excavation by divers beyond 100 meters'.[1485] The project team consists of two archaeologists, while the number of divers exceeds 20 persons.[1486] Media publications on that project reveal that due to the dangerous nature of the dive, only a few highly disciplined expert divers had access to the site to retrieve the objects from the seabed.[1487]

904. In numerous other projects across the world archaeologists successfully teamed with divers in order to explore or excavate underwater sites. Some notable recent examples include the excavation of artefacts by non-archaeologist divers from the *Zambratija* in the Mediterranean,[1488] the *Kronan* in Sweden,[1489] and the *Antikythera* in Greece.[1490] There are also projects in which the participation of volunteer divers is expressly mentioned.[1491] Numerous other examples of direct involvement of volunteer divers in

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[1484] T. Maarleveld, U. Guérin et al. (eds), MANUAL FOR ACTIVITIES DIRECTED AT UNDERWATER CULTURAL HERITAGE. GUIDELINES TO THE ANNEX OF THE UNESCO 2001 CONVENTION (UNESCO, 2013), p. 174 (**RUL-124**). *See* also [redacted] Report, ¶62; Counter-Memorial, ¶¶536-537.

[1485] Phoenician Shipwreck Project, *The Main Page*, available at: https://phoenicianshipwreck.org/ (**RU-646**).

[1486] Phoenician Shipwreck Project, *The Team*, available at: https://phoenicianshipwreck.org/the-team/ (**RU-647**).

[1487] World Archaeology, *Excavating a Phoenician shipwreck off the coast of Gozo, Malta* (25 April 2018), available at: https://www.world-archaeology.com/features/excavating-a-phoenician-shipwreck-off-the-coast-of-gozo-malta/ (**RU-648**).

[1488] People, *Divers Plan to Recover 3,000-Year-Old, Hand-Sewn Ship in the Mediterranean Sea Next Month* (22 June 2023), available at: https://people.com/divers-3000-year-old-hand-sewn-ship-mediterranean-7551057 (**RU-649**).

[1489] Kalmar County Museum, *New finds at the regal ship Kronan's wreck site* (26 August 2022), available at: https://kalmarlansmuseum.se/en/uncategorized/new-finds-at-the-regal-ship-the-crown-wreck-site/ (**RU-650**); Kalmar County Museum, *Time for new dives at the Kronan wreck site* (25 May 2023), available at: https://kalmarlansmuseum.se/en/uncategorized/time-for-new-dives-at-the-crown-wreck-site/ (**RU-651**).

[1490] Return to Antikythera, *New findings from the underwater archaeological research at the Antikythera Shipwreck* (18 October 2019), available at: https://antikythera.org.gr/2019/10/18/2722/ (**RU-652**); Return to Antikythera, *Press release: 'Return to Antikythera 2022'* (20 June 2022), available at: https://antikythera.org.gr/2022/06/20/2888/ (**RU-653**).

[1491] Ghost Diving, *Teaming up with legendary explorer Mario Arena in Italy* (3 August 2021), available at: https://www.ghostdiving.org/news/view/116 (**RU-654**); Nord Stream Facts, *A Blast from the Past: Marine*

archaeological works are described in the [redacted] Report, including expeditions to the Duboka Bay, Cape Franina and Barbir Harbour wrecks, as well as *Zmeiniy Patroclus* and *Foros Byzantine* wrecks in Ukraine.[1492]

905. The reasons for such encouragement and frequent recourse to divers' assistance in underwater expeditions are clear. Unlike most archaeologists, divers possess the expertise needed for diving to the deep and physically accessing UCH objects.[1493] Accordingly, in many instances such participants of archaeological expeditions are also in a better position to accomplish various manipulations on the sites deep underwater.[1494] Ukraine's approach makes any large complex underwater excavations impossible as any archaeologist in the team would have to possess the qualities of a professional diver, which is impossible.

906. It is thus evident that Ukraine has drawn a distorted picture of how the participation of divers is actually perceived under international best practices.

ii. <u>Ukraine mischaracterizes the 'standards' concerning in situ and ex situ preservation</u>

907. Ukraine's position on *in situ* preservation also raises questions. Again, it is striking how Ukraine has changed its position in the Reply as compared to the Revised Memorial. Nowhere does the Revised Memorial mention the factors against which the decision on either *in situ* or *ex situ* conservation shall be made.[1495] Yet, in the Reply, Ukraine admits that excavation is possible if there is sufficient justification,[1496] without, however, indicating which justification for *ex situ* conservation is valid.

Archaeology Day in Sweden Starts with a Cannon Salute (August 2010), available at: https://www.nord-stream.com/download/document/52/?language=en (**RU-655**).

[1492] [redacted] Report, ¶¶71-75. *See* also Witness Statement of [redacted] dated 22 August 2022 ([redacted] Statement'), ¶18.

[1493] [redacted] Report, ¶70.

[1494] A. Bowens (ed.), UNDERWATER ARCHAEOLOGY: THE NAS GUIDE TO PRINCIPLES AND PRACTICE, (2nd ed., Blackwell, 2009), p. 141 (**RU-656**): 'The diver's hand remains the most sensitive, accurate, and useful tool for fanning away or scooping silt towards the mouth of the airlift or dredge …'.

[1495] *See, e.g.*, Ukraine's Revised Memorial, ¶¶270, 272, 274, 275. Of note is ¶276, where Ukraine states with respect to the episodes described as follows: 'This series of events is symptomatic of a larger pattern. Publicly-available information confirms that on numerous other occasions, UCH has been interfered with or removed from waters around the Crimean Peninsula, whether by Russian government officials or by private parties allowed to do so by the Russian authorities, *thereby contravening modern technical and archaeological standards that recommend UCH be preserved in situ to the extent possible*.' [*Emphasis* added]

[1496] Ukraine's Reply, ¶367.

908. According to UNESCO, *in situ* conservation is only the '*first*' option of UCH preservation, which 'is not the same as '*only* option' or '*preferred* option'.[1497] Reasons for *ex situ* preservation listed by UNESCO include, for example, development projects in the UCH area, the need for fundamental research of UCH or instability of the environment.[1498] In line with this, the UCH Rules explicitly provide that excavation is allowed for scientific purposes, as well as for the ultimate protection of the artefacts.[1499] In choosing a method of conservation one has to analyse numerous aspects, such as the material of the object, the specifics of the site, looters' interest, contribution to the scientific understanding of the respective historical elements.[1500] Therefore, there is no one-size-fits-all solution, and the decision to excavate always depends on the circumstances of each case. This approach is admitted by Ukraine in its Reply.[1501] As will be demonstrated below, the Russian Federation's conduct in relation to the particular episodes invoked by Ukraine is compliant with the above criteria.

909. The tailor-made approach to conservation outlined above is perfectly illustrated by recent archaeological practice across the world. For example, many UCH objects were removed from the seabed during the 2022 expedition to the *Antikythera* shipwreck in Greece led by renowned archaeologists, among which most notable are the marble head of a male bearded figure and a plinth of a marble statue.[1502] Nevertheless, researchers opined that

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[1497] UNESCO, The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage: Frequently Asked Questions, p. 8 (**UA-664**). *See* also S. Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, 2003, Vol. 18, No. 1, pp. 67-68 (**RUL-191**); M. J. Aznar, In Situ Preservation of Underwater Cultural Heritage as an International Legal Principle, *Journal of Maritime Archaeology*, 2018, Vol. 13, Issue 1, p. 77 (**RUL-128**). Article 5 of the Valetta Convention provides that 'Each Party undertakes…to make provision, when elements of the archaeological heritage have been found during development work, for their conservation *in situ when feasible'* [*Emphasis* added]. *See* European Convention on the Protection of Archaeological Heritage (Revised) (**UA-121**); Explanatory Note to the Valetta Convention clarifies that 'In certain circumstances, it may be decided that the project has to go ahead even though this will damage some aspect of the archaeological heritage' and that feasibility of preservation *in situ* 'will depend largely on the nature of the site and what is being constructed'; *See* Explanatory Report to the European Convention on the Protection of the Archaeological Heritage (Revised) (**RUL-123**).

[1498] UNESCO, The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage: Frequently Asked Questions, p. 8 (**UA-664**).

[1499] Convention on the Protection of Underwater Cultural Heritage, 2562 U.N.T.S. 158 (2 November 2001), Annex, Rule 4 (**UA-120**); Counter-Memorial, ¶543.

[1500] P. O'Keefe, *Underwater Cultural Heritage* in THE OXFORD HANDBOOK OF INTERNATIONAL CULTURAL HERITAGE LAW (OUP, 2020), p. 302 (**RUL-127**); M. Aznar, In Situ Preservation of Underwater Cultural Heritage as an International Legal Principle, *Journal of Maritime Archaeology*, 2018, Vol. 13, Issue 1, p. 69 (**RUL-128**).

[1501] Ukraine's Reply, ¶361: 'Since the principle is an international minimum standard, its requirements are context-specific, requiring different measures in different circumstances.'

[1502] Return to Antikythera, *Press release: 'Return to Antikythera 2022'* (20 June 2022), available at: https://antikythera.org.gr/2022/06/20/2888/ (**RU-653**).

such interference with the site is outweighed by the scientific contribution of the finds to the 'understanding of the ship, its cargo, the crew and where they were from'.[1503]

910. Similarly, in March 2023 numerous fragile objects – such as 17th century dresses, textiles, and leather book bindings – were lifted from the wrecks of a Dutch merchant ship off the coast of Texel.[1504] The dresses are now at the Netherlands' Museum Kaap Skil, stored in special display cases filled with pressurised nitrogen removing all oxygen to prevent deterioration.[1505] It is a truism to say that in these circumstances the dresses can be better preserved than underwater. In addition, the researchers emphasise the exceptional historical value of these finds.[1506]

911. In August 2023, archaeologists and divers finished the excavation of a whole 400-year-old Hanseatic shipwreck found off the coast of Lübeck just 18 months after its discovery.[1507] The remains comprise mostly delicate organic wooden material[1508] which is subject to rapid decay.[1509] The lead archaeologist explained that the excavation was justified by scientific purposes in order to 'draw a number of conclusions as to the cargo and equipment of the Hanseatic ship'.[1510]

[1503] Smithsonian Magazine, *Divers Pull Marble Head of Hercules From a 2,000-Year-Old Shipwreck in Greece* (27 June 2022), available at: https://www.smithsonianmag.com/smart-news/divers-pull-marble-head-hercules-shipwreck-greece-180980306/ (**RU-657**); *See* also: Lund University, *Antikythera shipwreck yields remarkable artefacts* (5 October 2017), available at: https://www.lunduniversity.lu.se/article/antikythera-shipwreck-yields-remarkable-artefacts (**RU-658**), Archaeology.org, *Researchers Return to Greece's Antikythera Shipwreck* (26 July 2023), available at: https://www.archaeology.org/news/11610-230726-greece-antikythera-shipwreck (**RU-659**), Whoi.edu, *Marine Archaeologists Excavate Greek Antikythera Shipwreck* (24 September 2015), available at: https://www.whoi.edu/press-room/news-release/antikythera-shipwreck-excavation/ (**RU-660**).

[1504] CNN, *Stunning silver wedding dress recovered from 17th century shipwreck* (17 February 2023), available at: https://edition.cnn.com/2023/02/17/world/dutch-palmwood-shipwreck-finds-scn (**RU-661**).

[1505] *Ibid*.

[1506] Maarten van Bommel, exhibition researcher and professor of conservation science at the University of Amsterdam, commented that '[t]here may only be two such dresses in the whole world. And they are both here, on Texel,' *see* CNN, *Stunning silver wedding dress recovered from 17th century shipwreck* (17 February 2023), available at: https://edition.cnn.com/2023/02/17/world/dutch-palmwood-shipwreck-finds-scn (**RU-661**).

[1507] Deutsche Welle, *German archaeologists unearth 400-year-old ship in Baltic* (8 January 2023), available at: https://www.dw.com/en/german-archaeologists-unearth-400-year-old-shipwreck-in-baltic/a-66401704 (**RU-662**).

[1508] Deutsche Welle, *German shipwreck's 400-year-old treasures uncovered* (7 May 2023), available at: https://www.dw.com/en/german-shipwrecks-400-year-old-treasures-discovered/a-66120874 (**RU-663**).

[1509] Deutsche Welle, *German archaeologists unearth 400-year-old ship in Baltic* (8 January 2023), available at: https://www.dw.com/en/german-archaeologists-unearth-400-year-old-shipwreck-in-baltic/a-66401704 (**RU-662**).

[1510] *Ibid*. *See* also: M. Axinte, C. Nejneru et al. (eds.), Corrosion behaviour of some steels in Black Sea water, *REV.CHIM*. (Bucharest), 2015, Vol. 11, p. 1851, available at: https://bch.ro/pdfRC/AXINTE%20M.pdf%2011%2015.pdf (**RU-664**).

912. Ukraine also wrongly purports to extend the UCH preservation 'standards' applicable to UCH *sites* to individual *artefacts*. As experts [redacted] explain, there is a fundamental difference between the two, with an UCH site (or monument) referring to a whole object found undersea, the relevant *in situ* and *ex situ* preservation considerations applicable thereto; by contrast, artifacts are individual items that may be found within an UCH site.[1511] In this case, Ukraine misleadingly interprets the 'standards' it refers to as applicable to all sorts of items found on the seabed altogether.[1512] This interpretation is wrong. All sources cited by Ukraine only refer to sites and not individual artefacts.

913. Ukraine's attack on Russia's reference to the archaeological excavations in the context of the Nord Stream project misses the point. Ukraine tries to undermine the argument of the Russian Federation that infrastructural projects may necessitate *ex situ* preservation by simply stating that the 'number of UCH objects removed [in the Nord Stream project] remained very low compared to those preserved *in situ*'.[1513] Yet, the specifics of the projects and the uniqueness of the site remain largely ignored. The relatively low number of excavations is perfectly explained by the possibility to reroute the pipeline.[1514]

914. Experts agree that where infrastructure projects are being implemented, *in situ* conservation can only be achieved by modifying the project and excluding the site from the project area,[1515] if such a modification is possible in principle and reasonable both in terms of ensuing time and costs. Accordingly, the planning and implementation of infrastructure projects is widely recognized as a basis for conducting an excavation of the archaeological sites concerned.[1516] This is primarily because the planned works may pose

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[1511] [redacted] Report, ¶¶15-17.

[1512] For instance, Ukraine wrongly purports to apply the *in situ* preservation methodology to the excavation of amphorae found on the site of the Byzantine-era Ship, while specifically referring to them as 'artifacts'. *See* Ukraine's Reply, ¶274. Similarly, Ukraine refers to alleged violation of in situ preservation in the course of excavation of the Terractta Sculpture Fragment, which is an artefact by all standards. *See* Ukraine's Reply, ¶¶276-277.

[1513] Ukraine's Reply, ¶368.

[1514] Nord Stream Espoo Report: Key Issue Paper. Maritime Cultural Heritage, February 2009, p. 40, Section 5.1 (**RU-518**).

[1515] [redacted] Report, ¶36.

[1516] Chartered Institute for Archaeologists, *Standard and guidance for archaeological excavation* (2014), p. 4, available at: https://www.archaeologists net/sites/default/files/CIfAS%26GExcavation_2.pdf (**RU-665**); N. Johansson, L.G. Johansson, *Rescue Archaeology* in UNESCO - ENCYCLOPEDIA LIFE SUPPORT SYSTEMS, available at: https://www.eolss.net/sample-chapters/c04/E6-21-04-04.pdf (**RU-666**); *See* also [redacted] Report, ¶31. *See* also Explanatory Report to the European Convention on the Protection of the Archaeological

a threat to the physical preservation of the site. One example of the mass recovery of artefacts is an archaeological excavation conducted during the Marmaray underwater tunnel construction in the Yeni Kapi area of Istanbul, Türkiye. Tens of thousands of artefacts were found and recovered then, along with 37 shipwrecks.[1517]

915. Be that as it may, as will be demonstrated in section D below, the Russian Federation complied with the 'standards' for UCH protection on which Ukraine bases its allegations in respect of the specific episodes that Ukraine invokes.

C. THE RUSSIAN FEDERATION'S LEGISLATION AND ENFORCEMENT PRACTICE COMPLY WITH ARTICLE 303(1) OF UNCLOS

916. As the Russian Federation has pointed out,[1518] and Ukraine does not appear to dispute, Article 303(1) of UNCLOS only establishes a general obligation of 'due diligence' but not an obligation to ensure an end-result. However, in its Reply, Ukraine distorts the position of the Russian Federation regarding the contents of its obligations under Article 303(1) of UNCLOS. In particular, contrary to Ukraine's assertions, Russia did not assert that Article 303 'allows it to be satisfied by actions on paper alone'.[1519] In fact, the Russian Federation has demonstrated, and will elaborate further below, that it has taken the necessary steps and efforts to satisfy the 'due dilligence' obligation to protect UCH within its jurisdiction by adopting proper legislation and enforcement practice.[1520]

Heritage (Revised), p. 6 (**RUL-123**): 'In certain circumstances, it may be decided that the project has to go ahead even though this will damage some aspect of the archaeological heritage. The Icomos Charter specifically states that excavation should be carried out in these circumstances. Article 5, paragraph *ii*.b, embraces this principle and requires States to ensure that consultation takes place so that adequate time will be given "for an appropriate scientific study to be made of the site" and the necessary funds provided'.

[1517] *See* Yenikapı Byzantine Shipwrecks Project, *The Main Page*, available at: https://nauticalarch.org/projects/yenikapi-byzantine-shipwrecks-project/ (**RU-667**); *See* also Republic of Turkey Governorship of Istanbul, *Yenikapı Archeology Excavations Shed Light on the History of Istanbul* (12 March 2020), available at: http://en.istanbul.gov.tr/yenikapi-archeology-excavations-shed-light-on-the-history-of-istanbul (**RU-668**); U. Kocabaş and I. Özsait-Kocabaş, COMPARATIVE ANALYSIS OF LIFTING FROM ON-SITE AND CONSERVATION OF THE YENIKAPI SHIPWRECKS, HERITAGE, 2023, Vol. 6, Issue 2, pp. 1871-1890 (**RU-669**).

[1518] Counter-Memorial, ¶519.

[1519] Ukraine's Reply, ¶359.

[1520] *See* Counter-Memorial, ¶521 referring to 'Russia's legislative framework and law enforcement practice'; and ¶561 referring to 'Russia's legal, as well as law enforcement framework'.

i. The Russian Federation Takes Efficient and Active Measures for the Protection of Cultural Heritage

917. The 'due diligence' obligation under Article 303(1) of UNCLOS requires the Russian Federation to introduce 'policies, legislation, and administrative controls which are capable of preventing or minimizing the risk' of damage to UCH.[1521] The Russian Federation demonstrated in the Counter-Memorial that the legal and law enforcement framework of archaeological heritage protection it adopted fully satisfies this requirement.[1522] Some of the relevant legal instruments, including the Guidelines for Archaeological Fieldworks and Scientific Reporting Documents ('RAS Guidelines 2018') and the Rules for Archaeological Works in the Body of Water Areas ('RAS Rules of 2019') of the Russian Academy of Sciences, expressly acknowledge that they bear up against international instruments, including the Valetta Convention, and the UNESCO Convention.[1523]

918. To reiterate and summarize briefly, the key provisions of the Russian legislative framework of archaeological heritage protection are as follows:

    a. Any field operation to explore or excavate archaeological heritage objects may only be conducted based on prior authorisation by the Ministry of Culture of the Russian Federation.[1524] Non-authorised exploration constitutes an administrative and criminal offence;[1525]

[1521] *Ibid.*, ¶519.

[1522] *Ibid.*, ¶547-561.

[1523] Guidelines for Archaeological Fieldworks and Scientific Reporting Documents approved by the Resolution of the History and Philology Department Bureau of the RAS No. 32, 20 June 2018, p.1.3 (**RU-530**); IA RAS, Rules for Archaeological Fieldworks in the Body of Water Areas approved by Resolution of the History and Philology Department Bureau of the RAS No. 29, 21 May 2019, p.1.1 (**RU-523)**. This is without prejudice to the Russian Federation's position that the Arbitral Tribunal's jurisdiction *ratione materiae* is limited to the application of UNCLOS itself and does not encompass consideration of the Russian Federation's compliance with other treaties, including those to which the Russian Federation is not a party.

[1524] Federal Law No. 73-FZ, 'On objects of cultural heritage (monuments of history and culture) of the peoples of the Russian Federation,' 25 June 2002, Article 50(1) (**RU-171**).

[1525] Code of the Russian Federation on Administrative Offences (Federal Law No. 195-FZ, 30 December 2001) (**RU-524**), Article 7.15; Criminal Code of the Russian Federation (Federal Law No. 63-FZ, 13 June 1996) (**RU-525**), Article 243.2.

b. A permit can be granted only to a professional archaeologist from a research institution.[1526] Before the Ministry of Culture issues a permit, the Russian Academy of Sciences ('RAS') reviews application documents and provides its opinion as to the advisability of an archaeological expedition;[1527]

c. All activities with archaeological heritage objects are subject to supervision by a professional archaeologist authorised by the State, who shall be present at an archaeological site and bears full responsibility for the conduct of an archaeological expedition, quality of works, appropriate treatment of obtained materials and artefacts as well as for the preparation of a scientific report;[1528]

d. The permit-holder shall transfer excavated artefacts to the state division of the Museum Fund of the Russian Federation.[1529] Before transferring those to the state museum, the permit-holder shall ensure that all artefacts are properly recorded, labelled, packed and stored.[1530] Museums, in turn, perform all necessary restoration works, ensure physical preservation and security of these artefacts, and guarantee public access to them;[1531]

e. A permit-holder is obliged to notify regional and local authorities of the start of an expedition and inform them about the discovery of any archaeological heritage objects, as well as to submit a detailed scientific report on the conducted works to the RAS within three years after the permit expiration date;[1532]

f. Scientific reports of permit-holders are subject to examination by the Scientific Council for Field Research within the RAS, which assesses compliance with the requirements of the methodology of archaeological works and preparation of

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[1526] Counter-Memorial, ¶552; Federal Law No. 73-FZ, 'On objects of cultural heritage (monuments of history and culture) of the peoples of the Russian Federation,' 25 June 2002, Article 45.1(4) (**RU-171**).

[1527] Rules for Issuing, Suspending and Cancelling Authorisations (Archaeological Excavation Permits) for Operations to Identify and Explore Archaeological Heritage Sites approved by Resolution of the Government of the Russian Federation No. 127, 20 February 2014, ¶¶10(b) and 11 (**RU-529**). *See* more details Counter-Memorial, ¶552.

[1528] *See* Counter-Memorial, ¶554.

[1529] *See* Counter-Memorial, ¶558.

[1530] *Ibid.*

[1531] Federal Law No. 54-FZ 'On the Museum Fund of the Russian Federation and Museums in the Russian Federation', 26 May 1996, Articles 5 and 35 (**RU-532**); Counter-Memorial, ¶558.

[1532] *See* Counter-Memorial, ¶560.

scientific reports that the RAS Guidelines and Rules envisage.[1533] Violations of the permit holder's statutory obligations, as well as of the standards provided in the RAS Guidelines and Rules, can lead to administrative liability under Russian law.[1534]

919. Therefore, the Russian Federation's legislative and law enforcement framework of archaeological heritage protection provides that the archaeological works are organised, conducted and supervised by specialists, which minimises the risk of inappropriate treatment of UCH.

920. Underwater objects relating to the Second World War (WWII) are also subject to protection in Russia under a specific legal regime:[1535]

a. Under Russian law, all military graves, as well as monuments and other memorial objects of the WWII perpetuating their memory, must be protected, preserved and restored.[1536] Destruction of military objects or damage thereto is recognised as an offence;[1537]

b. The Ministry of Defence of the Russian Federation supervises military search operations and authorises governmental and non-governmental public associations to conduct search operations in accordance with the approved annual plan. The Russian law strictly prohibits search operations in places of hostilities and military graves as an amateur initiative;[1538]

c. Military items found in search operations must be recorded and transferred to the military administration bodies at the place of their discovery for examination and

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[1533] *Ibid.*

[1534] Code of the Russian Federation on Administrative Offences, Article 7.13 (**RU-524**); *See* Counter-Memorial, ¶561.

[1535] Counter-Memorial, ¶¶563-569.

[1536] Law of the Russian Federation No. 4292-1 'On the Perpetuation of the Memory of Those Killed in the Defence of the Fatherland', 14 January 1993, Articles 6, 13 (**RU-539**); Federal Law No. 80-FZ 'On the Perpetuation of the Victory of the Soviet People in the Great Patriotic War of 1941–1945', 19 May 1995, Article 5 (**RU-540**) (Counter-Memorial, ¶564).

[1537] Criminal Code of the Russian Federation, Article 243.4 (**RU-525**).

[1538] Law of the Russian Federation No. 4292-1, Article 8 (Counter-Memorial, ¶565).

expertise. Once equipment is 'brought to a state that precludes [its] combat use', it may be transferred to museums for exhibition.[1539]

d. Under the auspices of the Ministry of Defence of the Russian Federation, the Interdepartmental Commission for the Identification and Preservation of Military-Technical Historical and Fortification Objects[1540] was established that exercises public control over their safety and use on Russian territory.[1541]

921. Thus, Russia takes all necessary actions to protect and commemorate the underwater heritage of WWII, taking into careful consideration specific issues that their treatment raises.

922. In addition to the above-mentioned measures aimed at UCH protection and preservation, the Russian Federation has developed a number of active and diligent mechanisms:

a. Russian authorities are actively engaged in the protection and restoration of cultural heritage sites located in Crimea.[1542] For example, only in 2016 the Russian Federation provided RUB 75 million (that approximately equals to USD 850 000) for the restoration and other needs of the Tauric Chersonese Museum-Reserve.[1543] These funds have been used to ensure proper repair of the Museum-Reserve's infrastructure, which confirms the Russian Federation's commitment to maintaining and promoting the cultural heritage of Crimea.

b. Russian state agencies fight unlawful excavation of, and trade in, objects of archaeological heritage and ensure better preservation of Crimean cultural

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[1539] Counter-Memorial, ¶566.

[1540] Ministry of Defence of the Russian Federation official website, 'Regulations on the Commission on the Identification and Preservation of Objects of Military-Technical History and Fortification, Located outside Public and Private Military-Historical and Military-Technical Museums, Displays and Vaults' (**RU-544**). According to para. 1.3 of the Regulations on the MTHF Commission, MTHF Objects include samples of weapons and military special equipment, other material means, fortifications and other buildings and structures that are significant for the military history of the Russian Federation.

[1541] *Ibid*., ¶¶2.2, 2.5, 3.1.10.

[1542] *See*, for example, Tass, *22 Cultural Heritage Sites Will Be Restored in Crimea After Flooding in 2021* (21 November 2022), available at: https://tass ru/ekonomika/16384117 (**RU-670**).

[1543] Komsomolskaya Pravda, *74.9 Million Roubles Allocated for the Restoration of the Tauric Chersonesus Museum Preserve* (30 September 2016), available at: https://www.crimea.kp ru/daily/26585/3604118/ (**RU-671**).

heritage,[1544] applying administrative and criminal legislation.[1545] Besides, Russia restores cultural heritage sites and reconstructs war graves associated with the events of the Great Patriotic War and WWII;[1546]

c. Crimean authorities regularly conduct explanatory work to raise people's (and in particular, divers') awareness about the need to safeguard the Crimean cultural heritage.[1547]

d. The Ministry of Culture of the Russian Federation signed an agreement with Crimea and Sevastopol on the protection of cultural heritage and on the delegation of certain responsibilities in the sphere of state protection of cultural heritage sites. This agreement, in particular, stipulates that the Republic of Crimea and the City of Sevastopol shall implement state control and supervision over the preservation, use, promotion and state protection of the cultural heritage on the territory of the Republic of Crimea and the City of Sevastopol.[1548]

923. Permanent Delegation of the Russian Federation to UNESCO confirmed that after reunification with Crimea, Russia has committed itself to preserving the Crimean cultural

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[1544] Website of the Government of the Republic of Crimea, *Larisa Opanasiuk Held a Meeting on the Issue of Combating 'Black Archaeologists'* (26 February 2015), available at: https://rk.gov.ru/ru/article/show/1283 (**RU-672**). According to the head of the State Committee for the Protection of Cultural Heritage of Crimea, Sergei Efimov, 'the problem of 'black archaeologists' is gradually coming to nought'. *See* Rusantikvar, *Crimean Authorities Noted Success in the Fight Against 'Black Archaeologists'* (14 November 2018), available at: https://rusantikvar ru/news/vlasti-kryma-otmetili-uspekhi-v-borbe-s-chernymi-arkheologami/ (**RU-673**).

[1545] According to the statistics of the Supreme Court of the Russian Federation, 21 persons were convicted under Article 243.2 of the Russian Federation Criminal Code in Russia in 2022 and 4 persons in 2021. *See* Supreme Court of the Russian Federation, Report on the Number of Convicted Persons for All Offences Under the Criminal Code of the Russian Federation in 2022 (**RU-674**), Supreme Court of the Russian Federation, Report on the Number of Convicted Persons for All Offences Under the Criminal Code of the Russian Federation in 2021 (**RU-675**). In 2023, there was at least 1 criminal conviction related to illegal archaeological excavations in Crimea – *See* Fourth Cassation Court of General Jurisdiction, Cassation Ruling No. 77-47/2023, 19 January 2023 (**RU-676**).

[1546] Government of the Republic of Crimea, *Works to Restore Cultural Heritage Sites and Military Graves Associated With the Events of the Great Patriotic War Continue in the Republic of Crimea* (7 May 2020), available at: https://archive-gkokn.rk.gov.ru/ru/article/show/345 (**RU-677**).

[1547] Rusantikvar, *Crimean Authorities Noted Success in the Fight Against 'Black Archaeologists'* (14 November 2018), available at: https://rusantikvar.ru/news/vlasti-kryma-otmetili-uspekhi-v-borbe-s-chernymi-arkheologami/ (**RU-673**).

[1548] ForPost, *Russian Ministry of Culture Signs an Agreement with Crimea and Sevastopol on Protection of Cultural Heritage* (2 May 2014), available at: https://sevastopol.su/news/minkultury-rossii-podpisalo-soglashenie-s-krymom-i-sevastopolem-ob-ohrane-kulturnogo-naslediya (**RU-678**).

heritage and has paid close attention to the preservation of the UCH sites located in this region.[1549]

924. Consequently, the Russian Federation's authorities take active and efficient steps aimed at ensuring and improving the UCH protection.

D. SPECIFIC EPISODES RELIED UPON BY UKRAINE DO NOT EVIDENCE THE RUSSIAN FEDERATION'S VIOLATION OF ARTICLE 303 OF UNCLOS

925. Ukraine brazenly accuses the Russian Federation of engaging in a 'large-scale campaign to recover World War II objects', 'russification' and 'cultural erasure' in Crimea.[1550] These words are wholly unsupported by evidence and should be disregarded. Tellingly, Ukraine has only been able to identify four sporadic episodes, in respect of which it asserts that the Russian Federation violated Article 303 of UNCLOS. Yet, Ukraine has been unable to persuasively demonstrate any such violation even in respect any of these isolated instances. In fact, in its Reply Ukraine has limited itself to criticising the Russian Federation's evidence, rather than addressing the substantive arguments or establishing its own case.

i. <u>The Kitty Hawk Fighter Jet and the Airacobra Aircraft</u>

926. In its Counter-Memorial, the Russian Federation has showed that it did not breach its duty to protect UCH in connection with the removal from the seabed of two WWII-era aircraft, Kitty Hawk and Airacobra.[1551]

927. In its Reply, instead of rebutting the arguments advanced by the Russian Federation, Ukraine alleges purported deficiencies in the Russian Federation's evidence. In particular, Ukraine argues that the letters of the Institute of Archaeology of the Russian

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[1549] Permanent Delegation of the Russian Federation to UNESCO*, Information on the Situation in the Republic of Crimea (Russian Federation) in the Fields of UNESCO Competence* (17 October 2014) (**RU-679**): '… after the reunification of Crimea with Russia, the latter has committed itself to preserve the Crimean cultural heritage and has paid close attention to the preservation of underwater cultural heritage sites located in this region, including five underwater cultural heritage sites that were earlier inscribed by Ukraine in the state register in the framework of the 2001 Convention. Crimean agencies and institutes employ specialists who deal with underwater cultural heritage... The underwater heritage sector established in 2011 continues to operate within the State Committee for the Protection of Cultural Heritage of the Republic of Crimea. Republic authorities pursue their work in this field.

[1550] Ukraine's Reply, ¶¶383-384.

[1551] Counter-Memorial, ¶¶585-595.

Academy of Sciences,[1552] Battery 29 BIS,[1553] and the Ministry of Defence of the Russian Federation[1554] are of 'no evidentiary value'.[1555] In addition, Ukraine expresses specific concerns with respect to the abovementioned letters due to the redaction of the authors' signatures and, thus, the unavailability of the cross-examination of the letters' authors.[1556] However, Ukraine's allegations are not supported neither by the authorities invoked by Ukraine, nor by existing international practice.

928. It is difficult to agree with Ukraine's arguments given that the totality of the evidence[1557] supports the facts described in the letters in question.[1558] Notably, Ukraine's allegations are completely groundless specifically with respect to the letter from Battery 29 BIS corroborated by Battery 29 BIS report prepared as a result of the removal of the Kitty Hawk fighter jet.[1559]

929. Ukraine's arguments concerning the redactions and impossibility of cross-examining the letters' authors are also inconclusive.

930. ***First***, the Arbitral Tribunal's Procedural Order No. 2 dated 18 January 2018 ('PO2') explicitly authorises the use of redactions, *inter alia*, with respect to personal data. Such data is regarded as Confidential Information within the meaning of PO2.[1560] PO2 allows to designate such Confidential Information as Restricted Information – which results in

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[1552] IA RAS, Letter No. 14102/2115 OP-1762, 28 June 2022 (**RU-531**).

[1553] Battery 29 BIS, Letter No. 0149, 15 June 2022 (**RU-546**).

[1554] Ministry of Defence of the Russian Federation, Letter No. 174/1790, 24 November 2021 (**RU-552**).

[1555] Ukraine's Reply, ¶382.

[1556] *Ibid.*, ¶¶378, 382.

[1557] *See* above ¶¶515, quoting the position taken by the ICJ in the *Corfu Channel* case allowing to draw inferences of fact from circumstantial evidence, provided that it leaves 'no room for reasonable doubt'.

[1558] *See* IA RAS, Letter No. 14102/2115 OP-1762, 28 June 2022 (**RU-531**) mirror the facts set out in Ukraine's exhibit 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**). Analogously, the information specified in the Letter from Battery 29 BIS No. 0149, 15 June 2022 (**RU-546**) and the Letter from the Ministry of Defence of the Russian Federation No. 174/1790, 24 November 2021 (**RU-552**) reflects the same facts as the following media sources cited by Ukraine: The Builders of the Crimean Bridge Lifted a Plane from the WWII Period from the Bottom of the Kerch Strait*, KP (Komsomolskaya Pravda),* 6 May 2017 (**UA-236**); Drone Captures Lifting of U.S.-Made Warplane that Sank Near Russia In WW2, *Russia Today*, 6 May 2017 (**UA-237**); Russian Geographical Society, *WWII Fighter Lifted From the Bottom of the Black Sea* (1 October 2020) (**UA-670**); US Fighter Raised from the Black Sea, *Divernet* (28 September 2020) (**UA-694**).

[1559] Report of Search Operations at the Site of the Destruction of the Aviation Equipment No. 1, 12 May 2017 (**RU-547**).

[1560] PO2, ¶A(1)(d).

the non-disclosure of this information to the opposing party – if such disclosure gives 'rise to a real risk of material prejudice to a Party's national interests.'[1561] Such national interests are clearly at stake in the present circumstances.

931. Ukraine has been engaged in a systematic campaign of including individuals assisting the Russian Federation in the proceedings against Ukraine in the so called 'Mirotvorets' list comprising the purported 'enemies of Ukraine'. By way of example, the 'Mirotvorets' list now includes Messrs Michael Swainston and Mikhail Galperin due to their participation on behalf of the Russian Federation in the proceedings against Ukraine before the European Court of Human Rights;[1562] among those included are also Crimean residents who testified in support of the Russian Federation in the ICJ proceedings regarding treatment of ethnic minorities in Crimea.[1563] The same measures were also implemented against individuals employed by the Russian Academy of Sciences and the Hermitage Museum who took part in Crimean archaeological expeditions.[1564] Finally, and most tellingly, the 'Mirotvorets' list already includes Mr Roman Dunaev, [redacted], and [redacted] due to their participation in the archaeological expeditions near Crimea.[1565]

932. It is thus evident that Ukraine has been targeting individuals even in the context of the present proceedings. The inevitable harassment emanating from the inclusion in the 'Mirotvorets' list definitely causes a real risk of material prejudice to the interest of the Russian Federation in the protection of individuals involved in the ongoing legal

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[1561] PO2, ¶B(1).

[1562] Mirotvorets, *Galperin Mihail Lvovich* (11 September 2019), available at: https://myrotvorets.center/criminal/galperin-mikhail-lvovich/ (**RU-680**); Mirotvorets, *Swainston Michael* (11 September 2019), available at: https://myrotvorets.center/criminal/svejnston-mikhael/ (**RU-681**); *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, CR 2023/10, Transcript of 14 June 2023, p. 12 (Swainston) (**RUL-192**).

[1563] Mirotvorets, *Shirin Ibraim Rishatovich* (5 December 2015), available at: https://myrotvorets.center/criminal/shirin-ibraim-rishatovich/ (**RU-682**); Mirotvorets, *Bairov Ruslan Talyatovich* (29 April 2018), available at: https://myrotvorets.center/criminal/bairov-ruslan-talyatovich/ (**RU-683**).

[1564] Institute of History of Material Culture of the Russian Academy of Sciences, Letter No. 14102/33.1-215.2.1-1097, 5 October 2021, p. 3 (**RU-684**).

[1565] Mirotvorets, *Dunaev Roman Georgievich* (30 September 2019), available at: https://myrotvorets.center/criminal/dunaev-roman-georgievich/ (**RU-685**); [redacted]

proceedings. Therefore, the redaction of the names of the letters' authors is justified, and, in any event, expressly allowed by PO2 and cannot affect their evidentiary value.

933. ***Second***, Ukraine's concerns regarding the impossibility of cross-examination do not deserve consideration, given that the same is true for a number of documents produced by Ukraine.[1566]

934. ***Third***, redaction of documents is a widely used means to protect sensitive information and has been utilised in a multitude of cases without the need to produce the full version of the documents to the other party.[1567] Ukraine did not only fail to indicate any reasonable grounds for detracting from this practice, but also engaged itself in document redaction in other proceedings against the Russian Federation.[1568] Therefore, Ukraine's behaviour is contrary both to the generally accepted international practice, as well as the considerations of good faith.

935. Therefore, Ukraine's challenge to the evidentiary value of the evidence produced by the Russian Federation should be dismissed.

936. Ukraine also questions the 'distinct regime' applicable to the protection of WWII objects.[1569] As explained in the Counter-Memorial, this regime sufficiently protects WWII objects from unauthorised interference.[1570] Military search operations to retrieve

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[1566] [redacted]

[1567] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, pp. 128-129, ¶¶205-206 (**RUL-180**); *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award, 18 March 2015, pp. 7-10, ¶¶35-49 (**RUL-85**); *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, PCA Case No. 2011-01, Partial Award, 18 February 2013, pp. 29-31, ¶99 (**RUL-187**); *Guyana v. Suriname*, PCA Case No. 2004-04, Order No. 1 of 18 July 2005 (**RUL-188**); A. Miron, *Evidence: International Tribunal for the Law of the Sea (ITLOS)*, MPEPIL, ¶25, available at: https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3432.013.3432/law-mpeipro-e3432 (**RUL-193**).

[1568] *See, e.g.*, *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation)*, PCA Case No. 2019-28, Memorial, Payment Orders of the Embassy of Ukraine in the Russian Federation for Legal Representation of the Servicemen (January 2019 - February 2020) (**UA-28**). *See* also Artemenko Statement, Hrytsenko Statement, and Zinchenko attached to the same Memorial.

[1569] Ukraine's Reply, ¶383.

[1570] Counter-Memorial, ¶¶562-568.

such objects are conducted either directly by the Ministry of Defence,[1571] or by organisations having the required expertise pursuant to a special authorisation from the Ministry of Defence and under its supervision.[1572] In addition, the Ministry of Defence has created a specialised agency which is responsible for the identification, preservation, use, and protection of objects of military-technical history and fortification.[1573] Finally, causing damage to WWII objects results in criminal prosecution of perpetrators.[1574]

937. WWII objects thus receive special protection under Russian domestic law, which is in line with the general policy of the Russian Federation to preserve the memory of Soviet Union's victory in WWII. Despite the differences between this regime and the one set for archaeological objects, the framework for the protection of WWII objects guarantees that such objects are neither removed by persons having no professional expertise, nor damaged.

938. The mere fact of occasional removal of sunken WWII military objects is not and cannot be reflective of any structural deficiency in the Russian regime for their protection. In fact, as evidenced by recent international practice, it is perfectly normal for States to lift

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[1571] Minister of Defence of the Russian Federation, Directive No. D-30 'On the Procedure for Organisation and Conduct of Operations in the Ministry of Defence of the Russian Federation to Search for Weapons and Military Equipment Related to the Perpetuation of the Memory of Those Killed in the Defence of the Fatherland', 27 September 1999, ¶¶9-10, 15 (**RU-542**).

[1572] Counter-Memorial, ¶565; Law of the Russian Federation No. 4292-1, Article 8 (**RU-539**); President of the Russian Federation, Order No. 37 'Issues of the Perpetuation of the Memory of Those Killed in the Defence of the Fatherland', 22 January 2006, ¶1 (**RU-541**). As a result of a military search operation, the organisation must file a report with the Ministry of Defence pursuant to the Order of the Minister of Defence of the Russian Federation No. 845 'On Approval of the Procedure for Organization and Conduct of Search Operations by Governmental Public Associations, Public Associations Authorized to Carry out Such Operations, Carried out in order to Identify Unknown Military Graves and Unburied Remains, to Establish the Names of Those Killed and Went Missing in the Defence of the Fatherland and to Perpetuate their Memory', 19 November 2014, ¶12 (**RU-543**). This is in line with international practice. In numerous states the excavation of WWII-era military objects is controlled by the respective state bodies in charge of state defence or is accomplished with the participation of such state bodies. *See, e.g.*, Wessex Archeology, *Rare WW2 aircraft lifted from the sea* (6 June 2019), available at: https://www.wessexarch.co.uk/news/rare-ww2-aircraft-lifted-sea (**RU-688**); TVM News, *War plane engine recovered from seabed at Grand Harbour* (24 May 2019), available at: https://tvmnews mt/en/news/war-plane-engine-recovered-from-seabed-at-grand-harbour/ (**RU-689**).

[1573] Ministry of Defence of the Russian Federation official website, 'Regulations on the Commission on the Identification and Preservation of Objects of Military-Technical History and Fortification, Located outside Public and Private Military-Historical and Military-Technical Museums, Displays and Vaults' (**RU-544**). According to ¶1.3 of the Regulations on the MTHF Commission, MTHF Objects include samples of weapons and military special equipment, other material means, fortifications and other buildings and structures that are significant for the military history of the Russian Federation.

[1574] Criminal Code of the Russian Federation, Article 243.4 (**RU-525**).

sunken aircraft for their better preservation outside the aggressive marine environment as well as for scientific and cultural purposes.[1575]

939. Ukraine's questioning of the Russian Federation's ownership over sunken WWII military aircraft[1576] is also meritless. Under customary international law public property of a predecessor State with respect to the territory in question passes to the successor State.[1577] Accordingly, the crux of Ukraine's objection again boils down to the issue of sovereignty over Crimea and thus falls outside of the scope of the Arbitral Tribunal's jurisdiction in line with the 2020 Award.

940. It is thus telling that Ukraine devotes most of its argument to vague claims of Crimea's 'russification' and 'cultural erasure' by reference to the fact that 20,000 military objects were lifted from the seabed and transferred to Russian museums. Yet, Ukraine ignores that there are numerous reasons necessitating such excavations, such as risks of pollution,[1578] explosion of munition,[1579] damage to the UCH due to metal corrosion[1580] or the inconvenience caused by such objects to navigation.[1581] In addition, Ukraine's

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[1575] The Asahi Shimbun, *Warplane salvaged from sea in search for human remain* (24 June 2021), available at: https://www.asahi.com/ajw/articles/14380173 (**RU-690**); Wessex Archaeology, *Rare WW2 aircraft lifted from the sea* (6 June 2019), available at: https://www.wessexarch.co.uk/news/rare-ww2-aircraft-lifted-sea (**RU-688**); TVM News, *War plane engine recovered from seabed at Grand Harbour* (24 May 2019), available at: https://tvmnews mt/en/news/war-plane-engine-recovered-from-seabed-at-grand-harbour/ (**RU-689**).

[1576] Ukraine's Reply, ¶383.

[1577] M. Shaw, INTERNATIONAL LAW (Cambridge University Press, 2017), p. 748 (**RUL-184**); J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (9th ed., OUP, 2019), p. 416 (**RUL-145**). *See* also Czechoslovakia v Hungary, Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (the Peter Pázmány University), Order, PCIJ Series A/B No. 61, 15 December 1933, p. 237, available at: https://www.icj-cij.org/sites/default/files/permanent-court-of-international-justice/serie_AB/AB_61/01_Pazmani_Arret.pdf (**RUL-221**).

[1578] E. Maser et al., Warship wrecks and their munition cargos as a threat to the marine environment and humans: The V 1302 "JOHN MAHN" from World War II, *Science of The Total Environment*, 2023, Vol. 857, Issue 1, p. 2 (**RU-691**).

[1579] NBC News, *Video shows biggest WWII bomb found in Poland exploding while being defused* (14 October 2020), available at: https://www.nbcnews.com/news/world/video-shows-biggest-wwii-bomb-found-poland-exploding-while-being-n1243257 (**RU-692**); Deutsche Welle, *Frankfurt: WWII bomb detonated in river* (14 April 2019), available at: https://www.dw.com/en/frankfurt-wwii-bomb-detonated-in-river/a-48323783 (**RU-693**); SOCHI.com, *Bombs Were Exploded in the Waters of the Black Sea Near Sochi* (27 January 2017), available at: https://sochi.com/news/2090/389753/ (**RU-694**).

[1580] M. Axinte, C. Nejneru et al. (eds.), Corrosion behaviour of some steels in Black Sea water, *REV.CHIM.* (Bucharest), 2015, Vol. 11, p. 1851, available at: https://bch ro/pdfRC/AXINTE%20M.pdf%2011%2015.pdf (**RU-664**): 'Due to the porosity and loosing of the oxides layer, the corrosion have continuous destructive effect, with the water entering through the pores, thus continuing destruction until the total destruction of the metal'.

[1581] WBIF, *The EU supported removal of the sunken WWII German fleet in Danube River*, available at: https://www.wbif.eu/10-years-success-stories/success-stories/eu-supported-removal-sunken-wwii-german-fleet-danube-river (**RU-695**).

accusations of 'cultural erasure' appear especially artificial given its own disregard for the preservation of either of the two pieces of the sunken WWII aircraft.[1582] It is quite demonstrative that Ukraine made no attempts to conserve these objects *in situ* or take any other actions to safeguard them from the aggressive marine environment or potential harm to navigation.[1583]

941. In light of the above, Ukraine's claims regarding the alleged violation by the Russian Federation of Article 303 of UNCLOS in connection with the removal from the seabed of the two specified WWII-era aircraft are without merit and should be dismissed.

ii. Byzantine-era Ship

942. In the Counter-Memorial, the Russian Federation has explained in detail that it fulfilled in proper manner its obligations under UNCLOS in connection with the excavation of the sunken Byzantine-era Ship.[1584]

943. As a preliminary point, as explained above, Ukraine wrongly relies on applicability of the *in situ* preservation considerations to the excavation of individual artefacts (amphorae) from the Byzantine-era Ship site. A clear distinction is drawn between archaeological monuments (sites) and artefacts, and it is only the monuments that are caught by the *in situ* preservation recommendations. As experts [redacted] explain, individual artefacts, like the amphorae in this case, are not regarded as so caught.[1585]

944. In its Reply, Ukraine engages in criticising evidence produced by the Russian Federation. [redacted] witness statement is not an exception. Ukraine supports its position with a quote from the ICJ judgment in the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* case according to which affidavits sworn 'for purposes of litigation as to earlier facts will carry less weight than affidavits sworn

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[1582] As explained by Mr Elkin, the head of Battery 29 BIS, the Kitty Hawk fighter was first discovered back in 2012 by Taman fishermen in the Kerch Strait. Nevertheless, Ukraine failed to take any measures to protect the aircraft from decay and looting. *See* Battery 29 BIS, Letter No. 0149, 15 June 2022, p. 3 (**RU-546**).

[1583] *See* also: M. Axinte, C. Nejneru et al. (eds.), Corrosion behaviour of some steels in Black Sea water, *REV.CHIM.* (Bucharest), 2015, Vol. 11, p. 1851, available at: https://bch.ro/pdfRC/AXINTE%20M.pdf%2011%2015.pdf (**RU-664**).

[1584] Counter-Memorial, ¶¶570-577.

[1585] [redacted] Report, ¶17.

at the time when the relevant facts occurred.'[1586] In reality, however, a more nuanced approach towards the evaluation of witness testimony is followed in practice.

945. Notably, the above quotation reflecting the Court's cautious approach concerns exclusively witness testimony provided by State officials.[1587] The actual test formulated by the ICJ includes the scrutiny of such factors as 'whether [the affidavits] were made by State officials or by private persons not interested in the outcome of the proceedings' and 'whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events.'[1588]

946. As regards the issues of contemporaneity and preparation of witness testimony for the purposes of a given proceeding, in the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* case the ICJ expressly recognises that it is perfectly natural that private persons do not furnish witness testimony outside the context of pending proceedings, as one can hardly imagine circumstances which would have necessitated the preparation of witness testimony beforehand:

[1586] Ukraine's Reply, ¶371; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, I.C.J. Reports 2007, p. 731, ¶244 (**RUL-30**).

[1587] The full sentence provides that 'Affidavits sworn later *by a State official* for purposes of litigation as to earlier facts will carry less weight than affidavits sworn at the time when the relevant facts occurred.' [*Emphasis* added]; *See Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, I.C.J. Reports 2007, p. 731, ¶244 (**RUL-30**).

[1588] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, I.C.J. Reports 2007, p. 731, ¶244 (**RUL-30**). These criteria are also supported by abundant international jurisprudence. According to the prevailing practice, in weighing witness testimony it shall be taken into account whether, for example, testimony was given by a disinterested person (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Judgment of 27 June 1986, I.C.J. Reports 1986, p. 43, ¶69: 'In the general practice of courts, two forms of testimony which are *regarded as prima facie of superior credibility* are, first *the evidence of a disinterested witness* – one who is not a party to the proceedings and stands to gain or lose nothing from its outcome - and secondly so much of the evidence of a party as is against its own interest.' [*Emphasis* added] (**UAL-25**); *Frederick W. Stacpoole (Great Britain) v. United Mexican States*, Decision of 15 February 1930, 5 UNRIAA 95, p. 96 (**RUL-222**); the facts described are in the direct knowledge of the witness (Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, I.C.J Reports 2005, p. 201, ¶61: '[The Court] will prefer contemporaneous evidence from persons with direct knowledge.' (**UAL-32**); the person giving testimony is particularly suited to testify on a specific matter (see *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, I.C.J. Reports 2007, pp. 731-732, ¶244: 'The Court will also take into account a witness's capacity to attest to certain facts, for example, a statement of a competent governmental official with regard to the boundary lines may have greater weight than sworn statements of a private person.' (**RUL-30**). *See* also *Daniel Dillon (U.S.A.) v. United Mexican States*, Concurring Opinion of 3 October 1928 of Commissioner Nielsen, 4 UNRIAA 368, , pp. 370-371 (**RUL-223**): 'An arbitral tribunal cannot, in my opinion, refuse to consider sworn statements of a claimant, even when contentions are supported solely by his own testimony. It must give such testimony its proper value for or against such contentions. Unimpeached testimony of a person who may be the best informed person regarding transactions and occurrences under consideration cannot properly be disregarded because such a person is interested in a case.'.

> *…where there would have been no reason for private persons to offer testimony earlier, affidavits prepared even for the purposes of litigation will be scrutinized by the Court both to see whether what has been testified to has been influenced by those taking the deposition and for the utility of what is said*. Thus, the Court will not find it inappropriate as such to receive affidavits produced for the purposes of a litigation if they attest to personal knowledge of facts by a particular individual.[1589] [*Emphasis* added]

947. Indeed, strict adherence to Ukraine's logic would lead to an absurd conclusion that private persons must be constantly fixing their actions in various ways keeping in mind the possibility of future proceedings.[1590]

948. In addition, Ukraine has failed to show that the [redacted] Statement does not meet the criteria set in the *M/V Norstar* case,[1591] on which Ukraine also heavily relies.[1592]

949. It is clear that in light of the standard set in the *Territorial and Maritime Dispute* and *M/V Norstar* cases the [redacted] Statement constitutes credible evidence. Ukraine does not dispute that [redacted] is a private person having no affiliation with State bodies or personal interest in the outcome of the present arbitration. It is also hard to imagine a person who would be better suited to describe and give account of the Byzantine shipwreck's exploration in question. [redacted] is a widely renowned and respected archaeologist with more than 20-year experience in underwater archaeological research and numerous publications.[1593] Considering that he acted as the leader of the expedition who supervised the excavation personally and prepared a report on its results,[1594] there can be no doubt as regards his direct knowledge of the facts on this episode.

[1589] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, I.C.J. Reports 2007, p. 731, ¶244 (**RUL-30**).

[1590] In line with this logic, the ICJ stated on the facts of the case that it does not 'put into question their credibility' of the sworn statements of fishermen produced by Honduras, even though they 'were made for the purposes of the case'. *See Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, I.C.J. Reports 2007, p. 732, ¶245 (**RUL-30**).

[1591] *See* above ¶521, quoting the following criteria established in the *M/V Norstar* case: '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.'

[1592] Ukraine's Reply, ¶371.

[1593] [redacted] Statement, ¶¶4-5.

[1594] *Ibid.*, ¶14.

950. It is also notable that Ukraine's objections seem to be at odds with the fact that its own testimony is far more questionable as regards its evidentiary weight, as noted above with respect to [redacted] and [redacted] Witness Statements.[1595]

951. For the above reasons, Ukraine's contention that [redacted] Witness Statement 'should be given no weight'[1596] should be dismissed by the Arbitral Tribunal.

952. Furthermore, in its Reply, instead of establishing and supporting its own case with relevant evidence, Ukraine attempts to refute the Russian Federation's arguments concerning the sunken Byzantine-era ship.[1597] Ukraine's criticisms are based on cherry-picking from the evidence of the Russian Federation's witness, [redacted], the actual leader of the Byzantine ship expedition, as well as from unreliable mass media reports. In essence, Ukraine is trying to pervert the facts with reference to irrelevant and completely baseless evidence.

953. ***First***, Ukraine mischaracterises the extent of involvement of divers in the expedition and the status of [redacted] as the expedition leader. As it was amply demonstrated in the Counter-Memorial, the expedition was led by [redacted] himself as a renowned professional archaeologist,[1598] who was duly authorised to supervise the archaeological works in question by the Russian Ministry of Culture.[1599] In turn, Mr Roman Dunaev, whom Ukraine purports to portray as the expedition supervisor,[1600] did not and could not lead the expedition.

954. In his evidence, [redacted] extensively describes the course of the expedition.[1601] Indeed, it is [redacted] who applied to the Ministry of Culture of the Russian Federation for an archaeological excavation permit. It is also [redacted] who, as a permit holder and thus an expedition leader, was responsible for the entirety of archaeological works, directly supervised the expedition and took all the relevant

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[1595] *See* above, Chapter IV(C)(ii).

[1596] Ukraine's Reply, ¶372.

[1597] Ukraine's Reply, ¶¶373-376.

[1598] Counter-Memorial, ¶572.

[1599] [redacted] Statement, ¶¶7, 12-13.

[1600] Ukraine's Reply, ¶376.

[1601] *See* [redacted] Statement, ¶¶23-38.

decisions regarding its course,[1602] including the direct instructions to divers during the excavations works.[1603] [redacted] is further described in numerous media reports as a scientific supervisor of the expedition.[1604]

955. Whilst [redacted] evidence is self-sufficient to prove his involvement and role in the expedition, to address Ukraine's formalistic criticisms that no contemporaneous documents have been produced, the Russian Federation provides the expedition permit ('open list') specifically designating [redacted] as the person in charge of the expedition.[1605] It plainly demonstrates that Ukraine's contentions as to the expedition being run by divers and secondary role of [redacted] are without merit. This is not surprising given that Ukraine's assertions are wholly based on Internet sources and unjustified inferences therefrom.

956. ***Second***, Ukraine's allegations that 'amateur dive club members were given unfettered access to culturally significant site and were interfering with artefacts outside the control of qualified underwater archaeologist'[1606] are likewise unmeritorious and contradict even Ukraine's own evidence. Ukraine's evidence shows that the expedition was *organised jointly* by the relevant stakeholders, namely the Russian Ministry of Defense and the Russian Geographic Society.[1607]

957. Ukraine also wrongly continues to label the divers involved in the expedition as amateurs.[1608] [redacted] evidence makes it plain that all divers involved in the expedition were 'certified technical divers with the right to dive to a depth of 100+ meters on gas mixtures and also had the CMAS international certificates in underwater

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[1602] *Ibid.*, ¶¶31, 33.

[1603] *See Ibid.*, ¶18, 22, 33.

[1604] Meridian, *The Byzantine ship near Balaklava will not be lifted entirely from the bottom* (26 of August 2015), available at: https://meridian.in.ua/news/19670 html (**RU-696**).

[1605] Ministry of Culture of the Russian Federation, Open List for [redacted], 26 May 2015 (**RU-700**).

[1606] Ukraine's Reply, ¶364.

[1607] 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**) and Evgeniya Artemova, In the Depths of Centuries, Interfax ru (27 May 2015) (**UA-846**).

[1608] Ukraine's Reply, ¶¶364, 399, 411.

archaeology'.[1609] The divers were also instructed and constantly supervised with the use of an unmanned submersible.[1610]

958. In fact, Ukraine's assertion about the divers involved being amateurs is disproved by Ukraine's own evidence. In particular, the Rostov Dive Club's official website states that: 'Over the past years, our instructors have not stopped climbing the professional ladder and today they are able to make the most difficult technical dives into underwater caves and wrecks'.[1611] As another exhibit adduced by Ukraine states, 'for 13 years divers from the Rostov club have been engaged in the search and discovery of sunken objects in the Black Sea'.[1612]

959. Further, given the depth at which the ship was discovered (over 80 meters),[1613] it is bizarre even to suggest, as Ukraine does, that amateur divers were participating due to the risks for their health in such conditions.[1614] So Ukraine's contentions regarding the involvement of 'amateur divers' are not based on evidence.

960. As demonstrated above and further explained by experts [redacted], engagement of divers is both perfectly acceptable and endorsed by international best practices in underwater archaeology.[1615] So engagement of competent divers in the instant expedition was wholly justified.

961. ***Third***, in supporting its allegations Ukraine does not go beyond citing media sources and blogs. As was explained in detail above, the evidentiary value of mass media releases is incomparably lower as compared to that of scientific reports, which, in contrast to the former, undergo thorough check before being published.

[1609] [redacted] Statement, ¶17.

[1610] *Ibid.*, ¶¶17-18.

[1611] Rostov Dive, About Us (1 September 2011) (**UA-845**).

[1612] Evgeniya Artemova, In the Depths of Centuries, Interfax ru (27 May 2015) (**UA-846**).

[1613] [redacted] Statement, ¶17. *See* also media reports exhibited by Ukraine: 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**) and Evgeniya Artemova, In the Depths of Centuries, Interfax.ru (27 May 2015) (**UA-846**).

[1614] Typically, diving beyond 40 metres is treated as 'technical diving'; *see* Padi.com, *What is technical diving?* available at: https://blog.padi.com/what-is-technical-diving/ (**RU-697**); *see* also Ocean explorer, *Technical Diving* (9 November 2023), available at: https://oceanexplorer noaa.gov/technology/technical/technical html#:~:text=While%20the%20recommended%20maximum%20depth,350%20feet%2C%20sometimes%20even%20deeper (**RU-698**).

[1615] [redacted] Report, ¶¶67, 71.

962. Being unable to rebut the Russian Federation's evidence on substance, Ukraine is trying to criticise its form. Ukraine's failure to refute the proofs adduced by the Russian Federation is telling in light of its own erroneous pieces of evidence. Notably, Ukraine quotes a number of sources that directly contradict its arguments. Clear examples are exhibits UA-228 and UA-846 discussed above.[1616]

963. ***Fourth***, in arguing that amphorae were wrongly removed from the Byzantine-era Ship, Ukraine simply ignores the fact that no damage was inflicted to them. The amphorae were duly excavated, preserved and examined by competent specialists. These amphorae are presently displayed in the Tauric Chersonese Museum-Reserve – the most prominent museum in Crimea.[1617] Moreover, excavation of the amphorae marked a significant advance in scientific research and helped to receive more information on the historic period when the ship sunk,[1618] which is beneficial not only to the Russian Federation itself, but to the international community as a whole and goes in line with the *ratio* of legal protection of underwater cultural heritage.

964. In sum, instead of establishing and advancing its own case concerning the alleged violation of Article 303 of UNCLOS in respect of the Byzantine-era Ship episode, Ukraine only engages in criticising the evidence produced by the Russian Federation with its Counter-Memorial. It has failed to establish the Russian Federation's violation of Article 303 in respect of that episode.

iii. <u>Terracotta Sculpture Fragment</u>

965. In relation to the alleged interference with the Terracotta Sculpture Fragment, the Russian Federation has demonstrated in its Counter-Memorial that Ukraine's claims lack merit.[1619] As with the other episodes, in the Reply Ukraine has provided no evidence of the Russian Federation's violation of Article 303 of UNCLOS. Rather, in the absence of any solid arguments, Ukraine again focuses its criticism on the alleged deficiencies of Russia's evidence. However, this criticism is of no avail to Ukraine's case.

[1616] Rejoinder, ¶956.

[1617] [redacted] Statement, ¶¶39-41, *see* also [redacted] Report, ¶¶126, 128.

[1618] List of Scientific Works and Speeches Devoted to the Byzantine Shipwreck Research (**RU-173**).

[1619] Counter-Memorial, ¶¶578-584.

966. First of all, as explained above, Ukraine wrongly relies on applicability of the *in situ* preservation considerations to the excavation of the Terracotta Sculpture Fragment. A clear distinction is drawn between archaeological sites and artefacts, and it is only the former that are caught by the *in situ* preservation recommendations. As experts [redacted] explain, individual artefacts, like the Terracotta Sculpture Fragment in this case, are not regarded as so caught.[1620]

967. Moreover, the Terracotta Sculpture Fragment cannot even be treated as an UCH artefact found *in situ*. Indeed, as experts [redacted] explain, where an UCH object is removed from its locale and relocated elsewhere, it is no longer considered to be *in situ*. This is exactly the case with the Terracotta Sculpture Fragment as its site, as Ukraine's own authority explains, was relocated in 1970's as part of 'extensive dredging works' in the Kerch Bay, as a result of which 'bottom deposits containing ceramics were moved to the shallow water near Ak-Burun Peninsula'.[1621] Found in that new locale several decades later in 2017, the Terracotta Sculpture Fragment was no longer *in situ* and cannot be treated as an excavated *ex situ* artefact.[1622]

968. In any event, even if the relevant preservation methodologies were applicable, the Russian Federation reiterates that the removal of the Terracotta Sculpture Fragment from the seabed for preservation *ex situ* was in line with international practices and fully justified. As explained in the Counter-Memorial[1623] and elaborated above,[1624] *ex situ* preservation is expressly allowed, in particular by the 'standards' on which Ukraine rests its case. UNESCO Convention acknowledges that careful recovery of underwater cultural heritage may be justified 'for scientific or protective purposes'.[1625] Experts [redacted] confirm this approach in their expert report.[1626]

[1620] [redacted] Report, ¶136.

[1621] 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**).

[1622] [redacted] Report, ¶134.

[1623] Counter-Memorial, ¶¶542, 543.

[1624] Rejoinder, ¶¶908.

[1625] Convention on the Protection of Underwater Cultural Heritage, 2562 U.N.T.S. 158, 2 November 2001, Preamble (**UA-120**).

[1626] [redacted] Report, ¶¶33-35.

969. A wide range of human activities, including fishery and infrastructure projects implementation, are likely to bring irreversible damage to underwater cultural heritage. The surrounding marine environment also inevitably contributes to degradation processes that underwater cultural relics naturally undergo. For instance, microorganisms could penetrate the surface of artefacts. Chemical and biological corrosion also contribute to the vulnerability of underwater sites.[1627] All these attest to the fact that *in situ* preservation not always can ensure the security of fragile underwater artefacts in the long term.[1628] Salvage excavation, in turn, allows to place them in a safe and controllable environment.

970. International scientific community acknowledges that there is a variety of valid considerations justifying excavation of underwater sites.[1629] In a similar vein, in the Terracotta Sculpture Fragment excavation guaranteed the preservation of the artefact,[1630] allowing scientists to take full advantage of having all the information derivable from it when studied on the surface.[1631]

971. Ukraine claims that the Russian Federation has allegedly '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'.[1632] That is untrue. As mentioned in the Counter-Memorial, before the commencement of construction works, a survey was carried out in the Kerch Strait to identify potential archaeological heritage sites that the project could

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[1627] *Ibid.*, ¶28.

[1628] X. Chen, K. Xia et al., Extraction of underwater fragile artefacts: research status and prospect. *Heritage Science,* 2022, Vol. 10, Issue 9, available at: https://heritagesciencejournal.springeropen.com/articles/10.1186/s40494-022-00645-1 (**RU-699**).

[1629] *Ibid*, *See* also G. Bass, History beneath the sea, *Archaeology,* November / December 1998, Vol. 51, Issue 6, pp. 48-53, available at: https://www.jstor.org/stable/41771455 (**RU-701**): 'The excavation of shipwrecks of every century and, ultimately, every decade of the past, all over the world, will thus provide the most complete histories of art and technology imaginable, as ships carried everything ever made by mankind - from tiny beads to giant Egyptian obelisks.'

[1630] [redacted] Report, ¶136.

[1631] E. Greshnikov, A. Antsiferova et al., Analytical Studies of Pigments of Antique Sculptural Terracotta Found in the Kerch Bay, *Crystallography*, 2019, Vol. 64, Issue 6, pp. 999-1006, available at: https://www.researchgate net/publication/335864657_Analiticeskie_issledovania_pigmentov_anticnoj_skulpturnoj_terrakoty_najdennoj_v_Kercenskoj_buhte (**RU-702**): 'Presumably, the pottery could have been made by a little-known workshop in Asia Minor, imitating known centres and conveying a portrait resemblance to a historical figure. To confirm this, it was necessary to analyse the terracotta materials, determine their chemical composition and method of application, and study the surface morphology of the microdots. These data made it possible to make an educated guess as to the nature of the sculpture's use and function.'

[1632] Ukraine's Reply, ¶379.

affect.[1633] During the months-long remote reconnaissance, sappers and archaeologists surveyed more than 400 hectares of the Kerch Strait water area.[1634] As a result, a large accumulation of fragments of antique ceramics was discovered.[1635]

972. Following the discovery of an accumulation of archaeological artefacts on the seabed of the Kerch Bay near Cape Ak-Burun, all possible strategies for preserving the site were considered. In this case, preserving the objects at the site where they were found was not an appropriate option for the following reasons.

973. ***First***, the accumulation of archaeological artefacts was located where the construction of the Kerch Bridge was to be implemented.

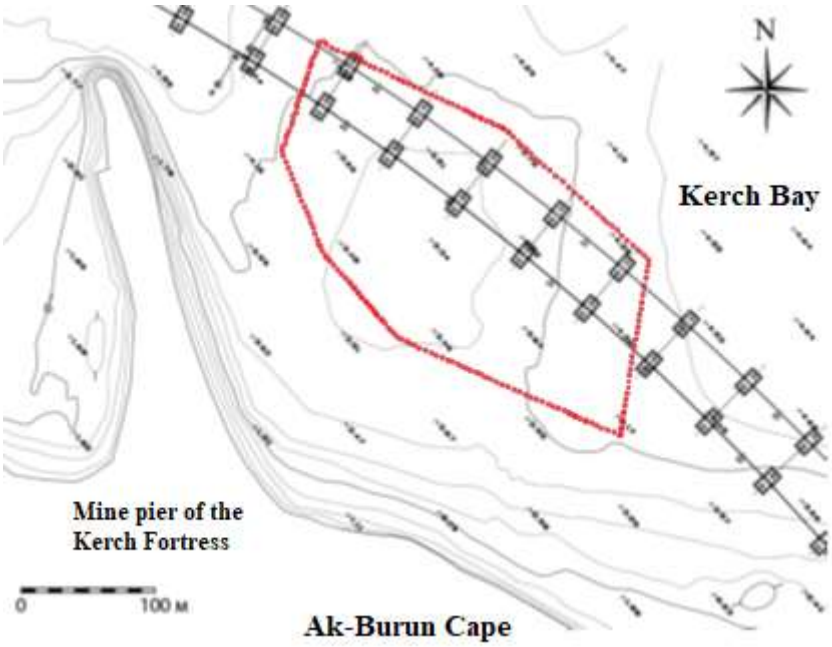

Figure 4. Kerch-Taman bridge crossing route near Ak-Burun Cape.

The dotted area shows the approximate boundary of the archaeological site 'Ak-Burun Cape'

974. As it was indicated in the Kerch Strait Bridge's design documentation, 'all the options, to one extent or another, spatially coincide with archaeological and historical heritage sites

[1633] Counter-Memorial, ¶583.

[1634] S. Olkhovsky, A. Stepanov, Underwater Archaeological Research on the Kerch Bridge Route, *Tauride Studios*, 2016, Vol. 6 (**RU-703**).

[1635] S. Olkhovsky, A. Stepanov, Rescue Underwater Research of CHO 'Bay Ak-Burun' in 2015, *International Yearbook of History, Archaeology, Epigraphy, Numismatics and Philology of the Bosporus Cimmerianus*, 2016, Vol. 20 (**RU-704**).

owing to their intense concentration'.[1636] Consequently, *in situ* preservation implied a reconfiguration of the marine section of the projected bridge crossing to bypass the territory of the identified archaeological heritage site at a safe distance. It was both technically impossible and impractical.[1637]

975. The Kerch Strait Bridge construction relied upon comprehensive engineering surveys in geodesic, geological, hydrometeorological and environmental spheres.[1638] The selection of the Bridge site and its configuration was preceded by a long-term research. A change of the design plan for the Bridge was hindered by physical and geographical factors specific to the Strait, including depth, width and ice conditions.[1639] Therefore, it was technically impossible and inappropriate to change the configuration of the projected Bridge to bypass the site. The chosen construction was the optimal one.

976. Furthermore, as experts [redacted] explain in their report, rescue archaeological works often remain the only recourse available due to the unique social significance of such construction projects. In such a case, cultural heritage artefacts may be completely removed from the construction site.[1640] This is common practice followed by many States.[1641] As an example, the experts refer to the construction of an underground tunnel under the Bosphorus Strait in Turkiye, where thousands of artefacts and the remains of 37 shipwrecks were found and excavated.[1642] Likewise, 15 shipwrecks and over 400 artefacts were recovered and conservated *ex situ* during construction in the Barcode B11-12 project in Norway,[1643] while in Argentina the hull of a ship and a

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[1636] [redacted]

[1637] *See* IA RAS, Letter No. 14102/2115 OP-1762, 28 June 2022, p. 2 (**RU-531**): 'Given 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, the salvage archaeological fieldworks (excavations) on the seabed sections under the projected bridge pillars with the total removal of archaeological artefacts were recognised as the optimal way to preserve the archaeological heritage site'.

[1638] [redacted]

[1639] Counter-Memorial, ¶163.

[1640] [redacted] Report, ¶40.

[1641] *Ibid.*

[1642] *Ibid.*

[1643] *Ibid.*, ¶41.

collection of olive jars inside it were excavated for conservation *ex situ* as part of the Zencity construction project.[1644]

977. ***Second***, the preservation of artefacts *in situ* in the instant case threatened their safety. As discussed above, *in situ* conservation cannot ensure the security of fragile underwater artefacts for the long term.[1645] The Ak-Burun Cape area is an active shipping area. *In situ* conservation of the artefacts would have posed significant risks to their preservation, as it could not protect the artefacts from various human activities, the surrounding marine environment and potential negative impacts from ships.

978. Therefore, possible site preservation strategies were duly assessed, and the decision to excavate the artefacts was both justified and documented.

979. The Russian Federation reiterates that all the required conservation works were duly conducted with respect to the Terracotta Sculpture Fragment,[1646] and experts [redacted] confirm that they were carried out in compliance with the relevant archaeological methodology.[1647] Such modern non-invasive techniques as infrared spectroscopy, scanning electron and optical spectroscopy, as well as energy dispersive X-ray microanalysis were applied for sculpture analysis.[1648]

980. The Terracotta Sculpture Fragment is presently a part of the Eastern-Crimean Historical and Cultural Museum-Preserve's collection. The museum maintains optimal temperature and humidity level for the safekeeping of the artefact. Due to careful storage and constant conservation work, the museum object is stable and no deterioration has been recorded.[1649]

[1644] *Ibid.*, ¶42.

[1645] *See* Rejoinder, ¶¶908-910.

[1646] *See* IA RAS, Letter No. 14102/2115 OP-1762, 28 June 2022, pp. 4-5 (**RU-531**).

[1647] [redacted] Report, ¶135.

[1648] *Ibid.*, ¶141; Rg.ru, *Scientists Named the Homeland of the Terracotta Head Found Near the Crimean Bridge* (4 February 2022), available at: https://rg ru/2022/02/04/reg-ufo/uchenye-nazvali-rodinu-najdennoj-u-krymskogo-mosta-terrakotovoj-golovy.html (**RU-705**).

[1649] Ministry of Culture of the Republic of Crimea, Letter No. 28280/10-11/2, 17 August 2023 (**RU-706**).

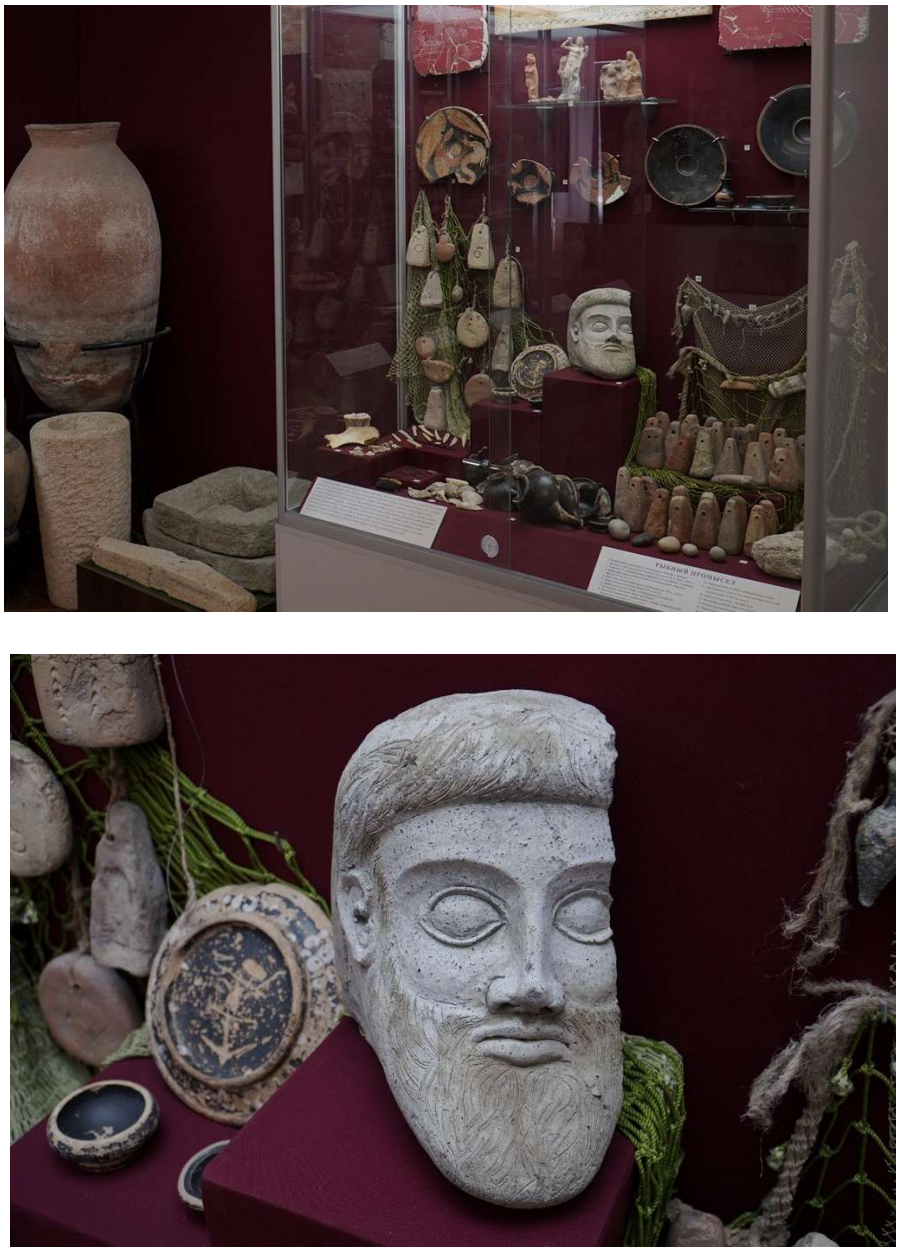

Figure 5. The Terracotta Sculpture Fragment in the Eastern-Crimean Historical and Cultural Museum-Preserve's collection[1650]

981. The importance of the Terracotta Sculpture Fragment for the scientific community can hardly be overestimated. Its uniqueness has been repeatedly stressed in scientific publications.[1651] As explained by experts [redacted], few archaeological artefacts have been so meticulously studied afterwards,[1652] which once again underlines the significance of the artefact concerned.

[1650] *Ibid.*, Annexes (**RU-706**).

[1651] [redacted] Report, ¶141.

[1652] *Ibid.*, ¶141.

982. In the Reply, Ukraine engages in criticising the evidence provided by the Russian Federation. Ukraine alleges that the Letter from the Institute of Archaeology of the Russian Academy of Sciences, [1653] 'is not corroborated by contemporaneous documents',[1654] 'was written after the fact' and should be given no weight by the Arbitral Tribunal due to redactions.[1655]

983. Importantly, the Institute of Archaeology of the Russian Academy of Sciences is the most reputable archaeological institution in the Russian Federation with extensive experience in the field.[1656] Since 1919, the Institute has been actively engaged in archaeological research, conducting numerous excavations (*e.g.*, approximately 33 excavations were performed in 2021-2022[1657]) and organising various scientific conferences and events. The Institute also oversees and regulates archaeological field works.[1658] It is responsible for issuing certificates of confirmation required for making an application for an archaeological excavation permit ('open list'),[1659] and reviews scientific reports on completed archaeological field operations.[1660] Its capability to provide the factual and scientific account of events in question cannot thus be contested.

984. Accordingly, Ukraine's allegations with respect to the Terracotta Sculpture Fragment episode are unfounded. Not only has Ukraine been unable to establish and advance its own case by adducing any convincing and trustworthy evidence, but its criticisms of the Russian Federation's evidence do not hold water. The exploration and excavation of the underwater artefacts near Cape Ak-Burun were carried out in compliance with the

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[1653] IA RAS, Letter No. 14102/2115 OP-1762, 28 June 2022 (**RU-531**).

[1654] Ukraine's Reply, ¶¶372, 378.

[1655] *Ibid.*, ¶378.

[1656] [redacted] Report, ¶¶93-94.

[1657] IA RAS, *Excavations*, available at: https://www.archaeolog ru/ru/expeditions (**RU-707**).

[1658] [redacted] Report, ¶93; *See also* Guidelines for Archaeological Fieldworks and Scientific Reporting Documents approved by the Resolution of the History and Philology Department Bureau of the RAS No. 32, 20 June 2018 (**RU-530**) and Guidelines for Archaeological Fieldworks and Scientific Reporting Documents approved by the Resolution of the History and Philology Department Bureau of the RAS No. 85, 27 November 2013 (**RU-170**), enacted by the Institute of Archaeology.

[1659] [redacted] Report, ¶95; Guidelines for Archaeological Fieldworks and Scientific Reporting Documents approved by the Resolution of the History and Philology Department Bureau of the RAS No. 85, 27 November 2013, ¶11 (**RU-170**).

[1660] [redacted] Report, ¶¶97-101; Guidelines for Archaeological Fieldworks and Scientific Reporting Documents approved by the Resolution of the History and Philology Department Bureau of the RAS No. 85, 27 November 2013, ¶¶6,5(2), 7.1, 7.4 (**RU-170**).

relevant archaeological standards and were the most optimal option in light of technical impossibility to change the configuration of the Kerch Strait Bridge.

E. UKRAINE IS PRECLUDED FROM INVOKING ITS CLAIMS DUE TO ITS OWN CARELESS ATTITUDE TOWARDS UCH PROTECTION

985. Ukraine should be precluded from invoking its UCH-related claims against the Russian Federation based on the 'clean hands' doctrine in view of its own approach to UCH protection.

986. Under the 'clean hands' doctrine, the Arbitral Tribunal should not encourage a party that has engaged in bad faith behaviour with respect to the very subject of the relief sought. In these circumstances, equity and good faith require to deny remedies requested by such party, as 'he who comes to equity for relief must come with clean hands.'[1661]

987. This doctrine emanates from the case law of the ICJ and its predecessor. In the *Diversion of Water from the Meuse* case, the PCIJ held that the Netherlands could not 'benefit of its submission' that Belgium violated its rights under the treaty establishing the regime for taking water from the Meuse by constructing and operating of a lock, given that the Netherlands acted in the same manner.[1662]

988. The PCIJ's position was clarified by Judge Hudson in his Separate Opinion, who described this principle in the following terms:

> *It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.* The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of the Anglo-American law. Some of these maxims are, 'Equality is equity'; 'He who seeks equity must do equity'. It is in line with such maxims that '*a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper'...*

[1661] G G. Fitzmaurice, The General Principles of International Law Considered from the Standpoint of the Rule of Law in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, Vol. 92 (Brill, 1958), p. 119 (**RUL-224**).

[1662] Diversion of Water from the Meuse (Netherlands v. Belgium), Judgment of 28 June 1937, Series A/B, p. 25 (**RUL-225**).

> [A] tribunal bound by international law ought not to shrink from applying a *principle of such obvious fairness*.[1663] [*Emphasis* added]

989. The doctrine received further support in the *Military and Paramilitary Activities* case from Judge Schwebel. In his opinion, since 'Nicaragua's hands are odiously unclean' due to its own prior attacks on El Salvador, its claims must have failed.[1664]

990. Although the ICJ has not yet expressly endorsed arguments based on the doctrine of clean hands, its conclusion in the *Certain Iranian Assets* case that Iran's conduct was not 'sufficient *per se* to uphold the objection... on the basis of the "clean hands" doctrine'[1665] suggests that the Court does not put into question the existence of this principle.

991. While Ukraine advances wild accusations against the Russian Federation of violations of UNCLOS in relation to UCH protection, Ukraine falsely asserts having made 'significant efforts to protect UCH within [its] maritime areas'.[1666] The reality is that the situation with the exploration and preservation of UCH in Ukraine is disastrous.[1667] This was exactly the case in Crimea before its reunification. [1668]

992. Analysis of Ukraine's cultural heritage preservation programmes prepared in 2017 highlighted severe problems in Ukraine's system of UCH protection, including:

    a. Poor-quality control over the implementation of the legislation by the State authorities: '[v]iolations of the legislation on the protection and use of historical and

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[1663] *Ibid*., Individual Opinion of Judge Hudson, p. 77 (**RUL-226**).

[1664] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, I.C.J. Reports 1986, Dissenting opinion of Judge Schwebel, p. 392, ¶268 (**RUL-227**).

[1665] Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019, I.C.J. Reports 2019, p. 44, ¶122 (**RUL-228**). *See* also Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment of 31 March 2004, I.C.J. Reports 2004, p, 38, ¶47 (**RUL-229**); Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment of 2 February 2017, I.C.J. Reports 2017, p. 52, ¶142 (**RUL-230**).

[1666] Ukraine's Reply, ¶57.

[1667] According to B. Dzharty, the former head of the Crimean government, 'That orgy that takes place with the 'black archelogy' - a problem not only of the Crimea, and Ukraine in general'. *See* Restcrimea.com, *The exhibition "Treasures of the Crimean Gothia"* (17 June 2011), available at: https://www.restcrimea.com/en/news/2011/06/17/1330/ (**RU-708**), I. Lozowy, Ukraine: Black Earth, Black Archeology, Black TimesTransitions Online, 2005, Vol 11, Issue 1 (**RU-709**).

[1668] As Volodymyr Prytula noted in 2006, it is Crimea that suffers from looters more than any other region of Ukraine. *See* Radio Liberty, '*Black Archaeology' – a Salvation for Looters*? (20 July 2006), available at: https://www.radiosvoboda.org/a/948567 html (**RU-710**).

cultural heritage have become systemic, and violators do not bear proper responsibility';

b. Lack of consistency and coordination in the activities of different State authorities responsible for the preservation of historical and cultural heritage;

c. Lack of scientific documentation with respect to most historical and cultural objects.[1669]

993. Indeed, after the dissolution of the Soviet Union, the black-market industry of archaeological trade in Ukraine developed gradually.[1670] According to media reports, vandalism in relation to valuable underwater monuments in Ukraine has 'become an uncontrolled process and grown to menacing proportions'.[1671] A number of well-known vessels, such as the German submarine hunter UJ-102, German vessel *Santa Fe*, and the Russian ship *Tsesarevich Alexei Nikolaevich* which lie at a shallow depth in sight of border guards, have suffered most of all and are now 'literally pulled apart.'[1672]

994. Ukraine asserts that its 'domestic legislative framework specifically provides for the protection of UCH'.[1673] However, the legislative changes referenced by Ukraine hardly resulted in any positive developments. As was aptly noted by the representative of the Scientific and Educational Centre of Underwater Archaeology of the Kiev National University, while the 'laws are well-drafted, but in fact *they do not work*'.[1674] [*Emphasis* added].

[1669] O. Rybchinsky, ANALYSIS OF CULTURAL HERITAGE PRESERVATION PROGRAMS IN UKRAINE, 2017, p. 12 (**RU-711**). The analysis was conducted in the context of the project 'Cultural Heritage: Opportunity for Improving Civic Engagement' funded by the European Union.

[1670] KP.UA, '*Black Archaeologists' Stole all the Treasures of Ukraine* (18 June 2011), available at: https://kp.ua/life/285930-chernye-arkheolohy-rastaschyly-vse-sokrovyscha-ukrayny (**RU-712**).

[1671] Hitlife, *Diving in Ukraine: Time to Get out of the Shadows* (2006), available at: https://hitlife net.ua/ru/article/dajving-v-ukraine-vremja-vyhodit-iz-teni (**RU-713**).

[1672] *Ibid.*

[1673] Ukraine's Revised Memorial, ¶57.

[1674] WAS, *Scientists in Scuba: 20 Questions to Underwater Archaeologists*, available at: https://was.media/2020-06-08-podvodny-arheology/ (**RU-714**).

995. Sometimes illegal dealers in archaeological heritage are even reported to work under the shelter of Ukraine's high-ranking officials, including the Security Service and police,[1675] with no prosecutions ensuing.[1676] In fact, 'the Security Service of Ukraine and … the police backed them' instead of protecting cultural heritage, as required by law.[1677] According to media reports, '[o]ver the past 25 years, *not a single criminal case* against "black archaeologists", diggers, grave robbers in Ukraine has ended with a real imprisonment for the guilty'.[1678] [*Emphasis* added].

996. As a result, valuable artifacts have been freely sold online, via the developed extensive 'black market'.[1679] Even the former Ukrainian President, Viktor Yushchenko, is known for having a rich antique collection, with concerns having been raised as to the legality of its acquisition.[1680] For instance, at his presidential inauguration in January 2005 Mr Yushchenko's wife 'wore a dress adorned with a striking ancient Greek medallion and a Scythian gold necklace', while the first lady's 'ancient jewels… had been illegally excavated'.[1681]

997. While Ukraine claims to have created the Department of Underwater Heritage 'to develop underwater archaeology in Ukraine',[1682] the activities of the Department have been widely and severely criticised. The Department's head, Sergey Voronov**,** has been

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[1675] Octagon, *Business on Bones: How Crimea is Robbed by Black Archaeologists* (6 April 2020), available at: https://octagon.media/istorii/biznes_na_kostyax_kak_krym_grabyat_chernye_arxeologi.html (**RU-715**). *See* also Hitlife, *Diving in Ukraine: Time to Get out of the Shadows* (2006), available at: https://hitlife net.ua/ru/article/dajving-v-ukraine-vremja-vyhodit-iz-teni (**RU-713**): 'there is some high-ranking 'patron' behind almost every more or less successful diving club, who, in the event of a run over the club by border guards, archaeologists and other organizations, can ward off troubles, or, more simply, serve as a "backing"'.

[1676] Ministry of Culture of Ukraine Information Centre for Culture and Art, *Some Problems of Protection of Archaeological Heritage in Ukraine (review based on press materials (2011-2012)*, National Parliamentary Library of Ukraine, DZK Issue 1/5 2013 (**RU-716**).

[1677] Octagon, *Business on Bones: How Crimea is Robbed by Black Archaeologists* (6 April 2020), available at: https://octagon.media/istorii/biznes_na_kostyax_kak_krym_grabyat_chernye_arxeologi.html (**RU-715**).

[1678] Ukraina ru, *'Black Diggers' on the Hunt. Ukraine Is Losing Historical Values* (22 December 2018), available at: https://ukraina.ru/exclusive/20181222/1022105960.html (**RU-717**).

[1679] KP.UA, '*Black Archaeologists' Stole all the Treasures of Ukraine* (18 June 2011), available at: https://kp.ua/life/285930-chernye-arkheolohy-rastaschyly-vse-sokrovyscha-ukrayny (**RU-712**).

[1680] ARTnews, *Trypillian Threat* (1 December 2007), available at: https://www.artnews.com/art-news/news/trypillian-threat-178/ (**RU-718**).

[1681] *Ibid.*

[1682] Ukraine's Revised Memorial, ¶59.

reported to have no professional archaeological education.[1683] In spite of this, Mr Voronov headed numerous archaeological expeditions, including 'Byzantium 2007'.[1684] This expedition is particularly notable for the well-reported episode of the then President of Ukraine, Mr Yushchenko, personally lifting ancient fragile amphorae using a robot manipulator without any relevant experience and later even handling the removed amphorae on board the vessel.[1685] It goes without saying that this is contrary to the 'international standards' restricting access to UCH for unqualified personnel advocated by Ukraine itself.[1686]

Figure 6. Ukraine's President Mr Yushchenko handles ancient amphorae removed from a Byzantine shipwreck

998. The Department's Head Mr Voronov was also reportedly involved in 'shady schemes' by unlawfully providing permits for archaeological expeditions and appropriating

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[1683] *See* Public Organization Ukrainian Union of Submariners, Open Letter No. 01-12/10 to the Head of Administration of the President of Ukraine Mr. S. Lyovochkin, 15 December 2010, ¶9, available at: http://web.archive.org/web/20190402055139/http://undersea-union.com:80/details/otkrytoe_pismo (**RU-719**).

[1684] KP.UA, *Ukrainian President Raises Medieval Amphorae From the Bottom of the Black Sea* (20 August 2007), available at: https://kp.ua/politics/9329-prezydent-ukrayny-podnial-so-dna-chernoho-moria-srednevekovuui-amforu (**RU-720**)

[1685] *See* UNIAN, *Viktor Yushchenko* (16 August 2007), available at: https://photo.unian net/photo/78912-viktor-yushchenko (**RU-721**). *See* also KP.UA, *Ukrainian President Raises Medieval Amphorae From the Bottom of the Black Sea* (20 August 2007), available at: https://kp.ua/politics/9329-prezydent-ukrayny-podnial-so-dna-chernoho-moria-srednevekovuui-amforu (**RU-720**): 'At the most crucial moment, when the amphorae were about to be lifted, the then President of Ukraine Viktor Yushchenko and his wife unexpectedly descended on the German vessel Alliance rented by archaeologists. With his request to lift valuable amphorae with a robot manipulator himself, he seriously alarmed the Americans. Certainly, this is because fragile historical artefacts could easily be damaged with a slight movement of the hand! However, the leaders of the expedition still had to allow the head of the state to feel like an archaeologist. Fortunately, the amphorae were recovered intact.'

[1686] Ukraine's Revised Memorial, ¶270.

artefacts.[1687] In 2010 and 2013, the Ukrainian Union of Divers[1688] submitted a number of open letters to the State authorities of Ukraine, including the Presidential Administration of Ukraine, [1689] addressing the alleged 'illegal activities' of the Department and describing in detail Mr Voronov's misconduct.

999. Hence, Ukraine's assertion as to its 'significant efforts' to protect the UCH in Crimea is misleading.[1690] Although Ukraine is a party to the UNESCO Convention, the actual state of affairs with the exploration and preservation of UCH is disastrous. This was exactly the case in Crimea before its reunification with the Russian Federation in 2014. As the result, in 2014 the Russian Federation had to take active measures to minimise the negative effects of Ukraine's earlier malpractices, and prevent further damage caused to the UCH. Curiously, one clear example relates to the Terracotta Sculpture Head, in relation to which Ukraine raises fierce attacks against the Russian Federation.[1691] The site where the Terracotta Sculpture Head was found had originally been discovered by Ukrainian fishermen in mid-1990s.[1692] However, no steps were taken by Ukraine to protect valuable artefacts. As a result, numerous ceramic artefacts obtained by Ukrainian 'black archaeologists' flooded the 'black market'.[1693] It is only after the Crimea's reunification with the Russian Federation in 2014 that the site was properly analysed and conservated as a part of salvage archaeological fieldworks.[1694]

[1687] Public Organization Ukrainian Union of Submariners, Open Letter No. 01-12/10 to the Head of Administration of the President of Ukraine Mr. S. Lyovochkin, 15 December 2010, Section 3(b), available at: http://web.archive.org/web/20190402055139/http://undersea-union.com:80/details/otkrytoe_pismo (**RU-719**)

[1688] Public Organization Ukrainian Union of Divers is an active organization, which participated in numerous search operations, including archaeological expeditions under open lists.

[1689] Public Organization Ukrainian Union of Submariners, Open Letter No. 01-12/10 to the Head of Administration of the President of Ukraine Mr. S. Lyovochkin, 15 December 2010, available at: http://web.archive.org/web/20190402055139/http://undersea-union.com:80/details/otkrytoe_pismo (**RU-719**), Public Organisation 'Ukrainian Union of Submariners', Open Letter of to the Ministry of Culture of Ukraine, 10 September 2013, available at: http://web.archive.org/web/20220701004640/http://undersea-union.com/news/ (**RU-722**).

[1690] Ukraine's Revised Memorial, ¶57.

[1691] Ukraine's Reply, ¶¶377-379.

[1692] S. Olkhovsky, A. Stepanov, Rescue Underwater Research of CHO 'Bay Ak-Burun' in 2015, *International Yearbook of History, Archaeology, Epigraphy, Numismatics and Philology of the Bosporus Cimmerianus*, 2016, Vol. 20, p. 355 (**RU-704**).

[1693] *Ibid*.

[1694] *Ibid*.

1000. ***In sum***, as the Russian Federation has demonstrated in this Chapter, Ukraine's arguments advanced under Article 303(1) of UNCLOS do not hold water. The narrative of Ukraine's claims demonstrates that it actually seeks to broaden the Arbitral Tribunal's jurisdiction by read into Article 303 obligations under extraneous instruments that it never covered. This sweeping approach cannot be reconciled with the jurisdictional confines and the treaty interpretation rules, and should fail. Ukraine also distorts the international 'standards' for the protection of UCH so as to artificially substantiate its claim. In reality, the Russian Federation has adopted and implemented efficient legislation and enforcement procedures in line with international best practices, which ensure due UCH protection. This is illustrated, *inter alia*, by the specific episodes invoked by Ukraine, in which the extraction of artefacts and objects of historical value was accomplished in conformity with the existing international standards. Finally, Ukraine should be precluded from advancing its arguments as they are all the more cynical in view of Ukraine's own notoriously careless treatment of UCH. For all these reasons, the Arbitral Tribunal should dismiss Ukraine's claims.

VIII. UKRAINE'S CLAIMS REGARDING THE AGGRAVATION OF DISPUTE ARE MERITLESS

1001. In the Reply, Ukraine maintains that the Arbitral Tribunal has jurisdiction over its claims that the Russian Federation has allegedly aggravated the present dispute.[1695] It attempts to derive the corresponding duty from an overly broad interpretation of Articles 279 and 300 of UNCLOS; and the Arbitral Tribunal's power to implement it – from Article 293(3).[1696] Ukraine also heavily relies on the *South China Sea* award.[1697] Finally, it puts forward a list of the Russian Federation's actions that, as it alleges, violate the duty of non-aggravation and breach other provisions of the Convention.[1698]

1002. However, as the Russian Federation has explained in the Counter-Memorial,[1699] and as will be further demonstrated below, UNCLOS contains no jurisdictional basis to advance aggravation claims (**A**). Without prejudice to that argument, Ukraine's claims are baseless on the facts (**B**). In any event, the doctrine of 'clean hands' precludes Ukraine from invoking the Russian Federation's alleged aggravation of dispute, if any, given that those actions pale beside Ukraine's own conduct (**C**).

A. UNCLOS PROVIDES NO BASIS FOR THE ARBITRAL TRIBUNAL'S JURISDICTION OVER UKRAINE'S AGGRAVATION CLAIMS

1003. The Russian Federation has explained that the Arbitral Tribunal has no jurisdiction over these claims.[1700] These arguments are maintained in full and will be elaborated further below. ***First***, in the absence of jurisdiction over Ukraine's main claims the Arbitral Tribunal cannot consider the aggravation claims (**i**). ***Second***, there can be no dispute over an obligation which is absent in the Convention, and the duty of non-aggravation is exactly that (**ii**). ***Third***, the *South China Sea* award is of no help to Ukraine's position (**iii**). ***Fourth***, Ukraine inappropriately amended its aggravation claim, which in the modified part are plainly outside the scope of the Arbitral Tribunal's jurisdiction (**iv**).

[1695] Ukraine's Reply, ¶¶389-390.

[1696] *Ibid.*, ¶¶391, 397.

[1697] *Ibid.*, ¶¶393-396.

[1698] *Ibid.*, ¶399.

[1699] Counter-Memorial, Chapter 8.

[1700] *Ibid.*, Chapter 8, Section I.

i. The Arbitral Tribunal Should Not Consider Ukraine's Aggravation Claims Because It Has No Jurisdiction Over Ukraine's Main Claims

1004. Ukraine's sole justification of the Arbitral Tribunal's jurisdiction rests on the alleged existence of a dispute between the Parties concerning the interpretation of Articles 279 and 300 of UNCLOS.[1701]

1005. However, as explained in the Counter-Memorial,[1702] even if a duty of non-aggravation exists under the Convention (*quod non*), its ultimate goal, in Ukraine's logic, is to disincentivise the parties from taking measures which would jeopardise execution of the future award.[1703] Accordingly, this duty is inherently ancillary – and can be brought before a tribunal only together with justiciable claims. Considering that none of Ukraine's main claims fall within the Arbitral Tribunal's jurisdiction, its aggravation claims, being ancillary to them, are bound to fail.

1006. Accordingly, because there is no underlying dispute subject to the Arbitral Tribunal's consideration, the Arbitral Tribunal equally does not have jurisdiction over Ukraine's aggravation claims.

ii. Article 279 of UNCLOS Does Not Provide For a Duty of Non-Aggravation

1007. There can be no dispute regarding an obligation which is manifestly absent from the Convention.

1008. Ukraine asserts that the reference in Article 279 of UNCLOS to Article 2(3) of the UN Charter 'imposes a duty not to aggravate a dispute while it is subject to compulsory dispute settlement.'[1704] It tries to further strengthen this assertion by interpreting Article 279 cumulatively with Article 300 of UNCLOS.[1705] In addition, it contends that this duty, being a 'universally accepted principle', can be applied by the Arbitral Tribunal

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[1701] Ukraine's Reply, ¶¶389-390.

[1702] Counter-Memorial, ¶598.

[1703] Ukraine's Reply, ¶¶394, 398. *See* also *South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, Award of 12 July 2016, PCA Case No. 2013-19, ¶1176 (**UAL-11**); *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Interim Measures of Protection, Order of 5 December 1939, P.C.I.J. Series A/B, No. 79, p. 199 (**RUL-130**).

[1704] Ukraine's Reply, ¶391.

[1705] *Ibid.*, ¶¶392-396.

by virtue of Article 293(1) of UNCLOS.[1706] Yet, neither of these contentions has any merit.

1009. Article 279 of UNCLOS states that:

> States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

1010. This article only provides that disputes between the Contracting Parties must be settled through 'peaceful means' pursuant to the specific provisions of the UN Charter.

1011. Article 2(3) of the UN Charter contains a similar obligation and states that disputes should be resolved 'in such a manner that international peace and security, and justice, are not endangered,' *i.e.*, without resorting to the use of force.[1707] Article 33(1) of the UN Charter further elaborates this obligation and sets a list of possible dispute settlement means. It has been noted by prominent commentators that:

> Judicial settlement . . . constitutes an ideal way of complying with Article 2, para. 3 UN Charter.[1708]

1012. Thus, in accordance with its ordinary meaning Article 279 only obliges the parties to a dispute to refrain from using force to resolve their dispute. It does not prescribe how the parties must behave after they have chosen a peaceful mechanism for resolving their dispute.

1013. The Convention's *travaux préparatoires* also show that the drafters did not even discuss the duty of non-aggravation and therefore did not intend Article 279 to include it. Specifically, the *Virginia Commentary* supports the above analysis and states that this article was supposed to 'incorporate[] by reference the peaceful means indicated in

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[1706] *Ibid.*, ¶397.

[1707] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment of 1 October 2018, I.C.J. Reports 2018, p. 560, ¶165 (**RUL-147**). *See* also D. Caron, C. Tomuschat, *Article 2, Para. 3 UN Charter* in C. Tams et al. (eds.), THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (3rd ed., OUP, 2019), pp. 131-132, ¶¶27-28 (**RUL-207**).

[1708] D. Caron, C. Tomuschat, *Article 2, Para. 3 UN Charter* in C. Tams et al. (eds.), THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (3rd ed., OUP, 2019), pp. 132-133, ¶31 (**RUL-207**).

Article 33, paragraph 1, of the Charter of the United Nations.'[1709] No separate self-standing obligations were envisaged.

1014. Ukraine's reference to the drafting history leads to the same conclusion. Ukraine argues that the working paper proposing the initial version of Article 279 relied on '[r]elevant provisions of international instruments,' including a quotation from the Declaration on Friendly Relations calling for States to refrain from aggravating situations endangering the 'maintenance of international peace and security'.[1710] However, the working paper in fact included several alternative versions of Article 279 and the one invoked by Ukraine, 'Alternative B', was eventually rejected, while the other version, 'Alternative A', which was worded in similar terms to Article 279 was the one to be eventually adopted.[1711] Accordingly, the Convention's drafting history merely reaffirms the principles enshrined in Article 2(3) of the UN Charter and add nothing to Ukraine's argument.

1015. Where drafters intend the document to prohibit aggravation of disputes, they include express provisions to that effect. This is the case with several treaties devoted to inter-State dispute resolution that contain references to the duty of non-aggravation.[1712] Thus, the absence of such clear wording strongly indicates that the instrument in question was

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[1709] M. Nordquist (ed.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY (Brill | Nijhoff, 2013), Vol. V., p. 18, ¶279.2 (**RUL-14-AM**).

[1710] Ukraine's Reply, ¶391, fn. 873, quoting the 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**). Notably, Ukraine intentionally shortened its citation and omitted from the quote that the Declaration on Friendly Relations actually calls on the States to refrain from aggravating situations 'so as to *endanger the maintenance of international peace and security*'. [*Emphasis* added] This wording thus does not even address the aggravation of disputes that are subject to dispute resolution procedures.

[1711] 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. 85 (**UA-854**).

[1712] *See*, e.g., the Revised General Act for the Pacific Settlement of International Disputes, 28 April 1949, United Nations Treaty Series, Vol. 71, Article 33(3), p. 101: 'The parties undertake to abstain from all measures likely to react prejudicially upon the execution of the judicial or arbitral decision or upon the arrangements proposed by the Conciliation Commission and, in general, to *abstain from any sort of action whatsoever which may aggravate or extend the dispute*' [*emphasis* added] (**RUL-208**). *See* also the Convention on Conciliation and Arbitration within the Conference on Security and Co-operation in Europe, 15 December 1992, United Nations Treaty Series, Vol. 1842, Article 16, p. 150: 'During the proceedings, *the parties to the dispute shall refrain from any action which may aggravate the situation* or further impede or prevent the settlement of the dispute' [*emphasis* added] (**RUL-209**). The European Convention for the Peaceful Settlement of Disputes, 29 April 1957, United Nations Treaty Series, Vol. 320, Article 31 (3), p. 243: 'The *parties shall abstain from all measures* likely to react prejudicially upon the execution of the judicial or arbitral decision or upon the arrangements proposed by the Conciliation Commission and, in general, shall abstain from any sort of action whatsoever *which may aggravate or extend the dispute*' [*emphasis* added] (**RUL-210**).

not intended to encompass an obligation of this kind. Therefore, Article 279 does not lend any support to Ukraine's case.

1016. Ukraine likewise has no basis to read into the Convention the duty of non-aggravation by relying on Article 300 of UNCLOS.

1017. ***First***, Article 300 of UNCLOS, which enshrines the principle of good faith, does not create any independent obligation, and can only be invoked in conjunction with other Articles of the Convention.[1713] Thus, an applicant relying on Article 300 of UNCLOS has to identify specific obligations under the Convention that were not performed in good faith.[1714] Because Article 279 of UNCLOS, as explained above, does not provide for a duty of non-aggravation, Ukraine does not have any ground to invoke Article 300 as a separate basis of the Arbitral Tribunal's jurisdiction.

1018. ***Second***, although it's the Arbitral Tribunal's jurisdiction remains confined under Article 288(1) to disputes concerning only the interpretation or application of the Convention. Article 293(1) cannot serve as a mechanism for extending the Arbitral Tribunal's jurisdiction over issues extraneous to the Convention.[1715] As explained above, the issue of non-aggravation is not governed by the Convention. Therefore, the Arbitral

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[1713] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, PCA Case No. 2011-03, p. 118, ¶303: 'a claim pursuant to Article 300 is necessarily linked to the alleged violation of another provision of the Convention. As such, the nature of Mauritius' rights pursuant to this provision coincides with the nature of the other provisions allegedly violated' (**RUL-85**). *M/V 'Louisa' (Saint Vincent and the Grenadines v. Spain)*, Judgment of 28 May 2013, ITLOS Reports 2013, p. 43, ¶137: '[i]t is apparent from the language of article 300 of the Convention that article 300 cannot be invoked on its own. It becomes relevant only when 'the rights, jurisdiction and freedoms recognised' in the Convention are exercised in an abusive manner' (**RUL-36**). *See* also *The 'Enrica Lexie' Incident (Italy v. India)*, Award of 21 May 2020, PCA Case No. 2015-28, p. 206, ¶729 (**RUL-179**); *The Dugzit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No 2014-07, Award of 5 September 2016, pp. 56-57, ¶¶216-218 (**RUL-121**).

[1714] *The M/V 'Virginia G' Case (Panama/Guinea-Bissau)*, Judgment of 14 April 2014, ITLOS Reports 2014, p. 109, ¶398 (**UAL-9**); *M/V 'Norstar' (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019, p. 79, ¶241 (**UAL-138**).

[1715] *The Dugzit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, Award of 5 September 2016, ¶207: 'Article 288(1) limits the jurisdiction of this Tribunal to disputes concerning the interpretation or application of the provisions of the Convention. Article 293(1) provides that the Tribunal shall apply the Convention and other rules of international law not incompatible with the Convention. The combined effect of these two provisions is that the Tribunal does not have jurisdiction to determine breaches of obligations not having their source in the Convention... as such, but that the Tribunal 'may have regard to the extent necessary to rules of customary international law... not incompatible with the Convention, in order to assist in the interpretation and application of the Convention's provisions...'' (**RUL-121**). *See* also *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Merits, Award of 14 August 2015, ¶192 (**UAL-04**); P. Tzeng, Jurisdiction and Applicable Law under UNCLOS, *Yale Law Journal*, 2016, Vol. 126, Issue 1, p. 248 (**RUL-119**); A. Proelss, The Limits of Jurisdiction Ratione Materiae of UNCLOS Tribunals, *Hitotsubashi Journal of Law and Politics*, 2018, Vol. 46, pp. 59-60 (**RUL-120**).

Tribunal should disregard Ukraine's claim regarding the violation of the general principle of non-aggravation, even if one existed outside the Convention, as being plainly outside the scope of its jurisdiction.

1019. To conclude, Article 279 of UNCLOS does not provide for a duty of non-aggravation. Thus, neither Article 279, nor its invocation in conjunction with Article 300 or extraneous principles creates any jurisdictional basis for Ukraine's claims. The Russian Federation has complied with its obligations under Article 279 regarding peaceful settlement of disputes by participating in the present proceedings in good faith.

iii. Ukraine's Reliance on the *South China Sea* Award is Inapposite

1020. Ukraine continues to seek support from the *South China Sea* award, which remains the sole case that concerned a duty of non-aggravation outside of the context of provisional measures.[1716] The Russian Federation reiterates its position that the ruling on the matter of aggravation in the *South China Sea* award is standalone, isolated, and provides no basis for reading into UNCLOS new obligations not contemplated by the Convention's drafters.[1717]

1021. The *South China Sea* tribunal mostly relied, in its own words, on the PCIJ's and ICJ's 'extensive *jurisprudence on provisional measures*'.[1718] [*Emphasis* added] In particular, it referred to the PCIJ's *Electricity Company of Sofia and Bulgaria* case. There, the PCIJ, citing Article 41 of its Statute, noted that there is a 'principle universally accepted by international tribunals' and that under it 'the parties to a case must... not allow any step of any kind to be taken which might aggravate or extend the dispute.'[1719] The tribunal also recalled the ICJ's provisional measures order in the *Land and Maritime Boundary*

[1716] Ukraine's Reply, ¶¶393-396.

[1717] Counter-Memorial, ¶¶602-605.

[1718] *South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, Award of 12 July 2016, PCA Case No. 2013-19, pp. 458, ¶1169 [*emphasis* added] (**UAL-11**).

[1719] *South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, Award of 12 July 2016, PCA Case No. 2013-19, pp. 457, ¶1167 (**UAL-11**) quoting *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Interim Measures of Protection, Order of 5 December 1939, P.C.I.J. Series A/B, No. 79, p. 199 (**RUL-130**).

case, in which the Court specifically identified Article 41 of the ICJ Statute as the source of its powers to direct the parties to refrain from aggravating the dispute.[1720]

1022. But the context of and legal bases for those decisions were strikingly different from those in the present case. The abovementioned rulings were made by the ICJ and the PCIJ during the incidental proceedings at the provisional measures stage, while Ukraine's aggravation claims concern the proceedings on the merits. In addition, in both cases the non-aggravation orders were based on express provisions in both the ICJ and the PCIJ Statutes empowering the Court to grant 'any' provisional measures if circumstances so require.[1721] Given that the ICJ Statute is an integral part of a treaty – the UN Charter – this situation falls squarely within the logic described above: the drafters, should they wish to envisage a separate duty of non-aggravation, include that expressly into the treaty. Therefore, all the Charter's signatories are *ipso facto* aware that the Court has expressly vested powers pursuant to its Charter to order non-aggravation. As the Russian Federation has explained above, this is not the case with UNCLOS.

1023. According to the settled judicial and arbitral practice non-aggravation measures cannot be ordered in the absence of other more specific protective measures.[1722] This confirms that non-aggravation measures are inherently ancillary to other provisional measures and cannot exist independently.

1024. Therefore, absent an explicit reference in the applicable treaties, non-aggravation measures apply only if *specifically ordered* as a provisional measure. Contrary to what

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[1720] *South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, Award of 12 July 2016, PCA Case No. 2013-19, pp. 458, ¶1168 (**UAL-11**) quoting *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Provisional Measures, Order of 15 March 1996, ICJ Reports 1996, pp. 22-23, ¶41: '...the Court possesses *by virtue of Article 41 of the Statute* the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require' [*emphasis* added] (**RUL-211**).

[1721] Article 41 in each respective statute.

[1722] *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I), p. 16, ¶49, p. 17, ¶56 (**RUL-212**); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, ICJ Reports 2011, p. 21, ¶62 (**RUL-213**). *See* also *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimants' Request for Provisional Measures of 3 March 2010, ¶¶61, 63-66 (**RUL-214**). Y. Tanaka, *Lawfulness of Chinese Activities in the South China Sea* in THE SOUTH CHINA SEA ARBITRATION: TOWARD AN INTERNATIONAL LEGAL ORDER IN THE OCEANS (Hart Publishing, 2019), pp. 157-158, fn. 258: 'However, it must be noted that in the jurisprudence of the ICJ, non-aggravation measures were ordered only as an adjunct to preservative provisional measures' (**UAL-211**). S. Ratner, The Aggravating Duty of Non-Aggravation, *The European Journal of International Law*, 2021, Vol. 31, Issue 4, p. 1315 (**UAL-210**).

Ukraine argues,[1723] a distinct duty of non-aggravation operating outside the context of provisional measures can be inferred neither from Article 279 of UNCLOS, nor general international law.

1025. Even assuming a distinct duty of non-aggravation exists as a 'principle universally accepted by international tribunals',[1724] the Arbitral Tribunal would have had jurisdiction over a claim alleging its violation only had it been directly incorporated into the Convention. As explained above,[1725] the Arbitral Tribunal cannot pronounce on a party's compliance with a rule, which is extraneous to the Convention, given the inherent limitations to its competence.

1026. On the whole, the *South China Sea* award does not provide a ready-made solution for Ukraine's aggravation claims and is no substitute for a proper jurisdictional basis in the Convention.

iv. Ukraine's Amended Aggravation Claims Fall Outside the Arbitral Tribunal's Jurisdiction

1027. Finally, Ukraine has changed its claims in the Reply by supplementing them with a new basis for its aggravation argument. Ukraine now contends that the Russian Federation aggravated the dispute by also 'claiming exclusive sovereignty over the Sea of Azov, whereas it previously claimed sovereignty over those waters jointly with Ukraine.'[1726]

1028. However, as explained above,[1727] this is just another manifestation of Ukraine's continuing attempts to bring within the Arbitral Tribunal's purview issues over which it lacks jurisdiction. Since the Arbitral Tribunal is without jurisdiction to consider claims concerning the Sea of Azov, it can neither exercise jurisdiction over this issue as artificially transformed into a separate aggravation claim.

[1723] Ukraine's Reply, ¶396.

[1724] *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Interim Measures of Protection, Order of 5 December 1939, P.C.I.J. Series A/B, No. 79, p. 199 (**RUL-130**).

[1725] *See* above Chapter II.

[1726] Ukraine's Reply, ¶¶403, 415.

[1727] *See* above, Chapters I and II. *See* also Counter-Memorial, Chapter 2.

B. THE RUSSIAN FEDERATION DID NOT AGGRAVATE THE DISPUTE

1029. In the Reply, Ukraine essentially avers that its actions complained of in its main claims are at the same time aggravating the present dispute.[1728] As explained in the Counter-Memorial and elsewhere in this Rejoinder, the Russian Federation's actions complained of by Ukraine did not violate UNCLOS, and hence there is no basis for a separate finding of aggravation. In any event, Ukraine has failed to demonstrate any aggravation as such.

1030. Ukraine's continuing opposition to the construction of the Kerch Bridge[1729] does not hold water. This is a lawful,[1730] necessary, justified, and proportionate[1731] action taken by the Russian Federation in the exercise of its sovereign powers, especially in light of the urgent humanitarian need to protect the Crimean population from the hostile actions of Ukraine, including the adverse effects of Crimea's blockades.[1732] A construction of civilian infrastructure tailored at catering to humanitarian needs does not aggravate the dispute between the parties.

1031. The above clearly distinguishes the present case from the award in the *South China Sea* arbitration. In that case, the tribunal found that China aggravated the dispute by building an artificial island.[1733] The circumstances of the island construction did not involve a pressing humanitarian necessity.[1734] In the present case, there was an urgent need to construct the Kerch Bridge amplified by Ukraine's actions.

[1728] Ukraine's Reply, ¶399.

[1729] *Ibid.*, ¶¶399, 402; Ukraine's Revised Memorial, ¶287.

[1730] Tellingly, Ukraine's own authorities suggest that legality is a strong indicator that an action lacks aggravating character, *see* S. Ratner, The Aggravating Duty of Non-Aggravation, *The European Journal of International Law*, 2021, Vol. 31, Issue 4, pp. 1329-1331 (**UAL-210**).

[1731] *See* also above Chapter III.

[1732] Counter-Memorial, Chapter 3, Section (A); ¶¶607, 609. *See* also Chapter III above.

[1733] *South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, Award of 12 July 2016, PCA Case No. 2013-19, pp. 464, ¶1181(a) (**UAL-11**).

[1734] *South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, Award of 12 July 2016, PCA Case No. 2013-19, p. 410, ¶1022: 'The Chinese government has been carrying out maintenance and construction work on some of the garrisoned Nansha Islands and reefs with the main purposes of *optimizing their functions, improving the living and working conditions of personnel stationed there, better safeguarding territorial sovereignty and maritime rights and interests...*' [*emphasis* added] (**UAL-11**).

1032. Ukraine further continues to accuse the Russian Federation of implementing the Infrastructure Projects 'in the absence of any apparent environmental assessment or monitoring program'.[1735] But this is also erroneous.

1033. The listed projects – except for the Communication cable, which does not require an EIA[1736] – were accompanied by robust EIAs and monitoring programmes that took place even *before* Ukraine filed its Notification under Article 287 of UNCLOS.[1737] Ukraine's argument is thus simply not corroborated by the facts.

1034. It is in any case hard to see how these actions could aggravate the dispute when they did not cause any actual environmental harm.[1738] A comparison with the *South China Sea* award is also illustrative here. Tellingly, in that case, the tribunal held that China aggravated the dispute by causing 'permanent, irreparable harm' to marine environment.[1739] This is evidently not the case here, as demonstrated extensively in [redacted] Second Expert Report.[1740] Ukraine's case on marine environment is entirely based on hypotheticals and lacks substantiation. Its suggestion concerning the lack of EIA and monitoring are likewise disproven by the evidence submitted by the Russian Federation. Therefore, Ukraine's aggravation claims have no legal or factual basis and must fall alongside its main ones.

1035. In a similar vein, Ukraine's accusations concerning inspections and suspension of transit passage must fail.[1741] These are lawful measures justified by legitimate security concerns raised, *inter alia*, by Ukraine's own provocative actions.[1742] Furthermore, Ukraine's line of reasoning suggests that until this dispute is finally resolved, the Russian Federation should refrain from inspecting *any* vessels related to Ukraine. This proposition is unreasonable and unfounded.

[1735] Ukraine's Reply, ¶399.

[1736] *See* above Chapter VI; Counter-Memorial, ¶¶442-446.

[1737] *See* above Chapter VI; Counter-Memorial, Chapter 6, Sections C, D.

[1738] *See* above Chapter VI; Counter-Memorial, ¶¶612-613.

[1739] *South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, Award of 12 July 2016, PCA Case No. 2013-19, pp. 464, ¶1181(b) (**UAL-11**).

[1740] Second [redacted] Report, III(B).

[1741] Ukraine's Reply, ¶¶399, 402.

[1742] Counter-Memorial, ¶¶610-611.

1036. Removal of the Kitty Hawk Fighter Jet and the Airacobra Aircraft from the seabed also provides no support for Ukraine's aggravation claims. The aircraft were severely damaged by aggressive marine environment; lifting them from the seabed contributed to their preservation.[1743] As the Russian Federation has explained, all items are in good condition ashore and looked after well. In addition, military aircraft wrecks pose objective threats for the marine environment and navigation, such as pollution from hazardous substances remaining aboard and risk of explosions.[1744] In these circumstances, the decision to remove the aircraft was completely justified. It is entirely unclear how these measures possibly could aggravate the dispute between the parties.

1037. In sum, Ukraine's aggravation claims lack any substantiation. All actions of the Russian Federation were legitimate and did not lead to the aggravation of the dispute.

C. IN ANY CASE, UKRAINE IS PRECLUDED FROM INVOKING ITS AGGRAVATION CLAIMS UNDER THE 'CLEAN HANDS' DOCTRINE

1038. Finally, the Arbitral Tribunal should not engage with Ukraine's aggravation claims because any of the above actions of the Russian Federation fade compared to Ukraine's own conduct.

1039. As explained above, under the 'clean hands' doctrine, the Arbitral Tribunal should not encourage a party that has engaged in bad faith behaviour with respect to the very subject of the relief sought.[1745]

1040. The facts below leave no doubt that Ukraine's egregious conduct after the commencement of the present proceedings fits squarely into the type of behaviour to which the 'clean hands' doctrine applies.

1041. Particularly appalling are Ukraine's continuing attacks of the Kerch Bridge. Ukraine has been voicing threats to blow it up since its construction started[1746] and has since carried out multiple attempts to do so. The most dangerous strikes were launched in in October

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[1743] *See* above Chapter VII(D)(i); Counter-Memorial, ¶¶587, 593.

[1744] *See* above Chapter VII.

[1745] *See* Rejoinder, Chapter VII(E).

[1746] Counter-Memorial, ¶¶262-263.

2022, as well as July and August 2023. Ukraine claimed full responsibility for them.[1747] Ukraine's officials have also continued to direct threats at the Bridge, promising to destroy it. The jeopardy posed by these attacks to the marine environment, navigation, and security in general completely outweighs any potential detrimental effects, if any, resulting from the construction of the Bridge.

1042. Another glaring example of Ukraine's reprehensible conduct is the repeated bombing in June 2022 of the JDRs *Tavrida* and *Sivash*[1748] – the very same JDRs that Ukraine asks the Russian Federation to return.[1749] Naturally, explosions on equipment engaged in hydrocarbons extraction create serious risks to marine environment and navigation that Ukraine cynically claims to defend in this Arbitration. In addition, considering that Ukraine's own actions threaten the remedy it seeks, they fit squarely into the criteria of aggravation set out in the *South China Sea* Award.[1750]

1043. Furthermore, Ukraine's regular pattern of provocative behaviour has been accompanying the entire length of these proceedings. This is illustrated by the numerous military exercises conducted, *inter alia*, in the Black Sea and the Sea of Azov Seas, as well as by the construction of a new naval base in Berdyansk.[1751] It is also notable that one particularly provocative intrusion of Ukrainian military vessels into the territorial sea of the Russian Federation even escalated to an armed confrontation and is currently being considered in another Annex VII arbitration.[1752]

1044. In addition, Ukraine did not stop or reconsider its blockades of Crimea which were the main trigger behind the construction of the Kerch Bridge.

[1747] CNN, *Ukraine Claims Responsibility for New Attack on Key Crimea Bridge* (17 July 2023), available at: https://edition.cnn.com/2023/07/16/europe/russia-crimea-bridge-intl-hnk/index.html (**RU-585**); Reuters, *Ukraine's SBU Claims Responsibility for Last Year's Crimea Bridge Blast* (26 July 2023), available at: https://www.reuters.com/world/europe/ukraines-sbu-claims-responsibility-last-years-crimea-bridge-blast-2023-07-26/ (**RU-586**); Ukrainska Pravda, *Ukraine's Defence Intelligence Chief On Recent Explosions Near Crimean Bridge: There Was Another Target* (24 August 2023), available at: https://www.pravda.com.ua/eng/news/2023/08/24/7416928/ (**RU-587**).

[1748] Counter-Memorial, ¶302.

[1749] Ukraine's Revised Memorial, ¶316(b).

[1750] Ukraine's Reply, ¶394; Ukraine's Revised Memorial, ¶284; Ukraine's Memorial, ¶241; *South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, Award of 12 July 2016, PCA Case No. 2013-19, ¶1176 (**UAL-11**).

[1751] Counter-Memorial, ¶¶259, 264

[1752] *See Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation)*, PCA Case No. 2019-28.

1045. Moreover, Ukraine's factories have been the main polluters of the environment in the region. While Ukraine claims that the Kerch Bridge construction somehow damaged the environment, or that its construction was not accompanied by appropriate EIAs, it itself has constantly overlooked all relevant procedures, and disregarded the environment when implementing its own infrastructural projects.

1046. In sum, it is plain that it is Ukraine that has been consistently contributing to the aggravation of the Parties' dispute by its aggressive and provocative actions. In fact, that even led to the emergence of a new dispute between the parties. Therefore, its claims as to alleged aggravation of the dispute should be dismissed in their entirety.

IX. THE RUSSIAN FEDERATION'S OBJECTIONS CONCERNING REMEDIES REQUESTED BY UKRAINE

1047. In its Revised Memorial and Reply, Ukraine sets out a catalogue of remedies that the Tribunal is requested to afford, claiming 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'. [1753] This request should be rejected in its entirety as it has no legal or factual basis: as explained in the Counter-Memorial and in this Rejoinder, the Russian Federation has not breached any of its obligations under UNCLOS and, consequently, its international responsibility is not engaged. Moreover, as explained above, in some instances, the relief sought by Ukraine would require the Arbitral Tribunal to address questions of sovereignty, contrary to the 2020 Award.[1754] Nonetheless, some remarks on the requested relief are warranted.

1048. In addressing Ukraine's position, the following principles must be borne in mind:

a. reparation must wipe out all the consequences of the illegal act as far as possible and in adequate form;[1755]

b. reparation is only owed to the extent that an injury is caused by the internationally wrongful act;[1756]

c. restitution may be awarded if it is not materially impossible and does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation;[1757] and

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[1753] Ukraine's Revised Memorial, Chapter 8 and Submissions; Ukraine's Reply, Chapter 7.

[1754] *See* Rejoinder, Chapter I(D)(i).

[1755] *Case Concerning The Factory at Chorzów*, Claim for Indemnity, Merits, Judgment of 13 September 1928, PCIJ Series A. No 17, p. 47 (**RUL-96**); s*ee* also *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Jurisdiction, Judgement of 26 July 1927, PCIJ Series A No 9*,* p. 21:'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.' (**UAL-140**); s*ee* also *M/V Saiga (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, p. 65, ¶170 (**UAL-28**); s*ee* also *Avena and Other Mexican Nationals (Mexico* v. *United States of America),* Judgment, I.C.J. Reports 2004, p. 59, ¶119 (**UAL-143**).

[1756] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, Article 31 (**UAL-33**).

[1757] *Ibid*., Article 35.

d. compensation may only be awarded to financially assessable damage insofar as it is established.[1758]

1049. As will be demonstrated below, Ukraine's request for reparation is excessive and inconsistent with these basic tenets of the law of State responsibility. Ukraine seeks to impose a disproportionately severe burden on the Russian Federation without having justified it in law or in fact.

1050. With respect to the other claims, Ukraine requests assurances of non-repetition, restitution and has reserved its right to request compensation. The Russian Federation will comment on each of these requests in turn.

1051. As regards the request that the Russian Federation should make assurances of non-repetition 'across all three substantive areas of the Convention implicated in this case',[1759] Ukraine does not explain why the circumstances of the present case would warrant them. As the ICJ has explained, '[a]s a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed'.[1760] That a State's good faith must be presumed and its bad faith must not be presumed but must be proven has indeed long become part of *jurisprudence constante* of international courts and tribunals.[1761]

[1758] *Ibid*., Article 36.

[1759] Ukraine's Revised Memorial, ¶300.

[1760] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua),* Judgment of 13 July 2009, I.C.J. Reports 2009, p. 267, ¶150 (**RUL-231**).

[1761] *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Merits, Judgment of 15 May 1926, PCIJ Series A No. 7, p. 30 (**RUL-232**); s*ee* also *Affaire du Lac Lanoux (Spain, France),* Award of 16 November 1957, Reports of International Arbitral Awards, 1957, Vol. XII, p. 305: 'il est un principe général de droit bien établi selon lequel la mauvaise foi ne se présume pas*'* ('for there is a general and well-established principle of law according to which bad faith is not presumed') (**RUL-233**); *see* also *Case of the Free Zones of Upper Savoy and the District of Gex*, Merits, Judgment of 7 June 1932, Series A/B, No 46, p. 167: 'an abuse cannot presumed by the Court' (**RUL-84**); *see* also *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment of 31 March 2014, I.C.J. Reports 2014, Dissenting Opinion of Judge Abraham, p. 328, ¶¶28, 34 (**RUL-234**); *see* also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018, Dissenting Opinion of Judge Cot, p. 491, ¶28 (**RUL-235**).

1052. Thus, only special circumstances may call for ordering assurances and guarantees of non-repetition.[1762] The burden of proving such circumstances are on Ukraine: 'it rests with the party who states that there has been such misuse to prove his statement'.[1763]

1053. However, Ukraine has failed to demonstrate any reasons why the Russian Federation's good faith should not be presumed (or why its bad faith should be presumed) should the Arbitral Tribunal find that it committed an internationally wrongful act. Therefore, Ukraine's request for assurances of non-repetition should be dismissed.

1054. In its second prayer for relief, Ukraine requests that the Arbitral Tribunal order the Russian Federation to 'modif[y] 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'.[1764] Such a relief would be inadequate, as it would put a burden out of all proportion on the Russian Federation and is hardly feasible materially.

1055. As the ICJ pointed out in Pulp Mills, 'where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction.[1765]

1056. This customary principle applies, *inter alia*, to infrastructure projects. For instance, in the *Great Belt* case between Finland and Denmark, the latter embarked on a construction of a bridge that would impede the passage of Finnish drill ships and oil rigs. Denmark argued at the provisional measures stage that 'if the Court ruled in favour of Finland on the merits, any claim by Finland could not be *dealt with by an order for restitution, but could only be satisfied by damages inasmuch as restitution in kind would be excessively*

[1762] *Ibid*.

[1763] *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Merits, Judgment of 15 May 1926, PCIJ Series A No. 7, p. 30 (**RUL-232**); *see* also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018, Dissenting Opinion of Judge Cot, p. 491, ¶28: 'In any event, one of the consequences of this notion is that it is incumbent on the party which claims that the other has violated the principle of good faith to prove that claim' (**RUL-235**).

[1763] *Ibid*.

[1764] Ukraine's Reply, ¶407; Ukraine's Revised Memorial, ¶307.

[1765] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, I.C.J. Reports 2010, p. 103, ¶273 (**UAL-152**); *see* also G. Hafner, I. Buffard, *Obligations of Prevention and the Precautionary Principle* in J. Crawford, A. Pellet *et al*. (eds.), THE LAW OF INTERNATIONAL RESPONSIBILITY (OUP, 2010), p. 531 (**RUL-236**).

onerous'.[1766] [*Emphasis* added] Eventually, the case did not reach the merits phase but was settled. However, it is notable that as part of the settlement Finland agreed to a compensation of approximately USD 15 million from Denmark and withdraw its case from the ICJ as well as any claims concerning a possible modification of the bridge.[1767] Importantly, Finland considered itself to be satisfied with the settlement and any potential damage to be compensated.[1768]

1057. In the present scenario, the modification of the Kerch Bridge would be unrealistic and onerous technically, economically, and environmentally. In essence, it is impossible to 'modify' the Kerch Bridge *per se*. What would need to be done is to destroy the Bridge and build a new one. Ukraine, as a claiming party, has failed to show that modification of the Kerch Bridge is at all possible in the first place. Indeed, as the Russian Federation has explained elsewhere,[1769] by reference to the Kerch Bridge's technical documentation,[1770] it has duly considered other options, such as tunnels, bridges with a movable span and/or larger clearance. Such options are simply not feasible technologically.

1058. In addition, a large construction project of dismantling one bridge and building another one in its place would necessarily entail environmental risks. It is telling that, while discussing at length hypothetical negative environmental effects of the Kerch Strait bridge construction, Ukraine and its experts ignore the adverse effect on the marine environment that any extensive demolition and reconstruction works may cause.

1059. From a financial standpoint, dismantling the Kerch Bridge and constructing a new one would entail exorbitant costs on the Russian Federation and its people. To compare, the construction of the Kerch Bridge itself cost almost RUB 228 billion[1771] (approximately

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[1766] *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991, p. 19, ¶31 (**RUL-237**).

[1767] M. Caroee, A. Singh, Dispute between Finland and Denmark on Shipping through the Great Belt, *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, Vol. 3, p. 137 (**RUL-215**).

[1768] M. Koskenniemi, Case Concerning Passage Through the Great Belt, *Ocean Development & International Law*, 1996, Vol. 27, Issue 3, p. 256 (**RUL-216**).

[1769] Counter-Memorial, ¶¶164-193; Rejoinder, Chapter III.

[1770] [redacted]

[1771] Rosavtodor, *The Final Price of Construction of the Bridge to Crimea has been established Considering the Construction Plan*, available at: https://rosavtodor.gov ru/press-center/news/archive-news/895 (**RU-811**).

USD 2.5 billion at the exchange rates of November 2023). Here, Ukraine is requesting that the Russian Federation dismantle the original Kerch Bridge and build a new one, creating a burden out of all proportion. Ukraine has failed to show anything that would justify it.

1060. Moreover, Ukraine's demand is also inadequate and disproportionate in that the Russian Federation does not hamper the freedom of navigation in the Kerch Strait. As shown above,[1772] the discrete number of vessels that are allegedly prevented from traversing the Strait have scarcely used it anyway. Furthermore, as noted in the [redacted] Report, the Crimean Bridge had no effect on the trends noticed in trade volumes.[1773]

1061. Importantly, the number of large vessels that are allegedly impacted by the Kerch Bridge and precluded from entering the Strait is negligible (less than 2.5%).[1774] Re-constructing the entire bridge for the sake of those vessels that may or (likely) may not transit the Strait is clearly a burden out of all proportion and cannot be considered a relief in adequate form. Just to compare, as noted above, Finland was satisfied in a similar scenario with a compensation of 90 million Danish Krons (approximately USD 15 million at the then exchange rate).

1062. Ukraine has not met its burden of proof and has failed to show any economic damage sustained as a result of the Kerch Bridge's construction, let alone any circumstances that would necessitate rebuilding the Bridge.

1063. Ukraine also requests that the Russian Federation be ordered 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'.[1775] Ukraine adds that '[a]t a minimum, Russia must undertake the environmental monitoring

[1772] *See* Rejoinder, Chapter III(A)(iii).

[1773] [redacted] Report, ¶72.

[1774] *See* above, ¶323.

[1775] Ukraine's Reply, ¶409.

and analysis outlined by Ukraine and its environmental assessment expert, [redacted].[1776] This relief is also not adequate.

1064. When it comes to alleged breaches of procedural obligations, the remedy of restitution is disproportionate when the same result would have achieved, had the correct procedures been followed.[1777] The ICJ noted in Pulp Mills that: 'As Uruguay was not barred from proceeding with the construction and operation of the Orion (Botnia) mill after the expiration of the period for negotiation and as it breached no substantive obligation under the 1975 Statute, *ordering the dismantling of the mill would not, in the view of the Court, constitute an appropriate remedy for the breach of procedural obligations*'[1778] [*Emphasis* added].

1065. In the present case, Ukraine has failed to show any environmental harm to the Black Sea and Sea of Azov basin as a result of the Construction Projects. As [redacted] has explained, [1779] almost a decade into the projects, Ukraine's claims and complaints are still based on hypotheticals. Even [redacted] Second Report, submitted six years into this case, is premised merely on suggestions and speculations. Ukraine's other environmental expert, [redacted], has been unable to identify any actual environmental harm to the Sea of Azov or the Kerch Strait either. Ukraine has not shown a *single* concrete example of environmental damage caused by the Kerch Bridge and/or other Construction Projects complained of. It is plain that the alleged adverse effects of the Construction Projects feared by [redacted] and Ukraine have not materialized.

1066. Moreover, as the ICJ has stated, and as the Russian Federation has explained in detail, general international law does not 'specify the scope and content of an environmental impact assessment', and 'it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact

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[1776] Ukraine's Revised Memorial, ¶309.

[1777] J G. Hafner, I. Buffard, *Obligations of Prevention and the Precautionary Principle* in J. Crawford, A. Pellet *et al*. (eds.), THE LAW OF INTERNATIONAL RESPONSIBILITY (OUP, 2010), p. 515 (**RUL-236**).

[1778] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgement of 20 April 2010, I.C.J. Reports 2010, p. 104, ¶275 (**UAL-152**).

[1779] *See* Second [redacted] Report, ¶¶14,21.

assessment required in each case'.[1780] UNCLOS also does not specify the content and scope of environmental assessments for purposes of mitigation and reparation.

1067. Should the Arbitral Tribunal decide that the Russian Federation breached its environmental obligations under the Convention (*quod non*), any relief granted must take due account of these basic principles. Ukraine cannot impose the speculative and one-sided views of a single scientific expert on the Russian Federation.

1068. The same is true for the time period which, according to Ukraine, should be given for the Russian Federation to comply with the requested relief.[1781] Ukraine suggests that the Russian Federation should be given 15 months from the issuance of the award to prepare a 'comprehensive report on the reparatory and mitigation measures', and three months thereafter to 'commenc[e] implementation of the measures in question'.[1782] However, Ukraine provides no justification for these time periods, which may not be sufficient if Ukraine's allegations of environmental harm were found to be correct (*quod non*). The Russian Federation is of the view that it would not be appropriate to set a specific time limit for it to comply with any potential relief, in line with what the case law of other courts and tribunals. Indeed, no other court or tribunal has been requested to adopt such a measure for environmental damage to date. Moreover, courts and tribunals have dismissed requests to establish such procedures even in vaguer terms, let alone set specific time periods for implementation.[1783]

1069. Relatedly, the Russian Federation also objects to an amendment of Article 22 of the Rules of Procedure in the manner suggested by Ukraine.[1784]

1070. As regards an alleged aggravation of the dispute, Ukraine requests, in addition to a declaration of breach of Articles 279 and 300 of UNCLOS, 'full reparation, which must wipe out all consequences of Russia's unlawful conduct, including not only Russia's

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[1780] *See Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgement of 20 April 2010, I.C.J. Reports 2010, p. 83, ¶205 (**UAL-152**).

[1781] Ukraine's Revised Memorial, ¶311.

[1782] *Ibid*.

[1783] *See* e.g. *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment of 31 March 2014, I.C.J. Reports 2014, p. 300 (**UAL-155**); *see* also *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, PCA Case No. 2011-01, Final Award of 20 December 2013, ¶122 (**RUL-217**); *see* also *Perenco Ecuador Ltd. v Ecuador (Perenco)*, ICSID Case No ARB/08/6, Award, 27 September 2019, ¶902 (**RUL-218**).

[1784] Ukraine's Revised Memorial, ¶311.

initial violations of UNCLOS, but also the further steps took after this dispute was launched'.[1785] This statement is extremely vague and unsubstantiated, and the Russian Federation cannot comment on it properly. But to the extent that Ukraine is once again trying to have the Tribunal address issues relating to territorial sovereignty, Ukraine's request must obviously be rejected.

1071. Ukraine has also reserved the right to request compensation at a later stage of the proceedings.[1786] It will be for Ukraine to demonstrate, should it ever decide to demand compensation, that any alleged injury is the result of an internationally wrongful act by the Russian Federation, within the limits of what the Arbitral Tribunal may decide in its award on the merits. The Russian Federation notes that Ukraine has failed to show any damage to itself whatsoever but reserves all its rights in that respect.

1072. Finally, Ukraine states that 'certain of the actions … involve Russia remediating harm in areas subject to Ukrainian sovereignty but presently under Russian jurisdiction and control', and requests that, if 'Ukrainian jurisdiction and control is restored before these are completed, Russia should be ordered to cooperate with Ukraine to ensure completion of its reparation, and to bear all associated costs'.[1787] This request must be dismissed. Again, this is a blatant attempt to avoid compliance with the 2020 Award. The Arbitral Tribunal does not have jurisdiction to hear Ukraine's sovereignty claims, and all such claims must be disregarded.

[1785] Ukraine's Reply, ¶412.

[1786] Ukraine's Revised Memorial, ¶312.

[1787] Ukraine's Revised Memorial, ¶312.

X. SUBMISSIONS

For the reasons set out in this Rejoinder, the Russian Federation respectfully requests the Arbitral Tribunal:

a) to find that it is without jurisdiction over all of Ukraine's claims;

b) in the alternative, to dismiss all of Ukraine's claims in their entirety.

Gennady V. KUZMIN
Agent of the Russian Federation

8 December 2023, Moscow